Dear Commissioner

Re: Draft Development Assessment Regulations – MCF Response

The Mobile Carriers Forum (MCF) is a division of the Australian Mobile Telecommunications Association (AMTA). AMTA is the peak industry body representing Australia’s mobile telecommunications industry. MCF members include Telstra, Optus, Vodafone Hutchison Australia, and TPG, being the four mobile carriers with mobile network facilities in Australia.

Our members have a keen interest in the regulatory and planning frameworks within which they deploy their networks as these have a material impact on the efficiency and timeliness of bringing the significant benefits of mobile telecommunications to the businesses and communities of Australia.

In October 2018, the MCF made a substantial submission to the State Planning Commission to assist the South Australian government implement an efficient and effective planning framework for the future deployment of this essential infrastructure. The MCF has also recently made a submission on the State’s Productive Economy Discussion Paper.

As industry peak body, the MCF represent all carriers¹ and welcomes engagement with Government and urges careful consideration of the submission made to the State Commission in October 2018, which set out all of the relevant issues and concerns held in respect of the future efficient provision of telecommunication services. For ease of reference (and as a point of reference in respect of considerations already aired), a revised version of the full submission, including the caselaw summary is attached as Annexure A, and is to be read in conjunction with this submission on the draft Development Assessment Regulations.

It is now more than 30 years since mobile telephone services commenced, requiring necessary infrastructure to function seamlessly and effectively. The exponential increase, uptake and expansion in demand for both telephone and data wireless transmission – particularly in more recent times - has seen an evolution of technologies, infrastructure and regulatory processes for approvals of these structures. Much time and expense on the part of Carriers, Councils and

¹ As that term is defined in the Telecommunications Act 1997 (Cth)
objectors have collectively given rise to judicial determination about telecommunications facilities as items of essential infrastructure.

The drafting of new regulations for a ‘contemporary coordinated way of delivering infrastructure’ provides opportunity for guidance to carriers about future development of telecommunication facilities in our State. It was hoped that clear and specific steps for efficient, effective and timely development of Telecommunications Facilities would be anticipated and laid out in the Planning, Development and Infrastructure (General) (Development Assessment) Variation Regulations 2019 (‘the draft regulations’), but a reading of the ‘Draft for comment’ version of the regulations reveals that this is not so. There remains, in the MCF’s view, a much greater emphasis on ‘traditional’ infrastructure such as electricity, water and gas and deficiencies in the way telecommunications facilities are dealt with, despite also having been held by the Courts as essential infrastructure.

High speed, reliable mobile telephony and wireless data accessibility are expected by most South Australians, and by visitors to our State, many of whom have no fixed services for delivery of telephone and data connectivity. Students, tourists and business focussed non-residents rely on access to mobile telephone coverage that is enabled by Carrier supplied telecommunications facilities. It is imperative that future provision of telecommunication services be provided for in the new planning regime, but noticeably, the new PDI Act and draft regulations have no provisions for telecommunication ‘facilities’ – unless such are anticipated (but not defined) to be captured by the term ‘communications networks’ as that phrase appears in the definition of ‘essential infrastructure’ – detailed below.

In preparing this submission on the draft Development Assessment Regulations, the MCF has sought both legal and planning advice on the potential impact that the draft regulations may have on member Carriers.

Inconsistent Terminology

A reading of the potentially relevant provisions in the draft Regulations that relate to ‘communications’ reveals a lack of consistent and defined terminology – and none of the references found use the terminology ‘communications network’ (even though this is the term used in respect of ‘essential infrastructure’ for the purposes of sections 7 and 130 of the PDI Act). Lack of consistency in terminology to guide Carriers in undertaking, and relevant authorities in assessing development applications, will cause confusion, delay and cost.

In addition, case law focussed on telecommunications facilities development over the past 20 years has recognized that to the extent that a law of a State that is inconsistent with a law of the Commonwealth, ‘the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid’ -section 109 of the Telecommunications Act 1997 (Cth).

The issue of potential discrimination amongst providers of essential infrastructure was dealt with, but not required to be determined, in DAC’s appeal to the Full Court or the Supreme Court in Development Assessment Commission v 3GIS Pty Ltd & Anor [2007] SASC 216. The judgement stated at paragraphs 64-67:

64 We are not here concerned with an argument that the Development Act does not apply at all to a telecommunications carrier by virtue of the fact that other public utilities are exempted from equivalent elements of the Development Act regime. The respondent has expressly disavowed

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reliance on any such argument. The argument is limited to the alleged discriminatory effect of the Telecommunications Facilities provisions of the Development Plan.

65 In short, the argument is that to the extent that a demand need might be required to be established and measured against its effect on visual amenity, a telecommunications provider is singled out and treated differently from any other applicant for development approval. A carrier would be subject “to a burden of a kind to which others in a similar situation are generally not subject”.

66 The Telecommunications Facilities provisions of the Development Plan apply only to telecommunications carriers licensed under the Telco Act. No-one else is authorized to operate a facility. Whether the applicant for development approval is the carrier or a third party as lessor of the facility, it is a facility dedicated to a carriage service. The ability of the carrier to provide the service depends on the installation of the facility. The burden of establishing the relevant demand need will therefore fall on the carrier. Alternatively, it is the carrier and only the carrier who will be adversely affected if the burden is not discharged. No other applicant for development approval, including any other infrastructure provider, is required to prove such a need. The carrier is therefore singled out and treated differently from any other applicant for development approval.

67 Accordingly, on the information available and if it were necessary to do so, I would hold that the requirements of the Development Plan, insofar as they require proof of demand need in the area covered by the proposed facility, would be invalid by virtue of the operation of clause 44 of Schedule 3 as discriminating against carriers generally or at least the class of carriers who are required to obtain development approval for the installation of facilities in accordance with the requirements of the Development Act.

These observations are consistent with the requirement of Schedule 3, Clause 44 of the Telecommunications Act 1997 (Cth), which explicitly prohibits discrimination against a carrier or carriers generally. As such, any development legislation and regulation of the State must seek to cooperate and work in harmony with Federal law and on proper construction should also do so.

The MCF is of the view that the current round of changes being made to development legislation and regulation should strive for compliance with Commonwealth law and adopt consistent terminology with respect to ‘telecommunications facilities’ and ensure that terminology is properly defined (including as being part of the essential infrastructure provisions and all that follows from that inclusion).

Notably, there is no definition of ‘telecommunications facility’ in the draft regulations. Whilst not specifically defined in the Development Act 1993 nor in the body of the existing Development Regulations 2008, the definition of ‘telecommunications facility’ is currently included within Schedule 9 (Public Notice Categories) of the Development Regulations 2008 - a provision that has not been carried forward in to the Planning, Development and Infrastructure Regulations. The Development Regulations 2008 Schedule 9 definition is worded:

*telecommunications facility* means a facility within the meaning of the Telecommunications Act 1997 of the Commonwealth.

Moving forward, it is imperative for a clear and unambiguous understanding about future rollout of telecommunication services, that this definition be carried forward and included in the draft regulations, and that it be clearly aligned with provisions for Essential Infrastructure, and
‘communication networks’ as those terms arise. *Essential Infrastructure* is defined in section 3 the *Planning, Development and Infrastructure Act* as:

"essential infrastructure" means—

(a) infrastructure, equipment, *structures*, works and other facilities used in or in connection with—

(i) the generation of electricity or other forms of energy; or

(ii) the distribution or supply of electricity, gas or other forms of energy; and

(b) water infrastructure or sewerage infrastructure within the meaning of the *Water Industry Act 2012*; and

(c) transport networks or facilities (including roads, *railways*, busways, tramways, ports, wharfs, jetties, airports and freight-handling facilities); and

(d) causeways, bridges or culverts; and

(e) embankments, walls, channels, drains, drainage holes or other forms of works or earthworks; and

(f) testing or monitoring equipment; and

(g) coast protection works or facilities associated with sand replenishment; and

(h) *communications networks*; and

(i) health, education or community facilities; and

(j) police, justice or emergency services facilities; and

(k) other infrastructure, equipment, *buildings*, *structures*, works or facilities brought within the ambit of this definition by the regulations;

‘*Communications Networks*’ is also not defined anywhere in the PDI Act or the draft regulations. The MCF questions whether a telecommunication ‘facility’ as that term is understood in the *Telecommunications Act 1997*, comprises (or was an intended meaning of) ‘communications networks’ for the purposes of the *Planning, Development and Infrastructure Act 2019*. It is simply not clear what this term means or is to include.

The MCF is concerned that without a clear definition, not only will future delay follow potential argument and court proceedings (because wording within the Act and Regulations are inconsistent and undefined), but in addition, unnecessary cost will be incurred in the attempt to understand the intention of Government in drafting these new planning provisions.

In the *Telecommunications Act 1997 (Cth)* the term ‘facility’ is defined in section 7 to mean:

"*facility* “ means:

(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.

There is no definition of *Telecommunications Facility* in Sec 7 of the Act but *Communications* is defined in the same section of the Commonwealth Act to mean:
"communications " includes any communication:

(a) whether between persons and persons, things and things or persons and things; and
(b) whether in the form of speech, music or other sounds; and
(c) whether in the form of data; and
(d) whether in the form of text; and
(e) whether in the form of visual images (animated or otherwise); and
(f) whether in the form of signals; and
(g) whether in any other form; and
(h) whether in any combination of forms.

This definition does not anticipate a ‘communication network’ – that is, the use of this phrase in the draft regulations has no meaning in the Commonwealth Act.

The following ‘communication’ related terms appear within the draft regulations, and display disparity in nomenclature and meaning, including those terms as have been carried over from the Development Regulations 2008. It is also noted that some of the ‘carry-over’ provisions are outdated and in a modern telecommunications terms, have little (or no) work to do.

The terms as they now appear in the draft regulations are highlighted for ease of reference:

- Part 11—Classification and occupation of buildings.....section 109, (9) (d) ‘a public telecommunications system’

- Schedule 4, 3- Land division .....(4) ‘The grant or acceptance of a lease or licence, or the making of an agreement for a lease or licence, related to the installation or alteration of telecommunications facilities or wind turbine generators, including any infrastructure associated with such facilities or generators’.

- Schedule 4, 4 -Sundry minor operations, .....(5) (b) ‘the installation or alteration of a building or the making of any excavation or filling, that is necessary for or incidental to the installation of, any electrical, gas, water, sewage and sullage, or telecommunications service (including appliances and fittings). and which does not affect the ability of the building in which it is installed to resist the spread of fire’.

- Schedule 4, 13 -Aerials, towers etc, .....(1) (A) in Metropolitan Adelaide-7.5 metres or, in the case of prescribed infrastructure to be use solely by a person who holds an amateur licence under the Radiocommunications Act 1992 of the Commonwealth, 10 metres; or......

- Schedule 4,- 13, Aerials, towers etc, .....(4) prescribed subscriber connection telecommunications infrastructure means any of the following when used (or to be used) in order to provide telecommunications facilities to a particular subscriber...., subscriber means a subscriber to a telecommunications service

- Schedule 5, Colonel Light Gardens Heritage Area, 4- Sundry Minor operations, (7) Any work undertaken solely for the purposes of......(e) connecting a building or structure to the
National Broadband Network (including the installation of fixed-line telecommunications facilities).

- Schedule 14, -2 General, (b)(xx) ‘the installation or alteration of a telecommunications facility, if the facility is for the purposes of supporting communication by persons or bodies involved in the provision of emergency services’

All references to development in the form of telecommunications should be related back to the meaning and definitions as prevails in the Commonwealth Telecommunications Act, 1997, with any additional forms of ‘communication network’ specifically defined in the draft regulations (if [on closer interrogation], it is deemed necessary that they remain). Correct and consistent use of descriptors for the telecommunications facilities would assist in removing uncertainty.

Difficulties arising from lack of consistency in terminology led to many judicial comments as are detailed in the summary of cases attached to the MCF’s October 2018 submission provided as part of this document.

**Other Areas of Concern with the Draft Regulations**

1) Provisions to enable providers of other forms of ‘essential infrastructure’ are not readily available to Carriers for development in the nature of telecommunications facilities.

A reading of the draft regulations does not reveal a development assessment pathway that differs to past application and assessment procedures in any significant manner. It was hoped that the new planning regime, with the addition of focus on ‘infrastructure’, may specify a streamlined process for approvals of certain forms of telecommunications facilities, especially in light of clear judicial comment relating to assessment of these forms of essential infrastructure together with ever increasing consumer demand for services.

In its October 2018 submission, the MCF (at Annexure B) also set out a suggested Infrastructure Policy Module, which sought to recognise telecommunications as essential infrastructure and dispense with the separate policy module used currently.

Additional provisions to be included in the draft regulations to provide parity with other providers of essential infrastructure (such as electricity and railways) is also considered necessary. These include exemptions for some forms of telecommunications development, and the classification of certain other forms - as are set out in Annexure C of the 18 October 2018 MCF submission to the State Planning Commission (copy attached), but for ease of reference, the text of Annexure C in that document is as follows:

**Annexure C (MCF October 2018 submission):**

**LIST OF SUGGESTED EXEMPT/COMPLYING DEVELOPMENT**

**Exempt Facilities**

- A temporary facility, not exceeding 25 metres in height and not existing on the land for more than 4 months in any 12 month period.
- Replacement of a tower or facility associated with a tower to enable collocation
- Extension of a tower or facility to enable collocation
- A telecommunication facility located within a road or rail reserve, not exceeding 25 metres in height

Complying Facilities

- New small cell structures up to 10 metres in height in any zone (therefore needing an exclusion in any provision to the contrary in the draft regulations where heritage considerations may be taken of conflict with this intention)*
- New monopoles up to 15 metres in height where located in a centre, commercial or like zone and more than 15 metres from a residential zone
- New monopoles up to 25 metres in height where located in a centre, commercial or like zone and more than 25 metres from a residential zone
- New monopoles up to 40 metres in height where located in an industrial zone and more than 50 metres from a residential zone
- New monopoles and towers up to 50 metres in height where located in a rural zone and more than 100 metres from a residential zone

*the bold comment is newly added, and it is requested that to the extent of any inconsistency with ‘saving’ provisions resulting in telecommunications facilities not capable of proceeding in State Heritage areas or places, that specific and clear exclusions or exemptions are detailed in the draft regulations.

It is important to bear in mind that much investment has been made in judicial proceedings over the years, with important guidance given. A change in definitions for what are defined as telecommunications ‘facilities’ in the Commonwealth legislation, would be regrettable, and potentially inconsistent, the latest judicial decision providing guidance being Alessandrini & Ors v The Corp of the City of Campbelltown & Or [2018] SAERDC 4 (case 30 in the attached Annexure - Caselaw).

2) Appropriate consideration of the relationship between Federal and State Law relating to the provision of Telecommunication Services

In the Alessandrini case, there was also judicial comment about the paramountcy of Federal laws and consideration of the Federal/State relationship in achieving provision of essential telecommunication services. The case was heard by a full bench of the ERD Court which relevantly referenced High Court views, leading the Court to conclude:

Federal and State Law

63. The Development Plan in this matter, as do all Development Plans, includes policies appearing in the General Section applying Council-wide under the heading “Telecommunications Facilities”. When first introduced as a Ministerial amendment in August 2000, background material accompanied these provisions, confirming the “pre-eminence” of the Telco Act when assessing how conflicting Development Plan policies are to be read. It also drew directly from the language of the Telco Act where it cited the “community need” for telecommunications facilities. Under the Better Development Plan conversion undertaken in 2011, the background material has been deleted and policies have been reworded somewhat.
65. However, the Court does not need to draw upon the pre-BDP editions of the Development Plan to reach a view as to the importance of the telecommunications facilities provisions or how these are to be read where in conflict with other Development Plan provisions.

66. This was made clear by the Supreme Court in 3GIS where it cited the High Court in Hutchison 3G Australia Pty Ltd v City of Mitcham as follows:

[50] ... the constitutional paramountcy of federal law is a contextual consideration that informs the resolution of the contested issues of interpretation argued in this appeal. Moreover, as will be shown, co-operation between the relevant federal and State instrumentalities is a policy mandated by both federal and State law.

67. Telecommunications services are essential infrastructure that is expected to be delivered equitably, affordably and to a good standard to the benefit of all communities. The Objects of the Telco Act include the following:

3 Objects
(1) The main object of this Act ... is to provide a regulatory framework that promotes:

(c) the availability of accessible and affordable carriage services that enhance the welfare of Australians.

(2) The other objects of this Act, ... are as follows:

(d) to promote the development of an Australian telecommunications industry that is efficient, competitive and responsive to the needs of the Australian community;

(g) to promote the equitable distribution of benefits from improvements in the efficiency and effectiveness of:

(i) the provision of telecommunications networks and facilities; and

(ii) the supply of carriage services;

68. It was common ground that the proposal was not an exempted facility from the provisions of the Development Act, the tower not being a low impact facility. It stands therefore to be assessed against the relevant Development Plan provisions.

69. For reasons including those set out in 3GIS, as an essential service demanded throughout Australia, the HFZ is not embargoed to telecommunications facilities:

[49] It follows that the Environment Court was correct in holding that a planning authority was not required to assess the social utility of the 3G services provided by the respondent. The questions which it was required to address, and which the Court in due
course did address, were whether this facility was needed to provide the service in the relevant area and whether it was located and designed to minimise the visual impact on the amenity of the locality.

It follows, that the draft regulations must not conflict with the intention set out in the *Telecommunications Act 1997* (Cth).

3) **Appropriate and clear regulations are required to ensure telecommunications facilities are essential infrastructure 'of a prescribed class' within the meaning of ‘Sec 130 – Essential infrastructure - alternative assessment process’, and that the Commission is the prescribed authority for the assessment of telecommunications facilities.**

In the past, the fact of individual Council’s acting as the ‘relevant authority’, has resulted in inconsistency of process and decision making. For the sake of consistency, and in keeping with the intention that the Commission act in respect of ‘prescribed classes’ of essential infrastructure, it would be appropriate to ensure that telecommunications facilities are so prescribed. This is especially important when acknowledging that each individual facility is part of a broad and comprehensive network, with individual components linked and integral to the whole network of telecommunication facilities.

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This submission (and lengthy attachment) comprises to highlight the importance that the MCF places of achieving a workable, efficient and economic legislative structure for the future control and regulatory system of development assessment and approvals in South Australia.

As always, the MCF welcomes engagement with government on these important issues and encourages careful consideration of the submission made to the State Commission in October 2018, which meticulously sets out all of the relevant issues and provides a clear pathway forward. The Code is a great opportunity to get this important policy regime right to ensure South Australia and its communities have access to the latest and most reliable mobile telecommunications networks available.

Please don’t hesitate to contact me further should you have any immediate questions and please advise when the MCF might present to the Commission to further these important issues and ensure the new planning system responds appropriately.

Yours sincerely,

Ray McKenzie
Manager, Mobile Carriers Forum
Australian Mobile Telecommunications Association

*Attached: MCF Submission October 2018 (with February 2019 update)*
TELECOMMUNICATIONS AND THE PLANNING SYSTEM

SOUTH AUSTRALIAN PLANNING REFORMS

Mobile Carriers Forum
FEBRUARY 2019

ABRIDGED VERSION
## CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Executive Summary</td>
<td>1</td>
</tr>
<tr>
<td>1. Introduction</td>
<td>4</td>
</tr>
<tr>
<td>2. Background</td>
<td>6</td>
</tr>
<tr>
<td>3. Economics of Telecommunications</td>
<td>8</td>
</tr>
<tr>
<td>4. The South Australia Planning Experience</td>
<td>11</td>
</tr>
<tr>
<td>5. Court Judgments and Legal Considerations</td>
<td>25</td>
</tr>
<tr>
<td>6. Review of Existing Development Plan Policies</td>
<td>33</td>
</tr>
<tr>
<td>7. Legislation in other States</td>
<td>41</td>
</tr>
<tr>
<td>8. Suggested Changes as part of SA Planning Reforms</td>
<td>46</td>
</tr>
<tr>
<td>9. Conclusion</td>
<td>49</td>
</tr>
</tbody>
</table>

## ANNEXURES

<table>
<thead>
<tr>
<th>Annexure</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>Summary of Court Cases</td>
</tr>
<tr>
<td>B</td>
<td>Infrastructure Policy Module</td>
</tr>
<tr>
<td>C</td>
<td>List of Suggested Exempt/Complying Development</td>
</tr>
</tbody>
</table>
EXECUTIVE SUMMARY

This submission by the Mobile Carriers Forum (MCF) is in response to the current planning reforms being undertaken by the South Australia Government and the Department of Planning, Transport and Infrastructure. These changes will result in a number of State Planning Policies and a Planning and Design Code, which will guide development and its assessment across South Australia.

The MCF is of the firm view the policy settings to allow for the approval and deployment of telecommunications infrastructure need to be carefully considered to ensure efficient, economical and timely deployment and in particular draw on the nearly two decades of experience and learnings under the current policy regime. The MCF is also keen to ensure, with all the resources expended over the last two decades, that any new policy doesn’t introduce retrograde steps (either intentionally or unintentionally) or create confusion about the important role telecommunications needs to have in a modern, creative and vibrant economy.

The submission sets out the background and lessons learnt over the journey the telecommunications industry – along with local government and the community – has taken through the planning system since 1997, how community attitudes have shifted and the need for the development of more infrastructure in the future to support the growing demand. Meeting this demand and providing widespread and reliable access to telecommunications across Adelaide and South Australia will be a key part of achieving economic and social outcomes desired by the State.

The submission details:

- Who the MCF is and its interest in influencing policy in this area;

- The purpose of the submission with reference to the State’s *The Blueprint for South Australia’s Planning and Design Code* and upcoming draft State Planning Policies;

- Background to the regulatory regime at State and Commonwealth level, changes to which drove the current policy regime;

- The economics of telecommunications and its importance to economic growth and productivity;

- The practical experience of the current policy regime, including the treatment of other forms of infrastructure such as electricity, gas and sewer;

- A review of existing Development Plan policy; and

- Legislative responses in other State jurisdictions.
To provide support to the experiences of the carriers and argument for change advanced in this document, a comprehensive summary of 40 Court cases and the outcomes and impacts has also been undertaken, showing a clear and settled pattern by the Courts.

The submission concludes the current policy regime, which has been tried and tested many times over the last 18 years (since the Ministerial changes implemented in 2000), is well understood in terms of its application but also its limitations and where it adds no value at all to the process.

It is concluded that the planning reforms currently underway should make a range of changes which include:

- Inclusion of telecommunications infrastructure as essential infrastructure, in line with repeated Court findings;

- Incorporate all telecommunication facilities policy provisions into the ‘Infrastructure’ module (with appropriate wording and additions), dispensing completely with the separate telecommunications facilities module currently in use;

- Ensure that the definition of ‘telecommunications facility’ is specifically defined and tied to the provisions for essential infrastructure in the nature of ‘communications infrastructure’, and that term be aligned with the Commonwealth ‘telecommunications facility’ definition in the *Telecommunications Act 1997 (Cth)*.

- Introducing a range of exempt, complying, accepted\(^1\) and deemed to satisfy\(^2\) complying development for telecommunications facilities, subject to certain performance and siting criteria. This might include a combination of facility height, zoning and the type of facility – akin to provisions for other forms of infrastructure such as railways;

- Ensuring there are no zones or areas (including character preservation areas or other special legislative schemes) where telecommunications facilities are excluded absolutely by way of being restricted\(^3\), non-complying, prohibited or similar;

- Ensuring that no Overlays adversely impact on the development of any essential infrastructure, including telecommunications facilities;

- Ensure there are no proximity-related policies which unnecessarily restrict or constrain the placement of telecommunications facilities (such as arbitrary buffer

\(^{1}\) As per the meaning contained in s104 of the *Planning, Development and Infrastructure Act 2016*

\(^{2}\) As per the meaning contained in s106 of the *Planning, Development and Infrastructure Act 2016*

\(^{3}\) As per the meaning contained in s110 of the *Planning, Development and Infrastructure Act 2016*
zones as occur in City of Port Adelaide Enfield which have effectively precluded deployment in the past) to ensure the community can be adequately served; and

- Removal of Councils as the relevant planning authority (for most applications) and have all applications assessed by the State Commission to ensure consistency in approach.

This submission is intended to provide a comprehensive snapshot to Government of nearly two decades of experience in this policy space, how it has been practically applied and how the Courts have played a key role in the interpretation of policy set by the Minister in 2000 and applied in a blanket fashion across the State.

This submission is also intended to lead into further discussion with Government that can occur against the background of a solid briefing on the last 20 years or so. It is hoped this will create open and clear lines of communication and dialogue with the industry to ensure technical and practical matters are well understood and any policy changes can be properly considered and unintended consequences are minimised or eliminated altogether.

Following its submission, it is anticipated a ‘workshop’ or similar forum can be held with the Department to collaboratively devise a workable policy position that feeds into both the relevant State Planning Policy module and the necessary operative parts of the Planning and Design Code.
1. INTRODUCTION

The Mobile Carriers Forum (MCF) is a division of the Australian Mobile Telecommunications Association (AMTA). AMTA is the peak industry body representing Australia’s mobile telecommunications industry. MCF members include Telstra, Optus, Vodafone Hutchison Australia, and TPG, being the four mobile carriers currently deploying mobile network facilities in Australia.

Our members have a keen interest in the regulatory and planning frameworks within which they deploy their networks as these have a material impact on the efficiency and timeliness of bringing the significant benefits of mobile telecommunications to the businesses and communities of Australia. Accordingly, the MCF wishes to provide a submission to assist the South Australian government implement an efficient and effective planning framework for the future deployment of this essential infrastructure.

Purpose of the Submission

The South Australian planning reforms are the biggest changes to the way planning, development and policy is handled in South Australia for a generation. Much has been learnt over the 25 years since the introduction of the Development Act 1993 and no more so than in the telecommunications industry, where until 1997 the State had virtually no input or control at all.

Since the first telecommunication policy was introduced State-wide by the Minister in 2000, the telecommunications carriers, local government and the community generally have been forced to rely on that policy and its interpretation by various Courts. Dozens of hearings have occurred over the last 20 years or so and there have been many more appeals, most of which have been either withdrawn or resulted in consensus.

As a result, there is now a number of key judgments from the Courts that have helped guide site selection and design and narrow the planning issues, with the approach to assessment and determination generally understood by most Councils.

However, during that time, millions of dollars have been spent, deployment of infrastructure has been delayed and there have been no significant ‘wins’ by Councils and all third party appeals that reach hearing stage have been dismissed.

The industry, councils and the community have tried to understand what the drafters of the 2000 amendments meant to say while at the same time demand for services continues to grow. Over time there has also been a growing, sometimes tacit, acknowledgement by many that telecommunications is essential infrastructure in a modern society and it “needs to go somewhere”, albeit this is usually a position taken by those who are not directly affected by the infrastructure.

Whilst there is a long way to go with the planning reform process, the State is unlikely to prioritise telecommunications in its policy decisions and to that end the MCF has decided to make this submission to ensure proper regard is had for the lessons learnt over the last 20 years, and to ensure no retrograde steps are taken, however inadvertent, that force the
industry, councils and the community to go back over old ground to test new policy wordings (or Constitutional validity).

Based on information already released about the planning reform process through *The Blueprint for South Australia’s Planning and Design Code*, one of the proposed Policy Discussion Papers is focused on a ‘Productive Economy’ which includes the key focus areas of ‘smart cities’ and ‘infrastructure’ into which telecommunications squarely falls and it will be of critical importance that the State Planning Policy consider the policy required to allow for the delivery of a productive economy.

The Blueprint document also talks briefly about ‘Challenges and Opportunities for the Future’, which identifies the issue of ‘Encouraging Smart Cities and Technology’ and makes an oblique reference to access to the NBN but no mention of mobile telecommunications which will be vital in achieving a ‘Smart City’ outcome.

Telecommunications, particularly mobile telecommunications, are essential and vital infrastructure in a modern society that, amongst other things, allows for the more efficient undertaking of business and improvements in productivity, flexibility and work-life balances. A logical, balanced approach to the selection of suitable locations and the deployment of infrastructure is necessary if the aspirations of the new planning system is to be realised.

Infrastructure associated with mobile telecommunications is often controversial, but great strides have been made over the past two decades to allow the industry, councils and the community to understand how the system needs to work to ensure the community at large has good, reliable access to telecommunications services.

This submission sets out the lessons learnt over the journey the telecommunications industry – along with local government and the community – has taken through the planning system since 1997; how community attitudes have shifted, and the need for the development of ever more infrastructure in the future to support the exponential increase in demand.
2. BACKGROUND

The power to regulate and control telecommunications in Australia is vested in the Commonwealth through Section 51 of the Australian Constitution and until 1997 such control was left exclusively to the Commonwealth. Telstra was the only significant player both with respect to infrastructure and customers and had been borne out of the fully Government-owned Telecom.

In 1991, the Telecommunications Act 1991, introduced the first real competition into the Australian market and allowed for the establishment of three digital (GSM) networks within Australia. Licences were granted to Telstra, Optus and Vodafone. Telstra was already operating an analogue network with Optus also re-selling those services.

In 1993, all three carriers earnestly began their GSM rollouts and were aided by a range of exemptions and coercive powers afforded by the Commonwealth. This allowed the carriers to establish a network without the need for State approvals and included the construction of structures such as monopoles and lattice towers.

In 1997, the market was fully de-regulated and the Telecommunications Act 1997 came into force. This allowed other carriers and service providers to become established and operate, including rolling out their own infrastructure.

At the same time, the Commonwealth limited the exemptions and powers available to the carriers and permitted only ‘low-impact facilities’ to be deployed without State approval. These exemptions were enshrined in the Telecommunications (Low-Impact Facilities) Determination 1997 (the Determination), which was amended in 1999 and 2018. The Determination deals primarily with the mounting of antennas on existing buildings and structures, as well as collocation and the placement of ground-based equipment. The Determination sets out in a schedule the physical and locational characteristics which must be complied with to enable a carrier to deem a facility ‘low impact’.

However, this approach left a gap in the system as States had never had to regulate telecommunications nor provide any policy for its deployment. As such, any infrastructure that was not ‘low-impact’ was subject to the planning regime of the State in which it was proposed.

After several years of having no specific policy, the South Australian Government introduced a state-wide change to planning policy in August 2000 that affected all Councils. It introduced the concept of ‘preferred’ zones (typically non-residential zones) and also made changes to the Development Regulations 1993 which categorised telecommunications facilities as category 1 or 2 in certain zones and circumstances. The State did not seek to introduce a definition for telecommunications but instead relied on it having the same meaning in South Australia as it does in the Commonwealth Telecommunications Act 1997.
The ‘Better Development Plan’ program introduced a policy library which contained a telecommunications module, although some Development Plans had already made some changes to the original 2000 wording.

Since 2000, these provisions have been tested in the Court at various times and for various purposes, with the carriers often faced with the refusal of development applications on the grounds of visual impact (particularly with respect to residential amenity) and the contention that there must be a better location at which to locate the infrastructure – the “put it somewhere else” argument – i.e., the NIMBY or ‘not in my back yard’ attitude.

Since 1998, the Environment, Resources and Development Court (ERD Court, or its predecessor Tribunal) has determined at least 27 appeals, with most resulting in approval for the telecommunications facility. The Supreme Court has considered at least 7 matters and found in favour of the Carrier on all occasions except one, a decision which was then overturned by the High Court.

To that end, although some members of the community are concerned when a facility is proposed near them, the current regulatory regime in South Australia is now well established and understood by both the industry and local government and, to a lesser extent, the community. The ERD Court has also become quite fixed in its view on the approach to assessment and has consistently been so for at least the last decade. The Court’s now firmly accept that telecommunications facilities are essential infrastructure, needing to be developed as necessary in pursuit of the aims dictated in the Commonwealth Telecommunications Act. The Commonwealth Constitution provides that Commonwealth laws are paramount (section 109), and to the extent that any State Law conflicts with the Commonwealth Telecommunications Act for the development of telecommunications facilities, the State law is invalid, and offending State clauses are severable.

With the need for infrastructure on-going, both through increases in demand and population growth (particularly in newly-established residential areas), it is important that any new regulatory regime continues to recognise and reinforce the essential nature of telecommunications and its associated infrastructure. As well as the clear economic benefits to the State and businesses large and small, it is also important to recognise the significant social utility of a well-connected society.
Mobile broadband continues to play a key role in stimulating Australia’s economic growth and productivity. It is a driving force in connecting people and businesses, stimulating innovation and technological progress, and transforming industries. Future development of mobile and fixed wireless technologies, such as 5G, the Internet of Things (IoT) and Machine to Machine (M2M) applications will re-shape the Australian economy and drive productivity improvements.

There are currently over 32 million mobile subscriptions active in Australia, representing a penetration rate of over 130%. This is a technology that Australians have not only taken to heart but which they recognise provide real benefits in terms of convenience, efficiency and security. The benefits are both social in terms of connectedness, and economic in terms of increased productivity for businesses and the workforce.

Recent research by Deloitte Access Economics found that mobile telecommunications creates significant benefits in terms of productivity and workforce participation.

Specifically, the research showed that Australia’s economy was $42.9 billion (2.6% of GDP) bigger in 2015 than it would otherwise have been because of the benefits generated by mobile technology take-up with an increase in:

- long term productivity of $34 billion or 2% of GDP); and
• workforce participation of $8.9 billion, or 0.6% of GDP).\textsuperscript{5}

From: Deloitte Access Economics, Mobile Nation: Driving workforce participation and productivity, 2016\textsuperscript{1}

\textsuperscript{5} Ibid
The research also found that 65,000 full-time equivalent jobs were supported by the increased GDP attributable to workforce participation (equivalent to 1% of total employment in the Australian economy).\textsuperscript{6}

Consequently, it is evident that mobile network infrastructure is not only a key element of essential infrastructure for the nation but also for the state of South Australia which would share proportionally the significant benefits outlined above.

To that end, a suitable, efficient and workable legislative regime for approvals and deployment is essential to ensure the South Australian economy remains competitive and attractive to business and investment.

\textsuperscript{6} Ibid
4. THE SOUTH AUSTRALIAN PLANNING EXPERIENCE

As is the case in all other States and Territories, the South Australian planning system was not required to deal with telecommunications facilities as these were the domain of the Commonwealth until the deregulation of the industry in July 1997.

Between 1993 and 1997, Telstra, Optus and Vodafone rolled out their initial digital networks, commonly referred to as GSM or ‘2G’. The infrastructure required for these networks, which were much smaller in geographic areas and needed fewer base stations due to the low number of users, were deployed under a Commonwealth regime which not only required no State planning approvals, it allowed for the construction of monopoles and other infrastructure which would now need approval.

In July 1997, the industry was de-regulated and the Commonwealth only allowed for the deployment of ‘low-impact facilities’, the details of which were set out in a legislative instrument. This meant that any non-low impact facilities would be subject to the State regime and would almost certainly require planning approval.

As this coincided with the deregulation of the industry, there was also a flurry of activity from new players such as One.Tel, Hutchison and AAPT. However, the key problem was there had been no previous policy for telecommunications (as there had been no reason to) and as such the planning system was ill-equipped to deal with applications. It provided no guidance as to the preferred zones in which such facilities should be placed nor did it provide any general or specific policy against which to assess them. The result was chaotic and with no reference to such facilities in the Development Plan, Act or Regulations, most applications were deemed category 3 for the purposes of public notification and caused a great deal of angst and concern in the community.

There were also problems caused by having no standard definition for a telecommunications facility. The term ‘transmitting station’ already existed in the non-complying list of a large number of Development Plans. Case’s subsequently brought before the Court’s determined that ‘transmitting station’ did indeed cover mobile phone base stations, which instantly and dramatically increased the area covered by this non-complying term.

During this planning policy vacuum, a number of Councils introduced separate policy documents (all along similar lines) to try and put some rules around what carriers would need to demonstrate and provide in order for applications to be processed. As well as a generally poor understanding of technical requirements, the policy documents had no statutory standing and although they were used from time to time as part of a refusal, they were not part of the Development Plan. Many of those policy documents still exist and have been updated from time to time but are now generally used to help Councils make decisions about proposals by carriers on Council-owned land (i.e. from a property perspective).
In 2000, a State wide Ministerial amendment (‘PAR’) introduced standardised policy (primarily at a Council-wide level) to all local government areas, which inserted the following Objectives and guiding commentary:

**Telecommunications Facilities**

- **Objective 30:** Telecommunications facilities provided to meet the needs of the community.
- **Objective 31:** Telecommunications facilities located and designed to minimise visual impact on the amenity of the local environment.

Telecommunications facilities are an essential infrastructure required to meet the rapidly increasing community demand for communications technologies. To meet this demand there will be a need for new telecommunications facilities to be constructed.

The Commonwealth Telecommunications Act 1997 is pre-eminent in relation to telecommunications facilities. The Telecommunications (Low-impact Facilities) Determination 1997 identifies a range of facilities that are exempt from State planning legislation. The development of low impact facilities to achieve necessary coverage is encouraged in all circumstances where possible to minimise visual impacts on local environments.

Where required, the construction of new facilities is encouraged in preferred industrial and commercial and appropriate non-residential zones. Recognising that new facility development will be unavoidable in more sensitive areas in order to achieve coverage for users of communications technologies, facility design and location in such circumstances must ensure visual impacts on the amenity of local environments are minimised.

Importantly, this policy and commentary recognised the need to provided telecommunications facilities to meet the needs of the community whilst acknowledging that there will be detrimental impacts on amenity. The commentary went further to identify industrial and commercial zones as preferred for the siting of such facilities but there would also be an unavoidable need on occasion to site facilities in more sensitive areas such as residential zones.

The changes also affected Schedule 9 of the *Development Regulations 1993* which allowed telecommunications facilities to be classified as category 1 or 2 in some zones up to a certain height (ranging from 30-40 metres) and also amended numerous non-complying lists to allow ‘transmitting stations’ to be a consent use up to 30 metres in height.

There were also some minor changes to Schedule 3 *Acts and Activities that are not Development*, of the *Development Regulations 1993* to further clarify some provisions being applied to telecommunications that were previously not designed to be used in that way. However, these changes and provisions in Schedule 3 Part 12 *Aerials, towers etc*, have proven over time to be limited in usefulness and practical application.

Accompanying the Ministerial PAR Objectives and commentary were the following Principles of Development Control, which set out to give practical effect to the Objectives, along with some performance criteria for siting and design.
These changes had an instant impact both in terms of actually allowing assessment of telecommunications facilities against specific policy, and also encouraging carriers to prefer certain zones and areas over others by way of both policy and changes to the Development Regulations 1993 and non-complying lists. The policy changes did not contemplate any significant need to place facilities in residential areas (which remains the case in many local government areas today), despite the realities of demand and deployment now dictating such locations as both necessary and more commonplace.

Non-Complying Designation

The designation of telecommunication facilities as ‘non-complying’ within Development Plans has also proven over time to be increasingly problematic, and in many cases is a legacy of the use of the historical term ‘transmitting station’ (or because of the rush in the early part of the 2000s to include telecommunication facilities within zone provisions – particularly residential zones). With the low-density of metropolitan Adelaide where vast expanses of residential areas exist within Council areas, such a designation does not
recognise the importance of reliable telecommunications being provided to households. Provision of services to households is important due to the continuing decline of landlines; the increasing use of mobile data and the general expectation from subscribers that fairly ubiquitous service should be available, particularly in urban areas.

Non-complying applications are particularly problematic for telecommunication facility Carriers, as they tend to attract objections and given that ‘no rights of appeal’ are legislatively available, are usually only attempted by the Carriers when there is simply no other option. The non-complying designation within residential zones also tends to have the effect of ruling out Council Reserves and other areas of open space, which can often be more appropriate locations than small strip groups of local shops or the like.

‘Blanket’ Non-Complying Designations

In some Council areas very large areas are covered by zones which designate telecommunications facilities (or a similar definition) non-complying, making the siting of new facilities extremely difficult.

An example of a problematic Development Plan zoning map is shown below, which is from the City of Mitcham’s Development Plan.

In this example, a telecommunications facility is non-complying in all areas of this map apart from the small NCe-zoned land in the top left corner. This area contains a considerable amount of residential development as well as the suburban and interstate rail corridor. It is topographically complex and there are no tall buildings or other structures.

This is repeated throughout the Council area and is not uncommon in other local government areas, particularly those who do not have BDP-formatted Development Plan.

Clearly, this is a severe constraint to the efficient and effective deployment of suitable infrastructure and either denies residents, businesses and visitors service in some areas altogether, or provides a poor quality and unreliable service, especially for the provision of data services.
Extract from City of Mitcham Development Plan
Hills Face Zone

The Hills Face Zone, which is an expansive zone affecting many Councils across Adelaide, lists ‘transmitting station’ as a non-complying use but contains provisions which allude to such infrastructure.

Notwithstanding that, many people live, work and conduct business in the Hills Face Zone, as well as there being large numbers of visitors. The area is also topographically complex with many steep hills and small valleys, making the provision of services very difficult.

It is salient here to note the February 2018 ERD Court in *Alessandrini & Ors v The Corporation of the City of Campbelltown & Anor*7 succinctly summarizes the attitude of the Courts to the development of telecommunications facilities and emphasizes that Hills Face zones are ‘not embargoed’ to the development of [essential infrastructure] telecommunications facilities.

Arbitrary Differentiation Between Similar Zones

The Barossa Council has elected to differentiate between the two rural zones within the Council area for the purposes of allowing telecommunications facilities in one, but not the other. This is a curious decision given that there is little or no physical difference between the two rural zone areas. In the example shown below, a telecommunications facility is non-complying absolutely in the **Primary Production (Barossa Valley Region) Zone** but only non-complying if above 30 metres in the **Primary Production Zone**.

As can be seen from the map extracts below, there is little difference from a siting perspective between the two zones, except that placement of facilities is effectively precluded immediately outside townships, instead being ‘forced’ inside the townships. This approach is generally at odds with community expectations and severely constrains the effective deployment of infrastructure, particularly in sparsely populated parts of the Council area.

The non-complying trigger of ‘above 30 metres in height’ in the **Primary Production Zone** is also at odds with the categorisation for such a zone in Schedule 9 of the Development Regulations 2008, which allows for 40 metres as category 2. This occurs in a number of Councils areas associated with the Mt Lofty Ranges.

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**Height Limits**

Another common non-complying designator relates to the arbitrary capping of the height of a facility by Development Plan policy, above which a facility becomes either becomes category 3 and/or non-complying. This often happens in small centre zones, such as local and neighbourhood centres and the ‘height limit’ is usually set at 30 metres.

Schedule 9 of the *Development Regulations 2008* lists a number of zones (mostly urban) where a telecommunications facility is category 1 up to 30 metres in height and another group of zones (mostly outer-urban/rural) where a facility is category 2 up to 40 metres in height.

Whilst a height limit can be an effective way of limiting visual impact, it can have the unintended consequence of preventing the effective provision of service, creating the need for additional facilities elsewhere and limiting collocation opportunities. It is prudent to note that the Courts have repeatedly commented that a marginal difference in height is relatively inconsequential to the impact on amenity in an area. Basically, the fact of the development of a base station, complete with monopole and equipment hut is generally little different in terms of visual impact, if 30m or (say) 31 -35m in height. However, the reduction in service delivery in settling for a shorter facility choice may be significant.

**City of Port Adelaide Enfield**

The City of Port Adelaide Enfield, being a council covering a large and varied geographic area, was, in 2000, already in the process of drafting its own amendment to introduce policy to control telecommunications. Although the Ministerial amendment was in place before Port Adelaide Enfield’s work was complete, a further amendment was completed which used the Ministerial policy as a basis but, in some areas, took it considerably further, including introducing a non-complying trigger associated with ‘distance from’ heritage items and areas.

Although no doubt a seemingly reasonable ‘in theory’ policy at the time, this embargo has resulted in a myriad of unintended consequences and has made whole suburbs difficult to adequately service (specifically Semaphore Road and Semaphore Foreshore, which regularly has high numbers of visitors). The difficulties caused are shown on the map below where the dark blue (which shows up as purple when over the pink residential zone) denotes areas where telecommunications facilities are non-complying - taking out most if not all of the suburbs of Semaphore, Exeter, Semaphore South and Alberton and significantly impacting on a number of others. This situation is made worse by the existence of a number of Historic Conservation Areas, which also preclude low-impact facilities being established. In areas such as Semaphore where there are few (if any) buildings above two storeys in height, achieving a viable location for a low-impact facility is extremely difficult, let alone a non-complying development application attempt.
The provisions introduced by Port Adelaide Enfield could be open to constitutional challenge on the basis of discrimination, given that they apply only to telecommunications and no other forms of essential infrastructure. However, no legal challenge has yet been brought in that respect, notwithstanding that the Courts have repeatedly intimated that such finding would be likely should the Court need to consider the point. To date, a decision by the Court has been unnecessary as a finding in favour of the Carrier was made on other grounds (see, for example, Development Assessment Commission v 3GIS Pty Ltd & Anor [2007] SASC 216).

**Changes since 2000**

Other Councils attempted some changes to the standard Ministerial provisions, with several Councils opting for provisions that equate to a ‘hybrid’ between the Ministerial provisions and those adopted by Port Adelaide Enfield.

The later ‘Better Development Plan’ (BDP) program developed a policy module for telecommunications facilities, but due to its incomplete roll-out, it does not affect all Council Development Plans. The Telecommunications Facilities policy module is based loosely on the original 2000 policy but has removed the associated commentary. The MCF worked closely (at the time), with Planning SA to ensure the transition across to BDP did not
unnecessarily disturb the intent of the 2000 amendment, and to date it has not done so because the Courts have continued to recognise and confirm in judgments dealing with BDP provisions, that telecommunications facilities are essential infrastructure. The BDP module and its impact is discussed in more detail below.

To that end, the planning reforms now proposed are an opportune time for the State to consider, in the light of two decades of experience and evidence, how telecommunications should be treated within the planning system and, most importantly, whether it is constitutionally correct and appropriate to maintain a different, and at times very onerous assessment and approval process when compared to the assessment processes relating to other forms of essential infrastructure. It is suggested that to do so would amount to discrimination and risk a finding that that the new legislation (or such part thereof) is void for inconsistency with the paramount Commonwealth Telecommunications Act.

Relevant Authority

There is also a secondary issue (relating more to process but reflects the policy approach advocated here) for discussion, which relates to the desire or ability of local Councils to deal with telecommunications facilities applications (which could be better described as a State matter). Given that the Councils have had to deal with these applications as they are deemed to the ‘responsible authority’ in the current planning system), the myriad of Court judgments and judicial comment to date has generally assisted Council planners and assessment panels to reach, what are at times, uncomfortable but correct decisions to approve controversial or unpopular proposals. Whilst there does not appear to be a desire to be the relevant authority for such applications, over time Councils have generally learned to cope with the assessment and determination process which generally only comes unstuck when local Councillors interfere or a Council Assessment Panel finds making such a decision with a gallery full of people too difficult. It is suggested that with the exponential increase in demand for services, it is now time for the State to take the decision-making responsibility for all approvals and increase consistency in both process and decision making.

Third Parties

The current system also poorly serves third party objectors and concerned members of the community, insofar as it gives rise to unrealistic expectations about the real influence they might have in the approvals process, and their prospects of success. The confusion arises essentially due to an ‘unusual’ (i.e., tall pole / antenna) type of development being made to fit into the ‘normal’ development assessment process (for a building with bulk and height), where it is often perceived that a different set of rules applies.

The siting of telecommunications facilities, which (at least in Adelaide) often consist of a very tall structure in an otherwise low-rise environment, is different to any other type of
non-essential infrastructure forms of development. There are a number of critical elements that need to come together in an adequate mix enabling a new facility to be proposed in a location where it can meet the technical outcome requirements, because ultimately if the technical and network outcomes cannot be met, then the construction of a new facility is pointless and will be discounted by the Carrier as non-feasible.

It is also almost always the case that the telecommunications facility is placed on land not owned by the carrier, with a commercial leasing arrangement entered into between the Carrier and landowner. As such, agreement to proceed from a landowner is critical in order to progress a development application.

As aforementioned, Development Plan zoning and Schedule 9 of the Development Regulations 2008 combine to give some guidance as to the ‘preferred’ placement of facilities but this doesn’t necessarily mean a willing landowner can be found in those locations. Absence of a willing landowner in a preferred zone, puts pressure on Carriers to investigate the potential for development of a telecommunications facility on nearby non-preferred land, and gives rise to what may be considered as a be poor choice of location - but is usually the result of nothing better being available.

Commercial reality about future redevelopment opportunities at non-residential properties often results in the proposed facility needing to be placed on a boundary of land, and most usually the rear boundary of a site, to preserve future options. This often has consequences for the neighbour at the rear, particularly if that neighbour is residential in nature.

Once a location is selected with a willing landowner, the application process can begin. However, the practical difficulty arises at this stage as there are no Development Plan zones that contain specific provisions to guide assessment of telecommunications facilities, and so assessment defers to the wording of the Council-Wide or General section of the Development Plan (depending on the format) being read together with the specific zone provisions.

To that end, it is often difficult – particularly for the community - to reconcile the impacts of a telecommunications facility against zone provisions which deal with dwellings, shops and industry, or worse, heritage matters. Concerns are heightened when a facility is proposed close to housing, a school or some other community use such as a sporting oval. Experience tells that objectors often perceive that there is a different set of rules applying to the carrier, even though the proposal by the carrier is completely different to a proposal for the sorts of development anticipated for the subject zone – such as a house, shop or more traditional ‘building’.

Nevertheless, because telecommunication facilities are subject to the normal planning process, telecommunications facilities need to be classified as category 1, 2 or 3, with most falling into category 2 or 3. When classified as category 2 (as is usually the case in Centre
zones where residential uses often adjoin), only adjacent properties are notified and only those notified are able to lodge a valid representation. In the metropolitan area and particularly where the proposed facility is close to residential uses, this is often seen as a highly inequitable outcome by those who are not notified, as these nearby landowners feel that their amenity will be diminished by the proposed development but are precluded from formally commenting.

Even those who do make a representation are not afforded an automatic right to speak at a Council Assessment Panel meeting and have no rights of appeal. As such, when the proposal is approved, that is effectively the end of the matter - leaving many third parties and neighbours feeling disaffected with the process, together with a sense that the council has let them down.

Applications classified as category 3 often draw considerable concern where the proposed telecommunications facility is close to residential uses, and of course the invitation to make a representation is to the ‘world at large’. Although representors have a right to speak before a Council Assessment Panel and have appeal rights to the ERD Court, usually very little is achieved before the Panel and the review undertaken of caselaw over the past 20 years has revealed that to date there have been NO successful third-party Court appeals.

Various reasons may explain the lack of success of the third parties, the main ones including:

- the ‘non-planning’ nature of concern by residents – i.e., about loss of value of their property,
- issues that have already been considered and settled by the Court – i.e., health risk by EME exposure (which the Courts accept is a matter dealt with by World Health Standards, and is not a matter for Court investigation, or
- information that has been adequately dealt with in the preparation of the development application, but the representors have not understood is contained within the application documentation.

Generally, the most common issues of Category 2 and Category 3 concern include:

- Matters that are based on perception or are otherwise intangible
- Concerns about possible health effects, despite the rigorous standards in place
- Concerns over property values (which are not helped by baseless statements sourced from real estate agents)
- Over-statement of the real impact of the facility due to a poor interpretation of the plans
- Genuine incredulity or dismay that the Council has even assessed the application much less recommended it for approval
- General anger over a perceived lack of consultation
- Assumption there must be a better location, without suggesting anywhere
- Simply wanting the facility to be somewhere else and away from the person making the representation
- Not having read any of the application documentation or, more often, not being made aware of the applicant’s response to representations which has specifically addressed some of all of the issues raised.

Driven by the imperative to provide service efficiently and economically, carriers will always strive to provide as much information as possible to councils and address (and re-address) questions which are not strictly planning matters or are otherwise irrelevant, because there is a recognition that most of the concerns raised are genuine, even if they are unlikely to change the outcome or be considered by council.

Experience has it that following this exchange, third parties often attend Panel meetings and see their concerns cast aside with approval granted to a meritorious development application – because the carriers have been able to demonstrate need for, and suitability of the site for the development of the telecommunications facility. If the third parties have a right of appeal to the ERD Court they then have a similar experience at the preliminary conference, where their concerns are still not given any affirmation and the burden of proof is on them to demonstrate that there is either no need for the facility, or that there is a better available site available. In reality, because of scarcity of available sites that meet the technical requirements in the discrete area of need, it is all but impossible for a third party to defeat the appeal. The appeal process is therefore a cause not only of frustration for third parties, but also of great cost and delay to the carriers in providing the necessary service that the proposal has been designed to deliver (both in the immediate area of need, and as part of the overall network).

This approvals and appeal process, which has been repeated over and over across metropolitan Adelaide and South Australia for the past 20 years, amounts to an assessment system that is broken as it is a system that inappropriately attempts to treat telecommunications facilities as ‘normal’ development, when they are in fact both necessary and essential infrastructure.

**Council Owned Land**

The concern in the community has a knock-on effect of making council-owned land, which would often provide a better solution for such facilities, unavailable, unattractive or simply too ‘political’ to pursue.

Elected members are often powerless with respect to the development application process (owing to the appeals process that can provide an approval where they may not have done so), but they hold all the power when deciding whether a carrier may lease council land and will often respond to community concern by refusing to permit access. In the cases of
Foresto & Mastripolito v Development Assessment Commission & Anor and Bury and Anor v Development Assessment Commission & Hutchison 3g Australia P/L, Council frustrated the development of Court approved telecommunication facilities, by eventually refusing tenure, even though initial support for tenure had been indicated to the carrier. In such circumstances, the facility, which is still required, must be sited elsewhere, and this is usually in a less ideal position with greater impacts - but ironically and inadvertently, the fact of having ‘tested’ the Council site enhances the chance of approval because the ‘better’ council-owned site is not available.

In both Bury and Foresto both facilities were non-complying and despite community opposition both were approved by the Development Assessment Commission. Both were then separately appealed to the ERD Court by third parties and both appeals were dismissed and the approvals upheld. Community pressure was then exerted on the City of Campbelltown and the leases were refused.

As a result of this type of behaviour, carriers will rarely pursue council-owned land unless there is no other option.

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8 [2005] SAERDC 45
9 [2005] SAERDC 43
5. COURT JUDGMENTS AND LEGAL CONSIDERATIONS

Initial cases tested before the Environment Resources and Development Court (The ERD Court) in SA, grappled with categorizing and defining mobile telephony structures, and how these structures (in their various forms: monopoles, antennas, equipment shelters etc) fitted within the zoning provisions set out in the Development Plans across the State.

The fragmented nature of Councils’ drafting, and the then trend of having unique Objectives and Principles of Development Control for discrete zones within Council areas, led to a myriad provisions for transmitting stations or the like. There was no uniformity or definition/s to guide consistent planning for these facilities on a State-wide basis. Accordingly, and as will be seen in the summaries below, the earliest cases focus on defining the ‘what amounts to’ a ‘transmitting station’, and also to establishing an acceptance by the Courts of the form of TF’s as ‘slim poles’ that do not have the bulk of typical buildings with storeys to which height provisions in the Development Plans are aimed.

Noting the confusion arising through the early cases dealt with, Government stepped in, with the then Planning Minister passing amendments to the Development Regulations 1993 and introducing the Telecommunications Facilities State-wide Policy Framework PAR (Interim) (Ministerial) – [31 August 2000], which was gazetted the following year.

These changes introduced:

- a uniform structure and understanding about the form and nature of telecommunications facilities (TF’s), and,
- guidance about how TF developments within particular zones were to be categorized.

However, owing to the differing circumstances of case by case scenarios (across the range of councils and zones therein, and across the physical design of the TF’s) the intended ease of assessment was not always apparent. Having said that, over time, and coincidental with the ever-increasing demand for mobile telecommunication service delivery, the Judiciary (here read ERD Court, Supreme Court and Full Bench Supreme Court of SA) found that:

- TF’s are items of essential infrastructure,
- TF’s have radio frequency engineering issues, specifically, a clear ‘line of sight’ requirement, and
- There has been an expediential increase of demand for services/facilities, necessitating the need to locate TF’s in areas of need not falling within the ‘preferred’ zones – that is to say, that proposals were put forward if no other location could be achieved, within Residential or other sensitive zones.

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11 Telecommunication Facilities State-wide Policy Framework PAR (Ministerial) - [30 August 2001].
Above and beyond the ‘blanket’ application of the Ministerial PAR provisions, it was also open to individual Councils to add additional TF provisions in Development Plans for their areas.

In more recent judgments, the ERD Court has laid out clear steps for assessment of TF’s. The most recent decision of the ERD Court in Alessandrini & Ors v The Corporation of the City of Campbelltown & Anor, summarizes the current state of development plan interpretation for an appropriate assessment of the TF provisions incorporated in Development Plans across the State of South Australia since 2001.

Whilst State based planning legislation provides a guide to assessment in the decision-making process within South Australia, regard must also be had to the paramountcy of the Commonwealth Telecommunications Act 1997. It is a Constitutional dictate that Commonwealth legislation prevails to the extent of any inconsistency or discrimination between Commonwealth and South Australian laws. Cases discussed below include judicial acceptance of this constitutional principle and go so far as to note that in the event of inconsistency, State based provisions would be invalid and unenforceable. In the 2007 decision of the full bench of the Supreme Court of South Australia in Development Assessment Commission v 3GIS Pty Ltd & Anor, the Court made clear statements about the potential invalidity of telecommunication provisions arising in state laws or development plans that are contrary to the dictates of the Telecommunications Act.

Over the period 1998-2018, a review of case outcomes includes recognition that:

- Providers of Telecommunication services have an onus to investigate a range of sites, and then prove in evidence that there is ‘no better’ site available for the development of the TF.
- This investigation involves an onerous and expensive site identification and selection process for carriers, and is an onus NOT shared by any other proponent for development approval, and especially not any other provider of essential infrastructure (raising issues of discrimination and potential severance of State law provisions)
- Council or Third Parties do not have industry-based RF expertise or information about the Carrier network sufficient to model a defensible case in Appeals, rendering

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13 Section 109, Commonwealth Constitution
14 See for example para 64 -67 in Development Assessment Commission v 3GIS Pty Ltd & Anor [2007] SASC 216 (18 June 2007) ---The argument is limited to the alleged discriminatory effect of the Telecommunications Facilities provisions of the Development Plan....I would hold....invalid by virtue of the operation of clause 44 of Schedule 3 [Telecommunications Act 1997 Cth] as discriminating against carriers generally or at least the class of carriers who are required to obtain development approval for the installation of facilities in accordance with the requirements of the Development Act’.
15 [2007] SASC 216 (18 June 2007) at para 43
the Appeals system frustrating for objectors, and redundant in terms of their inability to succeed.

The MCF has prepared a summary of the relevant case law which provides a comprehensive snapshot of the evolution of Judicial understanding and comment concerning appropriate and proper assessment for TF’s is discussed, together with the identities/expertise of the experts called, and the nature (and value to the Court’s ‘de-novo’ assessment) of evidence adduced.

Upon hearing evidence, the Courts have come to recognize that the Carriers, in having the onus of investigation of a multiplicity of sites (so as to find the best available RF solution / location for the provision of telecommunications services in an area of need), face a process that differs from the usual planning processes applicable to development application and approvals in South Australia. Proponents for a telecommunications facilities development application face an inequitable planning process that is cumbersome, inefficient, expensive and the cause of extensive delay in the provision of services.

A review of all relevant case law has revealed that NO third-party Appeals have succeeded over the 20-year period surveyed and Councils who have defended refusals have also achieved very little and suffered delay and expense. This is in part because the system does not work, but in the main, because of the now recognised nature of TF’s as items of essential infrastructure that deserve more appropriate and efficient treatment by the planning system.

Such an approach would be for telecommunications to be formally recognised by the State as essential infrastructure and be assessed in line with other items of essential infrastructure in South Australia. Electricity, water and railways are other forms of essential infrastructure, and each has been afforded specific processes, exemptions and/or exclusions from the definition of ‘development’ as that term is understood in the Development Act 1993, or Regulations thereunder.
The Better Development Plan (BDP) model

The Better Development Plan format sought to standardize Objectives and PDC’s across Council Development Plans through a number of policy modules including one for Telecommunications Facilities, which as noted above deleted the commentary introduced in the 2000 Ministerial amendment. The BDP provisions have now been judicially noted in recent cases including the Aldinga and Sellicks Beach cases discussed below.

The BDP provisions were similar to, but varied from the Telecommunications Facilities provisions as appeared in earlier cases, including the Full Supreme Court Appeal case: Development Assessment Commission v 3GIS Pty Ltd & Anor [2007] SASC 216. There, and based on the earlier wording of the Ministerial Telecommunications facilities PAR of 2001, the Court noted:

*Telecommunications facilities are an essential infrastructure required to meet the rapidly increasing community demand for communications technologies. To meet this demand there will be a need for new telecommunications facilities to be constructed….. Where required, the construction of new facilities is encouraged in preferred industrial and commercial and appropriate non-residential zones. Recognising that new facility development will be unavoidable in more sensitive areas in order to achieve coverage for users of communication technologies, facility design and location in such circumstances must ensure visual impacts on the amenity of local environments are minimized.*

The fact that the ‘note’ recognizing that TF’s are ‘essential infrastructure’ has not been carried forward into the BDP module did not stop Commissioner Green so finding (that TF’s are essential infrastructure), as set out in his approach to assessment in both the Aldinga determination: Telstra Corp Ltd v City of Onkaparinga & Anor [2013] SAERDC 25 at para 30, and in the Sellicks Beach determination: Telstra Corp Ltd v City of Onkaparinga [2013] SAERDC 28, at para 25.

Both cases make almost identical observations in this regard, with the Sellicks Beach version stating at paragraph 25:

*I have had regard to case law dealing with telecommunications facility appeals and particularly DAC v 3GIS Pty Ltd [2007] SASC 216 particularly at paras 44-48 and 69-76; Hutchison 3G Pty Ltd v City of Mitcham & Ors [2005] SASC 249; and City of Burnside v City Apartments Pty Ltd [2004] SASC 294 regarding ‘minimisation’; and a number of other judgments of this Court, particularly in the metropolitan Adelaide area. Being mindful of the approach and outline to assessment in those judgments I note that some of the key aspects include:*

*• that the Development Plan expressly recognises in its objectives, that*
telecommunications facilities are essential infrastructure required to meet the rapidly increasing community demand for communication technology, and that demand is assumed;

- the Development Plan assumes that telecommunications facilities will be constructed in the Council area in order to satisfy the community need for such relevant telecommunication technology;

- it is appropriate to ensure that the necessary facilities are constructed in a manner which ensures that coverage is available to satisfy the need (in the target search area and the radio frequency (RF hereafter) technology need in the context of surrounding facilities and demand growth), but in a way which minimises the visual impact of those facilities on the amenity of the local environment;

- it is not a matter of balancing the impact of a particular development on the amenity against some demonstrated demand need as the demand need is given;

- with respect to the facility need (as opposed to demand need), the weighing process is not a balancing of the need against the effect of development on visual amenity but a weighing of available alternatives and options and the extent to which they would each minimise visual impacts on the amenity of the locality;

- in considering minimising the effect on the environment, the planning authority is to consider alternative sites or low impact facilities, whether minimisation can be better achieved by installation of a facility at some other site(s) but the other so-called preferred or possible site(s) will need to meet the facility demand and if they do not, they may be discarded from the search;

- with regard to the role of alternative sites it is appropriate to consider obvious alternative sites which would clearly better meet the objectives and principles of the Plan and to consider them in a practical and common-sense fashion; and

- where alternative sites are under consideration, the Court is required to consider only the proposed facility and not whether some alternative site with some modified form of development would be more environmentally sensitive. An alternative site would have to be a reasonably practical alternative (including the likelihood of tenure being obtained) that would meet the facility demand and be a feasible alternative.’

The words emphasised in bold are important. Commissioner Green carried forward from the Supreme Court decision in Development Assessment Commission v 3GIS Pty Ltd & Anor [2007] SASC 216, the reference to TF’s being ‘essential infrastructure’, notwithstanding that the
specific wording of the BDP version of the Development Plan tested in the Sellicks Beach and Aldinga cases bore no reference to TF’s being essential infrastructure. A similar approach was taken by Commissioner Green in the Whyalla determination below.

More recently, the Alessandrini v Campbelltown decision determined that the lack of specific wording (about the nature of TF’s as essential infrastructure) does not derogate from an understanding that they are so.

As is presently understood, a new Development Code will replace all Development Plans across the State, and insofar as the BDP provisions that currently apply are ‘co-opted’ into that code, it is worth considering the other provisions in the BDP model that relate to Infrastructure. This is discussed further in Section 5.

Public Infrastructure and Discrimination:

Discrimination against the carriers is explicitly forbidden by Schedule 3 clause 44 of the Telecommunications Act 1997 (Cth). For some time, there has been an underlying argument about Constitutional Discrimination against Carriers (as providers of essential infrastructure), but to date, the Courts have not made a finding on the question as cases have been determined on other grounds. There has however been judicial comment made, indicating the anticipated to be made by the court should the need to formally consider the issue of discrimination against carriers arise.

The two following cases are relevant to the discussion about Constitutional inconsistency, in the nature of discrimination. The cases are:

- **Bayside City Council v Telstra Corp Ltd [2004] HCA 19**, and
- **Development Assessment Commission v 3GIS PTY LTD and Anor [2007] SASC 216**.

In the Bayside case, the High Court found that to the extent of an inconsistency between State and Commonwealth laws, the State laws were invalid. The Commonwealth law being the Telecommunications Act 1997 (the Telco Act):

7. *In the exercise of its powers, including the power, conferred by s 51(v) of the Constitution, to make laws with respect to postal, telegraphic, telephonic, and other like services, the Parliament, in the Telco Act, provided a regulatory framework which was intended to promote the development of an efficient and competitive telecommunications industry, including the supply of carriage services to the public, and to ensure that such services are reasonably accessible, and are supplied efficiently and economically to meet the social and business needs of the Australian community (s 3).....*
The Telco Act, in Schedule 3, clause 44 specifically provides for situations of inconsistency between Commonwealth and State legislation insofar as the latter may impact on the development of an efficient and competitive supply of services. The High Court noted:

13 In Div 8 of Pt 1 of the Schedule there appears cl 44, which is central to the present appeals. It is in the following terms:

"44. (1) The following provisions have effect:

(a) a law of a State or Territory has no effect to the extent to which the law discriminates, or would have the effect (whether direct or indirect) of discriminating, against a particular carrier, against a particular class of carriers, or against carriers generally;

(b) without limiting paragraph (a), a person is not entitled to a right, privilege, immunity or benefit, and must not exercise a power, under a law of a State or Territory to the extent to which the law discriminates, or would have the effect (whether direct or indirect) of discriminating, against a particular carrier, against a particular class of carriers, or against carriers generally;

(c) without limiting paragraph (a), a person is not required to comply with a law of a State or Territory to the extent to which the law discriminates, or would have the effect (whether direct or indirect) of discriminating, against a particular carrier, against a particular class of carriers, or against carriers generally.‘

Without detailing the facts of the case, it is sufficient for the present to know that the High Court declared that State Legislation that discriminated against Telstra and Optus was invalid.

Further, in the later SA Full Supreme Court case of DAC v 3GIS, the Court, when considering facts relating to discrimination against Telco’s, the court held:

67 Accordingly, on the information available and if it were necessary to do so, I would hold that the requirements of the Development Plan, insofar as they require proof of demand need in the area covered by the proposed facility, would be invalid by virtue of the operation of clause 44 of Schedule 3 as discriminating against carriers generally or at least the class of carriers who are required to obtain development approval for the installation of facilities in accordance with the requirements of the Development Act.‘

Telecommunications Facilities although now judicially recognized as items of essential public infrastructure, are not so recognized for the purposes of the Development Act 1993. Included in the items of public infrastructure at Section 49 of the Development Act 1993 are:
"public infrastructure" means—

(a) the infrastructure, equipment, structures, works and other facilities used in or in connection with the supply of water or electricity, gas or other forms of energy, or the drainage or treatment of waste water or sewage;

(b) roads and their supporting structures and works;

(c) ports, wharfs, jetties, railways, tramways and busways;

(d) schools, hospitals and prisons;

(e) all other facilities that have traditionally been provided by the State (but not necessarily only by the State) as community or public facilities.

As an example, when responsibility for Railway activities passed from the Commonwealth to individual States, the Development Act and the Regulations thereunder, were quickly amended to recognise that certain railway acts and activities needed to be excluded from the definition of development, or otherwise divided into a framework of what was ‘complying’, category 1, etc. This ensured that the delivery of rail services was not hampered by a cumbersome planning approval process that would grind services to a halt. It is suggested that similar or equal treatment should be reflected in the new planning regime for TF’s so as to enable timely and effective service delivery.

The evolution of case law over two decades shows the Court’s consideration of the increase of the demand for services and the ever improving ‘generations’ of telecommunications technologies. In essence, legislation has not kept astride with the rapid expansion of consumer demand for services, nor the expansion of the network. But what is clear, is that the Courts have come to terms with the essential nature of mobile telephony, data and Wi-Fi delivery via the infrastructure that must be put in place to allow for effective service delivery.
6. REVIEW OF EXISTING DEVELOPMENT PLAN POLICIES

Two formats of Development Plans persist in South Australia with most Councils now having the BDP format. The BDP format contains both a ‘Telecommunication Facilities’ and ‘Infrastructure’ modules. A review of both modules is set out below with a view to providing clarify in wording and logic in application for telecommunications facilities.

Given that the ‘old’ Development Plan format (which has not currently been replaced in all Councils by the BDP format), will be superseded by the new system it is not considered necessary to review the telecommunication facilities policies within those documents, albeit they form the basis of the BDP version.

As is set out below, it is recommended that the existing Telecommunication Facilities module policy be removed, with part only of the wording reviewed and added to as necessary and incorporated into the Infrastructure module. This will reduce the number of modules and more logically place telecommunications policy with other essential infrastructure.

The existing Objectives in the Telecommunication Facilities module read:

TELECOMMUNICATIONS FACILITIES

OBJECTIVES

1. Telecommunications facilities provided to meet the needs of the community.

2. Telecommunications facilities sited and designed to minimise visual impact on the amenity of the local environment.

Both of these Objectives have provided the basis of a facility need based approach to the assessment of telecommunication facilities and the reasonable minimisation of impact. The Courts have interpreted them to given legitimacy to the status of telecommunication facilities as essential infrastructure and to place only limited weight on the trade-off/balance between provision of adequate service and the visual impact.

Both of these Objectives are acceptably worded and with only some minor changes to the wording in the Infrastructure module can be carried over.

The existing Principles of Development Control (PDC) for the Telecommunication Facilities module state:

1. Telecommunications facilities should:

   (a) be located to meet the communication needs of the community

   (b) use materials and finishes that minimise visual impact

   (c) have antennae located as close as practical to the support structure
(d) be located primarily in industrial, commercial, business, office, centre and rural zones;

(e) where technically feasible, be co-located with other telecommunications facilities

(f) incorporate landscaping to screen the development, particularly equipment shelters and huts

(g) be designed and sited to minimise the visual impact on the character and amenity of the local environment, in particular visually prominent areas, main focal points and significant vistas.

Most of these provisions have proven to be workable over time with a particular recognition that part (d) identified what have become known as the ‘preferred’ zones with the key operative word being ‘primarily’.

This PDC also properly recognises that collocation is a more desirable outcome than a brand new, standalone facility, but can also be applied to allow new telecommunication facilities (such as a new monopole) to be sited at existing telephone exchanges for example.

Part (g) is considered a superfluous and possibly unnecessarily constraining provision and should not be carried over.

To that end, a re-worded version of this provision should be inserted into the Infrastructure module and is set out at the end of this section.

2 Telecommunications facilities in areas of high visitation and community use should use innovative design techniques (eg sculpture and other artworks) where possible and where the resulting design would positively contribute to the character of the area.

This PDC has proven to be an unworkable and impractical legacy of the original Ministerial amendment in 2000, where the Minister at the time was also the Arts Minister and it has been suggested anecdotally at least this played a part in its creation. However, in fairness it is also from a time when the telecommunications industry and networks were in their relative infancy and its requirements were not well understood.

First, it is unclear as to what ‘high visitation and community use’ actually means in this context, whether those are two separate things or whether they are to be read together. As such, a shopping centre may or may not be caught by this provision, or an area used by the community but not visited by large numbers of people might not be captured.

Second, this PDC fails to recognise the physical requirements of telecommunication facilities (particularly height), the increased bulk associated with disguising such a structure, and the limitation placed on future expansions and collocations. These problems increase almost exponentially the more elaborate the proposed structure.
The increased bulk that must necessarily result from such a structure will also have the effect of having a greater visual impact and drawing attention to what would otherwise simply appear a piece of modern day infrastructure, albeit utilitarian in nature, that the community is well accustomed to seeing and has over the last couple decades become extremely commonplace.

Lastly, views on what would ‘positively contribute to the character of the area’ is likely to be as varied as the number of opinions sought.

As such, there have been few if any successful implementations of this policy and where it has been applied the original intent and design integrity of the structure has been eroded over time by expansion of equipment and collocation. It is also not a policy provision that has been pursued with any particular vigour by Councils or the community.

It is also noted that such a requirement does not apply to any other form of infrastructure and as such there is the potential for a discrimination argument to be mounted, which if successful would invalidate the provision in any event.

The requirement for telecommunication facilities to minimise their impact should be sufficient to guide siting and design. Accordingly, this provision should be removed from any future policy module as it has no practical application.

3 Telecommunications facilities should be located in residential zones only if sited and designed to minimise visual impact by:

(a) using existing buildings and vegetation for screening

(b) where possible, incorporating the facility within an existing structures that may serve another purpose maintaining that structure’s character

(c) taking into account the size, scale, context and characteristics of existing structures, landforms and vegetation so as to complement the local environment.

It is obvious that residential zones will generally be more sensitive to the visual impacts of a telecommunications facility but as set out above there is on-going and growing need for facilities to properly serve such areas. It is also the case that many areas of open space such as reserves and sporting ovals are within residential zones but these are often the most appropriate locations for telecommunication infrastructure, particularly where they can be incorporated into lighting structures.

The intent of this policy is acceptable but requires some re-wording to ensure it is not unreasonably difficult to deploy telecommunication facilities in such zones (albeit preference should still be given to appropriate non-residential zones). Similar to PDC 2, it is not practical to expect telecommunication facilities to be compatible with the ‘size, scale, context and characteristics of existing structures, landforms and vegetation’ in what are
typically low density, low rise residential areas given the entirely different physical and technical requirements. It is therefore also unlikely that a facility in such an environment could be designed and sited in such a way to ‘complement the local environment’ and still be effective.

The Courts have opined that it is a ‘given’ that such facilities will have some detrimental impacts but are nonetheless required, with minimisation of impacts the key assessment criteria (which in turn is achieved through siting and design).

To that end, a re-worded version of this provision should be inserted into the Infrastructure module and is set out at the end of this section.

4 Telecommunications facilities should not have a direct or significant effect on the amenity, character and settings of Historic Conservation Areas, local heritage places, State heritage places or State Heritage Areas.

While the intent and apparent reasonableness of this PDC is apparent, it is nonetheless the case that despite heritage listings or heritage/conservation areas in particular, residents and businesses within such areas still require reasonable access to a reliable and useful service. As has been shown above, entire suburbs can be excluded from having the required infrastructure deployed where this type of approach has been left unchecked.

As such, any controls cannot be overly prescriptive, but it is understood that a provision at least recognising and partly dealing the question of heritage will be expected by the community – as it may be in respect of other forms of essential infrastructure structures.

To that end, a re-worded version of this provision should be inserted into the Infrastructure module and is set out at the end of this section.

INFRASTRUCTURE MODULE

Whilst the thrust of these objectives and principles of development control relate to the full range of development anticipated in current development plans, they are relevant to the development of TF’s.

There is currently no mention of any item of infrastructure being ‘essential’, but it would not be unreasonable to argue that all (i.e., electricity, water supply, effluent disposal, telecommunications etc) are essential infrastructure in that each is equally ‘essential’ to orderly and economic development.

The existing Infrastructure module Objectives read:

1. Infrastructure provided in an economical and environmentally sensitive manner.

2. Infrastructure, including social infrastructure, provided in advance of need.

3. Suitable land for infrastructure identified and set aside in advance of need.

38

5. *The efficient and cost-effective use of existing infrastructure.*

It is easy to conclude that all of these Objectives apply not only to the supply of telecommunications infrastructure, but to the need and demand demonstrated by the community’s base desire to be connected and have their expectation of the enjoyment of reliable and reasonably consistent services. Such is a reasonable expectation, and one that is technologically achievable if infrastructure is able to be located as needed. Further, now grouping the provision of TF’s with other forms of accepted ‘essential’ infrastructure, will consolidate the contention of the essential nature of telecommunications in the 21st century.

Telecommunications is now, and has for the past 20 years, usually been provided by the private sector and can be basic in nature at the commencement of development, (that is, it can initially be provided through existing infrastructure outside an area of need and expand over time -as opposed to underground infrastructure which must all be placed in a common trench at the same time). The deployment is often not as comprehensive or ubiquitous as, say, electricity and sewer. However, there should be some level of telecommunications provided at the outset of new areas of [say] housing developments, and an appropriate land use and zoning regime to allow for planning and future deployment.

The BDP Infrastructure Principles of Development Control (PDC) are as follows, with comments for the purposes of this document also set out:

1. *Development should not occur without the provision of adequate utilities and services, including:*

   (a) electricity supply

   (b) water supply

   (c) drainage and stormwater systems

   (d) waste disposal

   (e) effluent disposal systems

   (f) formed all-weather public roads

   (g) telecommunications services

   (h) social infrastructure, community services and facilities

   (i) gas services.
Telecommunications are already included in this PDC and so already given some legitimacy as ‘essential infrastructure’.

It is suggested the words ‘adequate utilities and services’ be changed to ‘essential infrastructure’.

It is suggested the words ‘including mobile telecommunication services’ be added at (g).

2 Development should only occur only where it provides, or has access to, relevant easements for the supply of infrastructure.

As the placement of telecommunications is more complex than planning a common trench for other infrastructure, telecommunications facilities would not rely on easements or the specific identification of land. However, such development would instead rely on the broader policy regime that allows the necessary infrastructure to be sited on the basis of technical requirements.

3 Development should incorporate provision for the supply of infrastructure services to be located within common service trenches where practicable.

Clearly this is not applicable to telecommunications facilities that need to be above ground, but the wording ‘where practicable’ already recognises this.

4 Development should not take place until adequate and coordinated drainage of the land is assured.

Not applicable.

5 Development in urban areas should not occur without provision of an adequate reticulated domestic quality mains water supply and an appropriate waste treatment system.

Not applicable.

6 In areas where no reticulated water supply is available, buildings whose usage is reliant on a water supply should be equipped with an adequate and reliable on-site water storage system.

Not applicable.

7 Urban development should not be dependent on an indirect water supply.

Not applicable.

8 Electricity infrastructure should be designed and located to minimise its visual and environmental impacts.

This PDC recognises that some electricity infrastructure will need to be located above ground and have tall structures associated with it, which is similar to the basic requirements
of telecommunications. As such, this PDC should be modified to be requirement of all infrastructure and include some of the wording from the current Telecommunication Facilities module, such as those relating to materials and finishes and landscaping.

9  In urban areas, electricity supply serving new development should be installed underground.

Not applicable.

10  Utilities and services, including access roads and tracks, should be sited on areas already cleared of native vegetation. If this is not possible, their siting should cause minimal interference or disturbance to existing native vegetation and biodiversity.

This PDC is suitable for application to all of those services identified in PDC 1 above. As such, for consistency, the words ‘Utilities and services’ should be replaced by ‘Essential infrastructure’.

11  Utility buildings and structures should be grouped with non-residential development where possible.

This PDC could be improved by replacing the words ‘Utility buildings and structures’ with ‘Buildings and structures associated with essential infrastructure’.

12  Development in proximity to infrastructure facilities should be sited and be of a scale to ensure adequate separation to protect people and property.

It is not entirely clear what this last PDC is attempting to achieve but applies to development near essential infrastructure and is not a requirement of the siting of the infrastructure itself. It appears to be a safety provision such as might be applied to separation to a water chlorination plan or electricity substation where fumes, fire or explosion might be a potential hazard. Telecommunications facilities only real impact is that of visual impact and no separation distance is required for safety.

As noted, given this PDC seems to apply to future development adjacent or near essential infrastructure and not guiding the siting of the essential infrastructure itself, it should be deleted from this module.

Additional Infrastructure Module Policy

If what is currently the General Section policy for telecommunications is to be moved into the Infrastructure module, some additional policy will be required. Based on the review of the existing BDP Telecommunication Facilities and Infrastructure policy modules set out above, it is suggested the following be added to the Infrastructure module to allow the Telecommunication Facilities module to be deleted in its entirety.
New PDC

*Telecommunications facilities should:*

(a) be located to meet the communication needs of the community

(b) be located primarily in non-residential zones

(c) where technically feasible, be positioned or co-located with other infrastructure.

New PDC

*Infrastructure located in residential zones should be sited and designed to minimise visual impact by:*

(a) using existing buildings and vegetation for screening

(b) where possible, incorporating the facility within existing structures that may serve another purpose and retaining that structure’s character.

New PDC

*Electricity infrastructure, telecommunications facilities and other similar infrastructure should be sited and designed to minimise impacts on the amenity, character and settings of heritage items, areas and places.*

For ease of reference, a revised Infrastructure Module (which picks up all the information here discussed) is attached as **Annexure A.**
7. LEGISLATION IN OTHER STATES

As noted above, South Australia has some exemptions within Schedule 3 of the Development Regulations 2008 that can be applied to telecommunications infrastructure deployment but these exemptions are only an adaptation of existing policy that was not originally intended to be used for mobile telecommunications. As such, they are of very limited application and do not anticipate all the equipment necessary for an entire new facility to be deployed.

Following deregulation by the Commonwealth in 1997, several States recognised that it might not be appropriate for all new telecommunications facilities which were not low-impact facilities to be caught by the full force of the planning system. These States implemented codes or policies at a State level so as to enable certain forms of TF’s. These codes and policies help to set a framework by which all Councils are bound when considering such infrastructure, and in some circumstances effectively expand the Commonwealth’s exemptions by allowing certain types of infrastructure in some zones, subject to meeting performance criteria. This type of scheme has proven effective and provided greater certainty to carriers.

New South Wales

In New South Wales the State Environmental Planning Policy (Infrastructure) 2007 (known as ISEPP) contains provisions relating to telecommunications. The policy underwent a review which resulted in amendments being made in December 2017. The ISEPP is the most expansive and progressive of all State-based regimes.

The ISEPP essentially expands the amount of infrastructure which can be deployed beyond those identified by the Commonwealth in the Low-Impact Determination and that which is caught by the planning system and subject to ‘normal’ assessment. This includes new towers up to 50 metres tall in rural zones, up to 30 metres tall in industrial zones and various other exemptions (all subject to certain performance and siting criteria). Where approvals are not required, new structures are required to undergo community consultation via the Deployment Code process (DC6).

The NSW Planning and Environment website states:

*The State Environmental Planning Policy (Infrastructure) 2007 assists the NSW Government, local councils and the communities they support by simplifying the process for providing infrastructure like hospitals, roads, railways, emergency services, water supply and electricity delivery.*

*The Infrastructure SEPP plays a key part delivering the NSW Government’s infrastructure works.*
On 15 December 2017, the NSW Government finalised amendments to the Infrastructure SEPP. The amendments make it easier and faster to deliver and maintain infrastructure, including new provisions for health service facilities, public administration buildings, state sports and recreation centres, and lead-in sewer and water infrastructure. They also seek to optimise the use of commuter hubs and enable councils to better manage and maintain their lands, including their operational lands.

The NSW Government has also produced a separate document called the Telecommunications Guideline which summarises all of the telecommunications parts of the ISEPP in one document.

The NSW Planning and Environment website says of the Telecommunications Guideline:

The Infrastructure SEPP allows telecommunications infrastructure providers to be either exempt from planning approval, or be able to receive a ten-day complying development approval, for a number of telecommunications facilities subject to strict criteria including health and amenity considerations.

New telecommunications towers in residential zones will continue to require development application approval from the local council.

The Telecommunications Guideline provides further detail about the types of infrastructure that can be classified as exempt or complying development and the requirements and development standards that must be met for each facility type.

As such, the NSW legislative regime has:

- Identified and classified telecommunications as infrastructure being of the same essential nature as a range of other utilities;
- Has developed an over-arching policy which permits certain activities to occur without any local government approval provided certain performance and siting criteria are met; and
- Has allowed for easier deployment of facilities that are likely to be less controversial in any event (such as rural and industrial deployment).

This approach not only further streamlines the more straightforward deployment, it actively encourages carriers to utilise it in preference to development applications. It also states very plainly the importance NSW places on the timely and cost-effective deployment of telecommunications infrastructure and the balance that needs to be struck with public interest and amenity.
Victoria

Victoria has adopted *A Code of Practice for Telecommunications Facilities in Victoria July 2004* to clearly enunciate the State’s position with respect to the importance of telecommunications facilities in Victoria, as well as effectively expanding the range of facilities (and the conditions required) that do not require approval, beyond those contained in the Low-Impact Determination.

The Code states:

*A Code of Practice for Telecommunications Facilities in Victoria is an incorporated document in all planning schemes in Victoria.*

The purpose of this code is to:

- Set out the circumstances and requirements under which land may be developed for a telecommunications facility without the need for a planning permit.
- Set out principles for the design, siting, construction and operation of a telecommunications facility which a responsible authority must consider when deciding on an application for a planning permit.

It aims to:

- Ensure that telecommunications infrastructure and services are provided in an efficient and cost effective manner to meet community needs.
- Ensure the application of consistent provisions for telecommunications facilities.
- Encourage an effective statewide telecommunications network in a manner consistent with the economic, environmental and social objectives of planning in Victoria as set out in section 4 of the Planning and Environment Planning Act 1987.
- Encourage the provision of telecommunications facilities with minimal impact on the amenity of the area.

The Code needs to be read in conjunction with the applicable local planning scheme. A standard clause (52.19) has been inserted into all planning schemes which requires a telecommunications facility to obtain approval if it does not meet the Code.

Section 4 of the Code sets out four principles for the design, siting, construction and operation of telecommunications facilities, which assists carriers during the site selection and design stage and councils during the assessment process.
Section 5 of the Code sets out in detail those facilities which do not require approval and in what circumstances. It is this section of the Code that expands the Low-Impact Determination exemptions.

The Victorian Code effectively provides that telecommunications facilities cannot be prohibited in any zone and must be subject to the same assessment approach as any other form of development when assessed. This recognises that despite their impact, such facilities are essential, and solutions must be found for the benefit of the community at large. These provisions are in conformity with and support the intention of the Commonwealth Telecommunications Act.

**Western Australia**

Western Australia has adopted a State Planning Policy for telecommunications infrastructure. Its formal title is *State Planning Policy 5.2 – Telecommunications Infrastructure September 2015*.

Unlike NSW or Victoria, the policy document simply states the State’s position with respect to the importance and role of telecommunications infrastructure, which is intended to provide direction to local government for incorporation into local planning schemes and council policy documents.

It is otherwise a ‘hands off’ approach and in unfortunately, in practice the State Planning Policy has had little effect on views held by Council(s), as many still tend to have very conservative policies about telecommunications facilities, some of which directly (and indirectly) undermine the State’s position which recognizes the significance and importance of the telecommunications network.

Unsurprisingly, Western Australia is seen by the industry as one of the most difficult jurisdictions in which to deploy telecommunications infrastructure in a timely and cost-effective manner.

**Northern Territory**

In the Northern Territory local councils are not the planning authorities, which is instead centralised. Development Assessment Services, which is part of the Department of Infrastructure, Planning and Logistics, handles all development applications in the Northern Territory, with the Development Consent Authority determining applications beyond staff delegations or if objections are received. As such, consistency in the approach to assessment is much greater in the Northern Territory.

Although the zoning policy in the Northern Territory Planning Scheme has no specific references to telecommunications, section 13.5 of the Scheme is dedicated to telecommunications and provides the basis of a consistent approach and application. As such, determinations of such applications have been relatively smooth and consistent.
despite various controversial applications. Third party appeal rights are also extremely limited in the Northern Territory.

Where the Development Consent Authority (which has the same chairperson throughout the Northern Territory) has made a determination, whether consistent with staff recommendation or not, it carefully sets out in considerable detail the reasons for its decision. This makes the reasoning for determinations both easy to understand, and readily applicable to subsequent applications.

Other Jurisdictions

The Australian Capital Territory, Tasmania and Queensland have no such policy or codes which allow for any exemptions of telecommunications infrastructure, or the placing of certain types of infrastructure or activities on a ‘simpler’ planning path.

Queensland in particular is widely seen in the industry as the most difficult jurisdiction in which to deploy telecommunications infrastructure, where every new facility not captured by the Low-Impact Determination requires a development application and is therefore at the mercy of local government policies. Such policies focus almost solely on the protection of residential amenity and do not seek to strike a balance with the need for telecommunications infrastructure and the benefits afforded by it. As a result such policies are often poorly informed, poorly worded and have unintended and unrealistic consequences for deployment. Such policies are also sometimes at odds with other Council policies on ‘Smarter Cities’ and other programs, within which reliable access to data and information is highly regarded.

Suggested Exempt and Complying Development for South Australia

Based on the experience in New South Wales and Victoria in particular, it is considered reasonable that South Australia also consider legislation that allows for particular telecommunication facilities to be either exempted from approval (likely to form an extension of what is permitted as a ‘Low-Impact Facility’) or, subject to performance criteria, require only a complying development application.

Some suggested exemptions and complying development is listed in Annexure B.
8. SUGGESTED CHANGES AS PART OF SA PLANNING REFORMS

The Planning, Development and Infrastructure Act 2016 (The PDI Act), was assented to in April 2016. It came into operation (in part) on 1 April 2017. There are transitional plans/provisions for the ongoing implementation of the Act, which will include the proclamation of, and the bringing into operation of related Regulations and The Planning and Design Code. The latter is intended to be ‘written in plain language, focused on design outcomes that can be tailored to address local character needs’\(^\text{16}\). It is proposed that the full effect of the new system be operational by 2020.

As can be seen from the discussion and analysis above, the process for the assessment and approval of telecommunications facilities in South Australia is cumbersome, costly and protracted (time-wise). The process driven system ignores the reality of discrimination against carriers, and it amounts to Constitutional inconsistency (when compared with the exemptions, exclusions and assessment processes set out in the Development Act and Regulations for other essential infrastructure providers), while at the same time creating a confusing policy setting for third parties and communities.

The significant amount of time spent by the various Courts considering these matters has resulted in a consistent judicial approach and has sent a clear message to local government planners and assessment panels.

Over the years 1998 – 2018, the rapid increase in mobile telephony usage has given rise to an evolution in handset technology and capability further driving the need for service delivery. However, the roll-out of infrastructure capable of delivering effective and efficient services has been unnecessarily fraught.

This is partly because unlike other more topographically dynamic cities, Adelaide is relatively flat, and is hindered by an historical pattern of town planning that created mass residential areas, which are generally deemed other than ‘preferred’ for the development of Telecommunication Facilities\(^\text{17}\).

The need for line of sight connection between a Telecommunication Facility (be that a supporting structure for an antenna atop a building, or a monopole) and mobile phone requires (in broad terms), a Telecommunication Facility for each Carrier that is proximate to the area of need.


\(^{17}\) Ministerial / Planning SA Guidelines / DPA
Previous policy references to a desire for the use of ‘sculpture and art’ has proven over time not to be practical, useful or feasible, with the ‘dressing up’ of structures only adding to the overall bulk which tends to draw more attention to the structure than would otherwise be the case. Such treatments also add very significantly to costs and as ‘beauty is in the eye of the beholder’ agreement on a suitable and appropriate treatment is often fraught.

Further, such design work is generally incompatible with the increase in equipment over time and collocation is extremely problematic, with the aesthetics of the structure’s disguise losing integrity. In the industry’s experience, the screening of a structure in such a way does not usually allay the concerns of community members or those it is nearest to.

Discussion noted in the many cases dealt with by the Courts over the past 20 years recognise these TF requirements, the appropriate process for assessment of TF’s and the potential discrimination ‘finding’ to be made should future laws conflict with the strict wording for telecommunications facilities in the Commonwealth Act. To the extent that future legislative provisions are inconsistent with the dictate of the Telecommunications Act, those new provisions would be invalid and have no job to do.

It is also obvious that the State’s position is that there is a need for this essential infrastructure for the good of the State; the opportunities it can provide and the wellbeing of the economy. It is not clear at this time how essential infrastructure which already enjoys a raft of exemptions and ‘special’ treatment, such as electricity, gas and railways, will translate across to the new planning system but it would expect to be relatively unchanged and with no retrograde steps.

Although not available at the time of writing, the discussion paper soon to be released on the Productive Economy will need to address the need for essential infrastructure, including telecommunications and this will lead to the devising of a number of State Planning Policies to inform the final Planning and Design Code.

As part of the upcoming legislative changes, the State should:

- Make an appropriate policy declaration that telecommunications infrastructure is considered essential infrastructure;

- Incorporate all telecommunication facilities policy provisions into the ‘Infrastructure’ module (with appropriate wording and additions), dispensing completely with the separate telecommunications facilities module currently in use, and

- Include wider use/acknowledgement of the definition of ‘telecommunications facility’, tying it to the Commonwealth definition.
Options for the policy approach to telecommunications infrastructure assessment and approval include:

- Introducing a range of exempt and/or ‘not development’ designations for telecommunications facilities as well as a broad range of complying designations, subject to certain performance and siting criteria. This might include a combination of facility height, zoning and the type of facility;

- Ensuring there are no zones where telecommunications facilities are prohibited or non-complying; and

- Ensure there are no proximity-related policies which unnecessarily restrict or constrain the placement of telecommunications facilities so as to ensure the community can be adequately served – that is, all proposals should be assessed on the individual merits and should have applicant appeal rights attached.

In short, South Australia should follow the lead of both New South Wales and Victoria, both of which now have provisions to accommodate and support timely and effective development of telecommunications facilities in areas of need.

In an effort to move toward ‘equivalence’ with the development of other forms of essential infrastructure, South Australia should consider removing Councils as the relevant authorities in conjunction with provisions that enable all applications to be assessed by the State. This would underscore the importance telecommunications infrastructure and provide consistency across all telecommunication facility assessments.

The State should also give careful consideration to its role as landowner and the potential provider of acceptable solutions for the siting of telecommunications infrastructure. Currently, the largest custodian of Government-owned land, the Department of Environment and Water, has no standard agreement with the carriers for the use of Crown land and instead relies on an annual licence which is not a viable option.
9. CONCLUSION

As is clear from the information and analysis set out above, much has been tried, tested and learnt by the carriers, local government and the community over the last twenty years or so with respect to telecommunications. The ERD Court in particular has helped to create a comprehensive set of judgments, that in recent years have remained consistent in approach, and appear to have dealt with most if not all of the practical applications of the existing State telecommunication policy.

However, it was the DAC v 3GIS decision of the Supreme Court of South Australia which amounted to the watershed moment that paved the way for the proper approach to the assessment of telecommunications facilities. The 3GIS decision remains the firm authority on which applications are proposed, assessed and determined. In some ways it was fitting that a decision by the State’s Development Assessment Commission (and not a Council) provided the opportunity for the Supreme Court to rule on a number of very important matters.

Over that same time, Councils and their planning departments have sought to apply those learned lessons and directions from the Courts resulting in recommendations for approval that do not always meet the (sometimes ill-informed) expectations of the members of the public, thereby placing Council Assessment Panels under duress.

Community members can become frustrated that they are invited into a process that, unbeknown to them, is bound by legal precedent flowing from outcomes in the ERD. While these outcomes are proper and correct, little is achieved for the community by having the development assessment process played out in a ‘normal’ fashion at a local government level. It would be better, based on the discussions above, for the process to be taken up within the SCAP and removed from Council consideration.

This assessment process all occurs against a backdrop of continuing growth in the demand for service and a continuing decline in the use of landlines.

What is clear from all of what has been learned over 20 years is:

- The carriers have an on-going requirement to construct new facilities to keep up with demand and deploy new technologies;

- The carriers have a limited ability to deploy ‘low-impact facilities’ in South Australia generally but particularly across the suburbs of Adelaide;

- If carriers perform their site selection investigations with appropriate levels of diligence; are clear in their radio-frequency/technical objectives, and can properly articulate these objectives during the course of development application, there is little Council can do apart from conditioning various aspects of the facility’s appearance (such as colours, finishes, screening and landscaping);
• Carriers provide a relatively high level of information (some might say an onerous amount), particularly as a result of concerns raised through public notification, but this rarely changes the outcome;

• No Council has successfully defended a refusal of a telecommunications facility since 2005 and since the DAC v 3GIS decision this likelihood has diminished further;

• No third-party appeals have been successful in the ERD Court – such appeals simply add cost and delay to an otherwise valid approval, as well as creating disappointment for the appellant.

The current South Australian Council assessment processes do not represent an efficient and economic system, particularly where the State is acknowledging the need for high quality and reliable access to telecommunications to drive its economy into the future. In other words, the State legislative processes are not in accordance with the State Strategic Plan policies. There is no practical or functional difference between telecommunications and other forms of public utilities, the latter which have for many years past enjoyed a simplified approval pathway because of their essential nature. Council and communities accept (or perhaps don’t even think about) the need for electricity, gas, sewer and railway systems.

With the evolution of, and exponential uptake in the use of mobile telephony, together with the reliance on connectivity over a range of devices (i.e. computers, iPads etc), it is now generally accepted that infrastructure must be in place to ensure reliable service provision.

There is no practical or public benefit in forcing the approval of telecommunications facilities down the (past) ‘normal’ development assessment pathway. It is time for a new ‘normal’ along the lines of that set out in Victoria and New South Wales, but extended further by removing Councils from the mix altogether. State based infrastructure assessment occurred only because of a regulatory change at the Commonwealth level in 1997, which for the first time moved some of the responsibility to the States and Territories.

In the following 21 years some States have sought to exempt a greater range of facilities in certain circumstances in recognition of the essential infrastructure nature (and the dictates of the Commonwealth Telecommunications Act), while other States have done nothing. South Australia provides a small and narrow number of exemptions, and then only because a form of them historically existed in the Development Regulations for radio antennas, masts and the like.

It is time for a change where the new planning regime allows a range of facilities to be complying or exempt from assessment subject to a range of design and siting criteria (such as occurs in NSW and Victoria), with anything outside those criteria being subject to limited public notification and devoid of rights of appeal.

There should be no zones where the equivalent of ‘non-complying’ can be applied to telecommunications infrastructure, and serious consideration should be given to making the
State Commission the sole ‘relevant authority’, which would simplify the process for all concerned – including local government.

When enacted, this new approach will properly recognise the important role of telecommunications in South Australia; the need for timely, economic and efficient deployment of telecommunications infrastructure and ensure the State is well placed to leverage growth and opportunities through widespread and reliable mobile access.
ANNEXURE A

SUMMARY OF COURT CASES
# Chronology of ERD Court Appeals

## 1. Optus v Cc Kensington and Norwood & Frost

<table>
<thead>
<tr>
<th>Case Number</th>
<th>ERD-97-344 Judgment No OE480 [1998] SAERDC 480</th>
</tr>
</thead>
<tbody>
<tr>
<td>Date</td>
<td>29 May 1998</td>
</tr>
<tr>
<td>Details of Court</td>
<td>Environment Resources and Development Court, Full Bench (including Judge Trenorden)</td>
</tr>
<tr>
<td>Zoning</td>
<td>Business Zone (near Historic Conservation Zone), Category 3</td>
</tr>
<tr>
<td>Refusal by Council</td>
<td></td>
</tr>
<tr>
<td>Details of Proposal</td>
<td>20m monopole plus antennas and equipment hut</td>
</tr>
<tr>
<td>Issues raised/dealt with</td>
<td>Third Party (Frost) raised issues of health, failure to meet prescribed height limits (2 storeys for the zone), and perceived diminution of amenity.</td>
</tr>
<tr>
<td>Summary</td>
<td>The Court accepted evidence of Mr Wayne Cornelius of the Australian Radiation Laboratory that likely measured RFR emissions from the proposed development were estimated to ‘be so close to zero as to constitute no risk’. It followed that arguments of perceived loss of amenity were unacceptable as the ‘basis of the residents’ concern is measurable and able to be assessed against standards’. As for height, the Court found that on balance, the proposal, whilst taller than 2 storeys, did not exceed the suggested height limit, as it was not a structure that had greater mass, like buildings having ‘storeys’ or ‘floors’.</td>
</tr>
<tr>
<td>Outcome</td>
<td>Appeal allowed, decision of Council reversed</td>
</tr>
</tbody>
</table>

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## 2. Optus Mobile Pty Ltd v City of Tea Tree Gully

<table>
<thead>
<tr>
<th>Case Number</th>
<th>ERD-98-905 Judgment No OE503 [1998] SAERDC 503</th>
</tr>
</thead>
<tbody>
<tr>
<td>Date</td>
<td>10 August 1998</td>
</tr>
<tr>
<td>Details of Court</td>
<td>Environment Resources and Development Court Judge Bowering</td>
</tr>
<tr>
<td>Zoning</td>
<td>District Commercial 2 Zone – category 1, complying development</td>
</tr>
<tr>
<td>Details of Proposal</td>
<td>26m monopole plus antennas and equipment hut</td>
</tr>
<tr>
<td>Issues raised/dealt with</td>
<td>Terminology, categorisation</td>
</tr>
<tr>
<td>Summary</td>
<td>Discussion about the meaning of the word ‘station’ (within the term ‘telecommunications station’ as used in the DP. Consideration as to potential loss of ‘complying’ status owing to need for referral to, and direction from the Federal Airports Corporation.</td>
</tr>
</tbody>
</table>

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2. Ibid at page 5
His Honour held that the Council must treat the development as Category 1 (complying), together with having regard to any direction received. ³

Outcome
Appeal allowed.

3. Optus Mobile P/L v Norwood Payneham & St Peters

<table>
<thead>
<tr>
<th>Case Number</th>
<th>ERD-99-1260 [2000] SAERDC 22</th>
</tr>
</thead>
<tbody>
<tr>
<td>Date</td>
<td>2 March 2000</td>
</tr>
<tr>
<td>Details of Court</td>
<td>Environment Resources and Development Court</td>
</tr>
<tr>
<td></td>
<td>Commissioner Hodgson</td>
</tr>
<tr>
<td>Zoning</td>
<td>Local Shopping Zone</td>
</tr>
<tr>
<td>Details of Proposal</td>
<td>10m pole mounted on the roof, plus antennas and equipment hut, along with signage (Mitre 10) and a flagpole. Overall height – 19.5m</td>
</tr>
<tr>
<td>Issues raised/dealt</td>
<td>Refusal by Council</td>
</tr>
<tr>
<td>with</td>
<td></td>
</tr>
<tr>
<td>Summary</td>
<td>The Court found that the zone was appropriate, that the form for the development although tall, and would ‘be highly visible from some parts of the locality but would not be so substantial a structure as to be dominant, nor one which would adversely affect the amenity of the locality’, and that nearby trees were as tall.</td>
</tr>
<tr>
<td>Outcome</td>
<td>Appeal was allowed, decision of the Council reversed.</td>
</tr>
</tbody>
</table>

4. Network Design & Construction v City of Marion

<table>
<thead>
<tr>
<th>Case Number</th>
<th>ERD-00-203 [2000] SAERDC 31</th>
</tr>
</thead>
<tbody>
<tr>
<td>Date</td>
<td>17 April 2000</td>
</tr>
<tr>
<td>Details of Court</td>
<td>Environment Resources and Development Court</td>
</tr>
<tr>
<td></td>
<td>Judge Trenorden</td>
</tr>
<tr>
<td>Zoning</td>
<td>Hills Face Zone</td>
</tr>
<tr>
<td>Details of Proposal</td>
<td>30m lattice tower monopole plus antennas and equipment hut</td>
</tr>
<tr>
<td>Issues raised/dealt</td>
<td>Applicability of the term ‘transmitting station’, non-complying application</td>
</tr>
<tr>
<td>with</td>
<td></td>
</tr>
<tr>
<td>Summary</td>
<td>The development plan provisions spoke of ‘transmitting station’, with no reference in the DP to ‘telecommunications facility’ or to ‘telecommunications station’ as appeared in other Council development plans. Submissions by counsel urged a correct interpretation of the development as a ‘telecommunications station or facility’, referring to the earlier Optus Mobile P/L v City of Tea Tree Gully (above case #2).</td>
</tr>
</tbody>
</table>

Her Honour, bearing in mind the finding by Judge Bowering in the earlier Optus decision said:

‘On the other hand, Mr Manos, for the respondent Council, while accepting that the proposed development is for a telecommunications station, urged me to conclude that a telecommunications station is but one member of the genus “transmitting station”. I do not accept that approach as being reasonable. While I think Mr Manos is probably correct in his contention that “transmission” has been and is being used to indicate more than the mere transmitting of signals, in for example the description of the three towers near Mount Lofty as “television transmission towers”, I am of the view that one has to be more careful in determining the nature of development for the purposes of assessment under the Development Act. In reality, the question is not whether the proposed development is a transmitting station, but what is the nature of the proposed development? It is not a matter of trying to fit the proposed development into a particular style of shoe, but rather considering what style and size of shoe most appropriately fits the proposed development’.

The form of development was declared to be other than ‘non-complying’.

Outcome

Appeal was allowed, referred back to Council.

5. Telstra & Ors v DC Mallala & Ors

Case Number | ERD-00-105 [2000] SAERDC 50
---|---
Date | 11 July 2000
Details of Court | Environment Resources and Development Court Commissioner Mosel
Zoning | Centre Zone (Two Wells), immediately adjacent the Recreation Zone (Two Wells)
Details of Proposal | 30m monopole plus antennas and equipment hut
Issues raised/dealt with | Issues about health and perception about loss of amenity were raised, with the Court following [Optus v Cc Kensington and Norwood & Frost](above, case #1).
Discussion was led by the joined party (also a Mr Frost), about the potential for a different site to be considered.
Refusal by Council

Summary

The Court said:

'Mr Edwards’ evidence was to the effect that the subject site was selected after carefully considering a number of criteria. Apparently a number of sites were examined. The selection of the subject site was made - according to Mr Edwards’ statement - because it takes advantage of the density of mobile traffic, the maximisation of in-building coverage, the utilisation of infrastructure and its co-location with an
existing telecommunications facility. These are commercial decisions and I would have expected no less of Telstra in its decision to maximise the benefits of its investment. While I acknowledge Mr Frost’s frustration at the selection process - insofar as it eliminated an alternative site (or sites) that is preferred by him - it is not for me to decide whether one location is better than another in planning terms. The proposed tower in its location on the subject site must be examined on its own merits.”

Emphasis added – the Courts attitude to the issue of alternative site consideration changed over time: see below at Telstra Corporation Ltd v City of Norwood Payneham & St Peters [2006] SAERDC 13 (below, case #17).

## Outcome

Appeal was allowed, decision of the Council reversed.

### 6. Telstra Corporation Limited v City of Marion

<table>
<thead>
<tr>
<th>Case Number</th>
<th>ERD-00-622 [2000] SAERDC 70</th>
</tr>
</thead>
<tbody>
<tr>
<td>Date</td>
<td>6 October 2000</td>
</tr>
<tr>
<td>Details of Court</td>
<td>Environment Resources and Development Court Judge Trenorden</td>
</tr>
<tr>
<td>Zoning</td>
<td>Commercial (South Road) Zone</td>
</tr>
<tr>
<td>Details of Proposal</td>
<td>Structure using incremental elements, by themselves exempt</td>
</tr>
<tr>
<td>Issues raised/dealt with</td>
<td>Appeal against a S84 enforcement notice</td>
</tr>
<tr>
<td>Summary</td>
<td>The parties sought a determination about the correct categorization of Low Impact Facilities(^5), and individual elements of development deemed exempt from the definition of development by reason of Clause 4 or Schedule 3 of the Development Regulations 1993 (prior to the amendment of 30 August 2000). The court also considered the appropriate terminology for the description of the proposed development. Her Honour said at para 17 in the judgement:</td>
</tr>
</tbody>
</table>

17 ‘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

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\(^4\) Telstra & Ors v DC Mallala & Ors No ERD-00-105 [2000] SAERDC 50, at page 6

\(^5\) Telecommunications (Low-impact Facilities) Determination 1997 as amended, made under subclause 6(3) of Schedule 3 of the Telecommunications Act 1997
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? (It is to be noted that I am using the term "telecommunications network station" as a term of art, drawn from the Telecommunications Act, in preference to the term "transmitting station", but nothing should be read into the choice of terms.)

Importantly, Her Honour then went on to opine (and the reasoning warrants full recital):

18 ‘In my view, one has to look at the purpose of the building work to determine the nature of what is proposed. Telstra seeks to construct a pole, install antennae on that pole, construct an equipment hut in which equipment for the network system would be installed, and surround the site with the fence, for the purpose of establishing a telecommunications network station. It should be noted that this is not the approach taken by the Telecommunications Act, which seeks to exempt each of these facilities required for the establishment of a telecommunications network station based, inter alia, on assumptions about the impact of the facility in the planning area or zone.

’19 It would appear that the approach of the Commonwealth Government through the Telecommunications Act and the 1997 Determination has been to facilitate the development of low-impact facilities attached to an existing building, by exempting them from the application of State planning laws, in the interests of the objects of the Telecommunications Act, but to allow a wholly new telecommunications network station, wherever located, to be subject to State planning laws.

20 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.

21 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.’
It was concluded that the proposed telecommunication network station involved a change in the use of the land and was therefore development under the Development Act 1993.

**Outcome**
Development application required.

### 7. Telstra Corporation Limited v City of Marion

<table>
<thead>
<tr>
<th>Case Number</th>
<th>ERD-00-640 [2000] SAERDC 69</th>
</tr>
</thead>
<tbody>
<tr>
<td>Date</td>
<td>6 October 2000</td>
</tr>
<tr>
<td>Details of Court</td>
<td>Environment Resources and Development Court</td>
</tr>
<tr>
<td>Judge</td>
<td>Trenorden</td>
</tr>
<tr>
<td>Zoning</td>
<td>Commercial (South Road) Zone</td>
</tr>
<tr>
<td>Details of Proposal</td>
<td>25m monopole plus antennas and equipment hut</td>
</tr>
<tr>
<td>Issues raised/dealt with</td>
<td>The Court was asked to determine if the proposed development was a ‘building’ as that term is understood in Development Act 1993. In the subject zone, ‘buildings with a height greater than two storeys or ten metres’, were expressed to be non-complying development.</td>
</tr>
</tbody>
</table>
| Summary           | In the Council’s Development Plan, various provisions referred to ‘buildings’, where it intended to refer to what is commonly understood by that term (i.e. mass / bulk etc), whereas in other parts of the development plan, the term ‘buildings and structures’ was used where Council intended to refer to ‘buildings’ as that term is understood in the Development Act. That being the case, Her Honour concluded (at paragraph 11):

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   11 The proposed 25 metre high tower is a structure, but not a "building" as that term is used in the phrase "buildings with a height greater than two storeys or ten metres", expressed to be a non-complying kind of development in the provisions for Commercial (South Road) Zone in the relevant Development Plan. It follows that the proposed development is not a non-complying kind of development, on account of its height. It seems that the most appropriate outcome is that the application be remitted to the City of Marion for further processing, but I will hear the parties as to the form of the final order'.
```

**Outcome**
Deemed a consent development, such provisions do not apply to TF’s.

### 8. Telstra Corporation Limited v City of Mitcham

<table>
<thead>
<tr>
<th>Case Number</th>
<th>ERD-00-884 [2000] SAERDC 77</th>
</tr>
</thead>
<tbody>
<tr>
<td>Date</td>
<td>2 November 2000</td>
</tr>
<tr>
<td>Details of Court</td>
<td>Environment Resources and Development Court</td>
</tr>
<tr>
<td>Judge</td>
<td>Bowering</td>
</tr>
<tr>
<td>Zoning</td>
<td>State Heritage (Colonel Light Gardens) Zone</td>
</tr>
<tr>
<td>Details of Proposal</td>
<td>The proposal was for structures to be added to the roof of an existing former picture theatre on Goodwood Road, described as a use that was, ‘additional use as cellular mobile telephone service base station’.</td>
</tr>
</tbody>
</table>
Terminology. In the subject zone, ‘transmitting station’ was listed as a non-complying use. However, in other parts of the Development Plan, the term ‘telecommunications station’ was used.

Submissions put argued about the relevance of the decision in the Full Supreme Court Appeal, in *Corporation of the City of Marion v Network Design & Construction* (reversing the decision of Trenorden J as reached in #4 above). The Court was asked to decide if, in light of the differences in definitions over the various development plans for proposals, it was bound by the decision of the Supreme Court *Network Design (Marion)* decision, given that the terminology in the present Mitcham Council case / zone was differently described. Judge Bowering said in paragraph 19:

> ‘19 As stated, although there are differences between the structure and mode of operation between the base station here proposed and that proposed in the Network Design case, the purpose, function and use of the two stations are identical. The development here proposed fulfils exactly the function and use of a transmitting station described by Gray J in City of Marion v Network Design. It is a “transmitting station”. The determination of the Mitcham Council to so classify it was correct.’

Appeal dismissed. The facility was a transmitting station.

### 9. Network Design & Construction v City of Salisbury

<table>
<thead>
<tr>
<th>Case Number</th>
<th>ERD-00-779 [2000] SAERDC 74</th>
</tr>
</thead>
<tbody>
<tr>
<td>Date</td>
<td>16 November 2000</td>
</tr>
<tr>
<td>Details of Court</td>
<td>Environment Resources and Development Court Commissioner Hutchings</td>
</tr>
<tr>
<td>Zoning</td>
<td>Neighbourhood Centre Zone</td>
</tr>
<tr>
<td>Details of Proposal</td>
<td>30m monopole with 2.9m Tuft antenna, and equipment cabinets</td>
</tr>
<tr>
<td>Issues raised/dealt with</td>
<td>Refusal by Council</td>
</tr>
</tbody>
</table>

Commissioner Hutchings recognised the increasing demand for mobile telephone services as ‘what is becoming a basic necessity in modern life’. He opined that in the zone, whilst PDC 68 called for ‘Buildings and Structures associated with the supply and maintenance of public utilities should, wherever possible, be sited unobtrusively and landscaped’, the shape and size / height of the tower did not offend the provisions and should be approved. He went so far to say that in his view, the ‘design and appearance of the tower itself is……exemplary. It is to be a slim, well proportioned shaft with no protuberances marring it…’.

Appeal allowed, decision of the Council reversed.

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6 [2000] SASC 185 delivered 30th June, 2000
10. Hutchison 3g Australia Pty Ltd v Adelaide City Council

<table>
<thead>
<tr>
<th>Case Number</th>
<th>ERD-02-55 [2002] SAERDC 71</th>
</tr>
</thead>
<tbody>
<tr>
<td>Date</td>
<td>7 August 2002</td>
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<tr>
<td>Details of Court</td>
<td>Environment Resources and Development Court Commissioner Hodgson</td>
</tr>
<tr>
<td>Zoning</td>
<td>Residential – R14, St Johns Precinct</td>
</tr>
<tr>
<td>Details of Proposal</td>
<td>The proposal was to add roof mounted antennas to a State Heritage listed property, now used as a Backpackers hostel, including panel antennas in a cluster, with a finished height of 14.7m above ground level, and associated equipment.</td>
</tr>
<tr>
<td>Issues raised/dealt with</td>
<td>Refusal by Council</td>
</tr>
</tbody>
</table>

**Summary**

Importantly, but for the Heritage listing, the development would have been classified as a Low Impact facility\(^7\) for which no development approval would be needed. Further, the reason for listing was other than architectural, and lay in the past charitable use of the premises (Salvation Army). Neither Heritage SA nor the Council’s Heritage staff objected to the proposal.

The Ministerial PAR provisions were in operation, and the application was assessed in light of those provisions.

The main issue was whether the TF would dominate the State Heritage building. It was agreed that the proposal was in the nature of a low impact facility, and the Court, on this issue said:

\[
37. \text{‘I accept Mr Leydon’s submission that, notwithstanding the fact that the proposed facility would be classified as a ”Low-impact Facility” were it sited on any other buildings in the locality, its proposed siting takes it outside the definition of a ”Low-impact Facility” and requires it to be assessed against all the relevant provisions of the Development Plan’}.\]

The expert heritage experts disagreed on likely impact, but Commissioner Hodgson, on balance, said:

\[
44. \text{‘While I acknowledge the view, expressed by Mr Danvers, that the historical and cultural significance of the building is embodied in its architecture, I do not find that view persuasive, inasmuch as its adoption, with reference to Heritage Places, would render meaningless the distinction, drawn in listing criteria, between architectural significance and historical or cultural significance. That conclusion is reinforced by the fact, evidenced in the Copy} .\]

\(^7\) Pursuant to the Telecommunications (Low-Impact Facilities) Determination 1997 (Cth)
Documents, that neither Heritage SA nor the Council’s own Heritage staff had any objections to the proposal.

A further issue related to the potential to satisfy demand by locating 2 low-impact facilities in a nearby Commercial zone (assuming 2 sites could be found), an option that the Appellant had discounted because of cost.

**Outcome**
Appeal allowed, decision of the Council reversed.

### 11. Edwards & Ors v City of Onkaparinga & Anor

<table>
<thead>
<tr>
<th>Case Number</th>
<th>ERD-02-546 [2002] SAERDC 115</th>
</tr>
</thead>
<tbody>
<tr>
<td>Date</td>
<td>13 December 2002</td>
</tr>
<tr>
<td>Details of Court</td>
<td>Environment Resources and Development Court</td>
</tr>
<tr>
<td></td>
<td>Commissioner Mosel</td>
</tr>
<tr>
<td>Zoning</td>
<td>Residential Zone</td>
</tr>
<tr>
<td>Details of Proposal</td>
<td>27m monopole with antenna, and equipment cabin.</td>
</tr>
<tr>
<td>Issues raised/dealt with</td>
<td>Third Party Appeal</td>
</tr>
</tbody>
</table>

**Summary**
Facility proposed at the Woodcroft Christian centre (some 130m from the Appellants property), with additional shrouding to give the appearance of a cross (to be white, with the monopole remaining grey).

The cross design was consistent with the Christian use of the land and was to have associated lighting.

The evidence showed that visibility of the TF was limited from the Edwards property.

The Ministerial PAR provisions applied, and the application was noted to be in the nature of essential infrastructure, and the site was the only one suitable and available to Hutchison 3G within the search area. Owing to siting and design, it was not so visually detrimental as to be objectionable and refused. The Council wide principles of development control and Objectives spoke ‘about minimising (and not eliminating) visual impact’.

Quoting APT CDMA Pty Ltd v City of Burnside [2001] SAERDC 40, Commissioner Mosel noted:

‘...when properly construed the telecommunication facilities provisions (that were in effect at the time) infer that “intrusive impacts must be accepted in some cases”. Those provisions are almost identical to those in the Development Plan for the Council and I have read them accordingly’.

**Outcome**
Appeal allowed, decision of the Council affirmed.
## 12. Hutchison 3g Australia P/L v City of Mitcham & Anor

<table>
<thead>
<tr>
<th>Case Number</th>
<th>[2004] SAERDC 94</th>
</tr>
</thead>
<tbody>
<tr>
<td>Date</td>
<td>18 November 2004</td>
</tr>
<tr>
<td>Details of Court</td>
<td>Environment Resources and Development Court</td>
</tr>
<tr>
<td></td>
<td>Full Bench, including Judge Cole</td>
</tr>
<tr>
<td>Zoning</td>
<td>Institutional Zone</td>
</tr>
<tr>
<td>Details of Proposal</td>
<td>18m monopole with antenna, and equipment cabin at Waite Campus</td>
</tr>
<tr>
<td>Issues raised/dealt with</td>
<td>Refusal by Council</td>
</tr>
<tr>
<td>Summary</td>
<td>Although it was accepted that the Institutional zone was an appropriate one, the Court found that the impact to the more pristine adjacent Birksgate area was unacceptable, especially in light of the evidence given by Hutchison’s witness that:</td>
</tr>
<tr>
<td></td>
<td>‘...the proposed development is by no means the only way, from a technical point of view, for Hutchison to establish the telecommunication facilities that it needs to cover the trouble spots in the 3G network. Hutchison has many options, some of which would not require the erection of a tower, but would instead involve the establishment of several low impact facilities under the Determination’.(^8)</td>
</tr>
<tr>
<td>Outcome</td>
<td>Appeal refused.</td>
</tr>
</tbody>
</table>

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\(^8\) At para 35. Then at para 43, the Court said, ‘The proposed tower would have a significant adverse impact upon the visual amenity of that part of the Residential (East Plains) Zone, the Hills Face Zone and the Institutional zone within its locality. The visual amenity of the areas which would be affected is presently high, and the adverse effect is unacceptable, having regard to the relevant provisions of the Development Plan.’
13. Network Design & Construction v City of Burnside

<table>
<thead>
<tr>
<th>Case Number</th>
<th>[2005] SAERDC 41</th>
</tr>
</thead>
<tbody>
<tr>
<td>Date</td>
<td>24 May 2005</td>
</tr>
<tr>
<td>Details of Court</td>
<td>Environment Resources and Development Court Commissioner Mosel</td>
</tr>
<tr>
<td>Zoning</td>
<td>Local Centre Zone (immediately abutting residential zone)</td>
</tr>
<tr>
<td>Details of Proposal</td>
<td>25m monopole with tuft antenna and equipment cabin</td>
</tr>
<tr>
<td>Issues raised/dealt with</td>
<td>Refusal by Council</td>
</tr>
</tbody>
</table>

**Summary**

The proposal was to be placed behind strip shops, adjacent to the rear fence of the property adjoining houses.

It was noted that a large gum tree was next to the site for the proposal that would ameliorate visual impact. Notwithstanding that fact, as the Local Centre zone area was seen by the Commissioner to be ‘very confined’, Commissioner Mosel found that the visual impact was direct and unacceptable to the adjoining land, saying:

‘I accept that, where dwellings are located at the interface with a significant use, some reduction to amenity is both likely and to be expected in the assessment of a new proposal. However, such an approach should not, as a consequence, open the floodgates.’

Commissioner Mosel was not satisfied that the evidence ‘demonstrated conclusively that the proposed location and type of facility is the only mode of delivery that could successfully withstand assessment under the relevant provisions’.

In considering the nature of the development as an item of essential infrastructure, Commissioner Mosel opined:

‘I acknowledge that telecommunication facilities are described in the Development Plan as ‘essential infrastructure’ (Objectives 34 and 35 text) largely as a consequence of their contribution to the State’s economy. However, on my reading of the relevant provisions of the Development Act 1993 and the Development Plan, the assessment of a telecommunications facility should be no different from the assessment of any other use of land in situations where the use proposed is neither complying or non-complying.’

It is suggested that this reasoning was erroneous, and although not tested on Appeal, in light of later judicial comment, it was not followed.

---

9 Network Design & Construction v City of Burnside [2005] SAERDC 41, at para 34

10 Ibid, at para. 18, page 5
Indeed, in 2008 when a later development application was lodged for this site, consent orders were recorded (revealing the shift in both Council based assessment trends, and also bearing in mind the case law that had by then evolved.11

### 14. Bury and Anor v Development Assessment Commission & Hutchison 3g Australia P/L

<table>
<thead>
<tr>
<th>Case Number</th>
<th>[2005] SAERDC 43</th>
</tr>
</thead>
<tbody>
<tr>
<td>Date</td>
<td>24 May 2005</td>
</tr>
<tr>
<td>Details of Court</td>
<td>Environment Resources and Development Court</td>
</tr>
<tr>
<td></td>
<td>Commissioner Hodgson</td>
</tr>
<tr>
<td></td>
<td><em>Ex tempore</em> judgment</td>
</tr>
<tr>
<td>Zoning</td>
<td>Residential Zone</td>
</tr>
<tr>
<td>Details of Proposal</td>
<td>25m monopole with antenna, and equipment cabin at Council reserve, replacing existing light pole (non-complying)</td>
</tr>
<tr>
<td>Issues raised/dealt with</td>
<td>Third Party appeal against Council’s approval and DAC concurrence</td>
</tr>
<tr>
<td>Summary</td>
<td>Commissioner Hodgson acknowledged that the likely visual impact was acceptable, saying that such assessment is very subjective. On the aspect of consideration of non-complying forms of development assessment, the Commissioner said:</td>
</tr>
<tr>
<td></td>
<td>‘Like any other development, non-complying developments must be assessed against the relevant provisions of the Development Plan. If they satisfy those provisions, they can be approved, subject to the concurrence procedures required by the Development Act, but without being required to clear hurdles higher than those placed before other kinds of development’.12</td>
</tr>
<tr>
<td>Outcome</td>
<td>Appeal dismissed – this proposal did not proceed as the City of Campbelltown refused to grant tenure</td>
</tr>
</tbody>
</table>

### 15. Foresto & Mastripolito v Development Assessment Commission & Anor

<table>
<thead>
<tr>
<th>Case Number</th>
<th>[2005] SAERDC 45</th>
</tr>
</thead>
<tbody>
<tr>
<td>Date</td>
<td>1 June 2005</td>
</tr>
<tr>
<td>Details of Court</td>
<td>Environment Resources and Development Court</td>
</tr>
<tr>
<td></td>
<td>Commissioner Green</td>
</tr>
<tr>
<td>Zoning</td>
<td>Residential Zone</td>
</tr>
</tbody>
</table>

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11 In 3GIS Pty Ltd v City of Burnside[2008] SAERDC 344, a Consent Order was issued by the ERD Court on 3 December 2008

12 Bury and Anor v Development Assessment Commission & Hutchison 3g Australia P/L [2005] SAERDC 43, at para 11, page 6
Details of Proposal | 30m monopole with antenna, and equipment cabin at Council reserve (non-complying)
---|---
Issues raised/dealt with | Third Party appeal against DAC approval
Summary | The Court considered the alternative sites discussed, and concluded that the location and siting were unavoidable, but acceptable in the circumstances, with visual impacts minimised to a sufficient degree by separation distance, landscaping, by virtue of a ‘light-pole co-location / swap-out’, and design.
EME health impacts were raised as a concern, but in the absence of evidence called, Commissioner Green said:

’No expert or other evidence was produced to the Court by the appellants on this issue. It is not sufficient to simply raise personal concerns or to rely on general material published in various media. This issue and concern has previously been dealt with by this Court and others in Australia, it is regulated by the Commonwealth Government and there has been no finding that I am aware of to reject a telecommunications facility of this kind on the basis of potential health effects on the community. At this time the Court must accept that position.’

Loss of land value of nearby properties owing to the development was suggested in evidence, but the Court found that such was ‘not a relevant factor to be taken into account in planning assessment and decision making’.

Outcome | Appeal dismissed – this proposal did not proceed as the City of Campbelltown refused to grant tenure

16. Telstra Corporation Ltd v City of Charles Sturt

| Case Number | [2006] SAERDC 1 |
| Date | 6 January 2006 |
| Details of Court | Environment Resources and Development Court Commissioner Mosel |
| Zoning | Industry Zone (Interface Policy Area 57), adjacent to a Residential Historic (Conservation) Zone |
| Details of Proposal | 30m monopole with antenna, and equipment cabin |
| Issues raised/dealt with | Refusal by Council |
| Summary | The Industry Zone had no specific provisions for TF’s (in common with most DP’s at that time). The Industry Zone Introductory note anticipated: |

13 Foresto & Mastripolito v Development Assessment Commission & Anor [2005] SAERDC 45, at para. 32
Recognizing the Ministerial PAR Telecommunication facilities Objectives and PDC’s for the essential infrastructure, which needed to be balanced against the Zone and Council wide Objectives and PDC’s; and further balancing the effect on visual amenity against the need for a telecommunications facility, the Commissioner commented (and I quote in full owing to the importance of the comments made that paved the way for future judicial assessment of TF’s):

‘30 Thus the visual impact of the proposed development on the visual amenity of the locality, the need for the facility as well as the availability and suitability of alternative sites or other options for service delivery are all factors to be considered.

31 It is the latter issue that the Court finds itself in a difficult role. Any finding as to the availability of more suitable sites or, for example, “multiple-site” solutions which might combine a monopole and a low-impact facility or a series of low impact facilities needs to be supported by evidence. It is one thing for the respondent to base its case in proceedings relating to a specified facility on a proposition that there are plentiful and better opportunities for "low impact" or multiple-site solutions within the target area; it is quite another for candidate sites to be suitable in technical and planning terms and be, in reality, available to the appellant carrier.

33 There are also practical considerations. In most instances, access to a potential site, must be agreed by the owner. That is not always forthcoming as the evidence would show when, in this case, the appellant approached the respondent to place a facility to serve the identified need on the Sam Johnson Sports ground. This site is a large and well landscaped public reserve (under the ownership of the respondent) within the northern sector of the target area. A similar outcome occurred when the appellant approached Transport SA in respect of land (set aside for road purposes) situated on Torrens Road. Furthermore, in the event that other sites are available, their suitability, from the perspective of the appellant carrier, will depend on many factors including the availability of a suitable position and area for the base station and the length of cable run between the antenna and base station; which factor determines, in part, the quality of the service. A base station is required whether or not the facility is of a "low-impact" type.

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14 Telstra Corporation Ltd v City of Charles Sturt  [2006] SAERDC 1, at para 16.
34 A consideration of the planning merits of alternative sites adds to the complexity. Whether one among several alternative sites is superior in planning terms (in particular, visual impact) is an issue that is difficult to determine in the absence of specific proposals for a specific site or series of sites as is the case here. In such circumstances, whether the appellant is found to have discharged its obligation to propose one among many sites that “minimise” visual impact (Council Wide Objective 104) is a matter that is determined on a very limited evidentiary basis. Further, while I accept Mr Byrt’s submissions that a "low-impact” solution might be construed by virtue of the term itself, as a preferred alternative, it does not necessarily follow that coverage of the target area by way of multiple low-impact facilities in lieu of a single site is to be preferred in planning terms.’

This decision laid out a recognition of Carriers’ plight in having to locate and then apply for approval of a site that is suitable for the provision of services (that is one that meets RF requirements); one that is suitable in planning terms, and one that has a landlord willing to grant tenure (unlike the outcome in Bury and Foresto above, and in many other instances not here discussed). Such steps do not need to be taken by other providers of essential infrastructure (i.e. electrical infrastructure which has specific provisions for assessment in the Development Act 1993\(^{15}\), and accordingly a potential Constitutional discrimination/inconsistency issue has arisen and been judicially discussed.

In order to demonstrate a further willingness to ‘minimise’ visual impact, Telstra offered to lower the height of the TF in an attempt to succeed in the Appeal. This sort of offer became common place, as did offers to landscape and screen (both of which only aid the lower portion of TF’s, with the upper portions still evident given the height needed for operation purposes / clear line of sight. And because to screen the whole height of a pole would be to add bulk, and therefore ADD to visual appearance and bulk.

**Outcome**

Appeal allowed (albeit with a reduction in height), decision of Council reversed

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### 17. Telstra Corporation Ltd v City of Norwood Payneham & St Peters

<table>
<thead>
<tr>
<th>Case Number</th>
<th>[2006] SAERDC 13</th>
</tr>
</thead>
<tbody>
<tr>
<td>Date</td>
<td>6 February 2006</td>
</tr>
<tr>
<td>Details of Court</td>
<td>Environment Resources and Development Court Commissioner Mosel</td>
</tr>
<tr>
<td>Zoning</td>
<td>Business Zone, but at the interface of the Historic (Conservation) Zone – Residential, and the District Centre (Norwood) Zone. Accordingly regard was had to those zone provisions, and to the policy setting for</td>
</tr>
</tbody>
</table>

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\(^{15}\) Development Act 1993, see the exceptions and exemptions for Electricity infrastructure provided for in section 49 (3) of the Act, and by the Development Regulations 2008, ‘Schedule 14 A - Development involving Electricity Infrastructure exempt from approval’
<table>
<thead>
<tr>
<th>Details of Proposal</th>
<th>24m monopole with antenna, and equipment cabin at Council reserve, replacing existing light pole (non-complying)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Issues raised/dealt with</td>
<td>Refusal by Council</td>
</tr>
</tbody>
</table>
| Summary | The hearing was protracted – it was adjourned after 3 days to allow the Appellant to explore whether an alternative Council owned site was available to it – that may have been assessed to be a ‘better’ site for the provision of services.

Counsel for the Council argued that Telstra had not proven a need for services. In response, Counsel for Telstra submitted ‘...that any question of need for a telecommunications services of the nature proposed is answered by the recognition of demand for a service in the Plan itself. By this I take it that he is referring to that part of the text following Objectives 91 and 92 which reads as follows:

Telecommunications facilities are an essential infrastructure required to meet the rapidly increasing community demand for communications technologies. To meet this demand there will be a need for new telecommunications facilities to be constructed.’

Later in the decision, and having regard to the dicta in recently delivered decisions of the Court (see above), Commissioner Mosel said:

‘...By virtue of the Plan (a) describing a telecommunications facility as "essential infrastructure" and (b) recognising that a new facility will be unavoidable in "more sensitive areas" there appears to be an inbuilt intention in the Plan to permit, where the need has been established, universal telecommunications coverage.’

The parties returned to Court some 3 months later, having spent time and effort preparing plans and RF engineering modelling to assess the potential for a better RF / planning outcome at the Norwood oval. It was apparent that a better outcome was not to be. The Court was so advised. The Court went on to find that ‘...there is no better site than the land within the area of need for the proposed facility’.

| Outcome | Appeal dismissed, decision of Council reversed. |

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16 Telstra Corporation Ltd v City of Norwood Payneham & St Peters [2006] SAERDC 13, at para. 30

17 Ibid at para 41.

18 Ibid at para 44.
### 18. 3GIS v Development Assessment Commission & Anor

<table>
<thead>
<tr>
<th>Case Number</th>
<th>[2006] SAERDC 89</th>
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</thead>
<tbody>
<tr>
<td>Date</td>
<td>13 December 2006</td>
</tr>
<tr>
<td>Details of Court</td>
<td>Environment Resources and Development Court Full Court, including Judge Cole</td>
</tr>
<tr>
<td>Zoning</td>
<td>Special Uses Zone (adjacent to a Residential Zone)</td>
</tr>
<tr>
<td>Details of Proposal</td>
<td>22m monopole with antenna, and equipment cabin at golf course Glenelg Council owned Golf Club, which was the subject of an Open Space Proclamation, necessitating DAC to be the relevant authority (by virtue of the Development Regulations 1999, Schedule 10, Clause 12).</td>
</tr>
<tr>
<td>Issues raised/dealt with</td>
<td>Refusal by DAC</td>
</tr>
</tbody>
</table>
| Summary       | In paragraph 10 of the judgment, the Court set out the history of mobile telephony in Australia, commencing in 1987 with Telecom Australia launching the analogue Advanced Mobile Phone System (AMPS). The information was taken from the statement of evidence provided by Mr Andrew Edwards for Telstra. Several key issues that had previously been judicially considered were raised, including:  

*The locality*, which was to be determined by reference to the visibility of the proposed development (following [Hutchison 3G Australia Pty Ltd v City of Mitcham & Ors [2005] SASC 249](http://classic.austlii.edu.au/au/cases/sa/SAERDC/2006/89.html)). (see below, Supreme Court case #6).  

*The 'need' referred to in the Development plan, being the need for facilities and not the need for services, which is assumed (emphasis added to highlight this important recognition, that has since been followed by the Courts):*

> ‘26 The telecommunications provisions in the Development Plan are repeated (with different numbering) in each of the metropolitan Development Plans in South Australia. These provisions were the subject of the judgment of the Full Court of the Supreme Court in [Hutchison 3G Australia Pty Ltd v City of Mitcham & Ors [2005] SASC 249; (2005) 141 LGERA 93](http://classic.austlii.edu.au/au/cases/sa/SAERDC/2006/89.html). At p.104, Justice Besanko, in the leading judgment, said:  

*It seems to me that the assumption behind those provisions is that telecommunications facilities involving a tower are likely to be unsightly and low-impact facilities are likely to be less intrusive. However, the effect on visual amenity is not the only matter relevant to the planning assessment. The Plan recognises that in certain circumstances there will be a need for a telecommunications facility. The need might be for a facility in the general area or it might be for a particular facility in a particular location. The question of need is relevant to the planning assessment and is to be weighed against the effect on visual amenity. I think it is inherent in the question of need (which was an important part of the*
appellant’s case) that other options or alternatives be considered. Provisions in the development plan which refer to where the facility is "located" (Objective 29) or "sited" (Principle 188(f)) which encourage low-impact facilities and which recognise that, on occasions, new facilities in more sensitive areas will be "unavoidable" reinforce the conclusions that an examination of the need and the available alternatives and options was not only permitted but in fact was required.

27 Besanko J has interpreted the word "need" in the telecommunications provisions to mean the need for the facility, or infrastructure, rather than the need for the telecommunications service. The Development Plan provisions assume the need for the service. In the text under Objective 88, telecommunications facilities are described as "essential infrastructure required to meet the rapidly increasing community demand for communications technologies". We accept Mr Henry’s argument on this point. It is not, therefore, the task of a planning authority in a planning assessment to assess the social utility of providing the latest generation of telecommunications services. The question to be addressed in a planning assessment is whether the particular facility proposed is needed to provide the service and, if so, whether it has been located and designed to minimise visual impact. The preference in the Development Plan for low impact facilities and for co-located facilities will enter into this assessment.’

Potential for inconsistency between Commonwealth and State legislation Counsel for Telstra (Mr Henry) argued that ‘the provisions of the Development Plan, should they be interpreted to require the proponent to prove need, were contrary to clause 44 of Schedule 3 of the Telecommunications Act 1997 (Cth), and therefore invalid. Clause 44(1) of Schedule 3 of the Telecommunications Act provides:-

44(1) the following provisions have effect:
(a) a law of a State or Territory has no effect to the extent to which the law discriminates, or would have the effect (whether direct or indirect) of discriminating, against a particular carrier, against a particular class of carriers, or against carriers generally;
(b) without limiting paragraph (a), a person is not entitled to a right, privilege, immunity or benefit, and must not exercise a power, under a law of a State or Territory to the extent to which the law discriminates, or would have the effect (whether direct or indirect) of discriminating, against a particular carrier, against a particular class of carriers, or against carriers generally;
(c) without limiting paragraph (a), a person is not required to comply with a law of a State or Territory to the extent to which the law discriminates, or would have the effect (whether direct or indirect) of discriminating, against a particular carrier, against a particular class of carriers, or against carriers generally.
The Court went on to find that it did ‘not consider that the telecommunications provisions of the Development Plan discriminate against telecommunications carriers in requiring that the need for a facility be demonstrated, in the sense of subjecting the carriers to a more onerous test than the test to which applicants for other kinds of development are subjected’. However, this conclusion was reviewed by the Supreme Court on Appeal (see Supreme Court case 7 below) - The Court held that to the extent that the DAC argued that the Development Act and Development Plan ‘required proof of demand need for 3G services’, such argument was inconsistent with the Commonwealth Telecommunications Act and to the extent of the inconsistency, was invalid.

The Court concluded that the planning assessment principally involved an assessment against the Telecommunications provisions in the Development Plan, and that given that need is assumed by the DP, it must be balanced with the visual impact of the proposed TF. Further, alternative sites investigated were not viable as they could not meet ‘the same or very similar needs’.

Outcome

Appeal allowed, decision of DAC reversed. This was then appealed to the Supreme Court.

19. Telstra Corporation Ltd v City of Holdfast Bay

<table>
<thead>
<tr>
<th>Case Number</th>
<th>[2008] SAERDC 47</th>
</tr>
</thead>
<tbody>
<tr>
<td>Date</td>
<td>7 July 2008</td>
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<tr>
<td>Link</td>
<td><a href="http://classic.austlii.edu.au/cases/sa/SAERDC/2008/47.html">http://classic.austlii.edu.au/cases/sa/SAERDC/2008/47.html</a></td>
</tr>
<tr>
<td>Details of Court</td>
<td>Environment Resources and Development Court Commissioner Green</td>
</tr>
<tr>
<td>Zoning</td>
<td>District Centre Zone (Policy Area 6 (Jetty Road))</td>
</tr>
<tr>
<td>Details of Proposal</td>
<td>24m monopole with antennas, total height 29m, with the base station equipment to be accommodated within the Local Heritage listed Telstra Telephone Exchange building on the site – hence, the Court acknowledged that there was no change of use, as the site had, since the 1920’s, been used for telecommunications purposes.</td>
</tr>
<tr>
<td>Issues raised/dealt with</td>
<td>Refusal by Council</td>
</tr>
<tr>
<td>Summary</td>
<td>The locality revealed a mix of uses, and there were nearby tall pine trees to assist with screening in the greater locality. This case followed the Full Supreme court decision in 3GIS v DAC &amp; Anor [2006] SAERDC 89. Commissioner Green was guided by that case, and noted:</td>
</tr>
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</table>

‘45 I have had regard to case law dealing with telecommunications facilities appeals and particularly DAC v 3GIS Pty Ltd [2007] 154 LGERA 72 and 3GIS v Development Assessment Commission & Anor [2006] SAERDC 89. I also note...’

19 Telstra Corporation Ltd v City of Holdfast Bay [2008] SAERDC 47 at para 46.
that with respect to telecommunications facilities Council Wide provisions were inserted in all Metropolitan Adelaide Council Development Plans with such guidelines being of a similar if not identical nature and that mostly these are newer provisions than the more specific zone provisions. In some respects the more recent, though broader, Council Wide policy directions for telecommunications facilities requires greater weighting where they overlap or are in contradiction to or are to be considered against silent’

Commissioner Green laid out a systematic ‘formula’ for assessment in the determination, which in hindsight, commenced a ‘template’ for judicial assessment that was to follow in future decisions by the Court. The assessment ‘headings’ in the case included:

- community need – both for services and infrastructure;
- zoning, location and alternatives;
- visual amenity impacts, minimisation and character consequences; and
- effect on Local Heritage Places.\(^{20}\)

Following a reasoned assessment, Commissioner Green concluded:

‘76 I have carefully considered the proposal, the evidence, the site and locality contexts, given due weight to all of the relevant Development Plan guidelines and taken into account all relevant matters. I conclude as follows:

- that there is likely to be a community need for the facility to provide telecommunications services to the target area at Glenelg East both immediately and in the near future;
- that the zoning and location of the subject land are adequate and acceptable for the development proposal and that it is acceptably sited on land behind the Local Heritage Place building;
- that any realistic alternatives are of no greater merit on the basis of meeting the technical needs of the appellant whilst also significantly minimising visual impacts;
- that visual amenity impacts on the locality and parts of it will be significant, but they are minimised to an appropriate and acceptable extent and are otherwise difficult to avoid;
- that the Local Heritage Place is not materially affected, directly or indirectly, and nor are its heritage values affected in any significant way; and
- that the "landmark site" designation of the Brighton/Jetty Road corner of the subject land cannot be afforded great weight in the light of the Local Heritage Place designation of the Telephone Exchange building on the land and having regard to all of the other general guidelines for the DCeZ and for such sites.\(^{21}\)

\(^{20}\) Ibid at para. 47

\(^{21}\) Telstra Corporation Ltd v City of Holdfast Bay [2008] SAERDC 47 at para 76.
This case set anew, a ‘style’ for judicial assessment of telecommunications facilities proposals.

<table>
<thead>
<tr>
<th><strong>Outcome</strong></th>
<th>Appeal allowed, decision of Council reversed.</th>
</tr>
</thead>
</table>

### 20. Telstra Corporation Ltd v Town of Gawler

<table>
<thead>
<tr>
<th><strong>Case Number</strong></th>
<th>[2009] SAERDC 2</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Date</strong></td>
<td>20 January 2009</td>
</tr>
<tr>
<td><strong>Details of Court</strong></td>
<td>Environment Resources and Development Court Commissioner Green</td>
</tr>
<tr>
<td><strong>Zoning</strong></td>
<td>Town Centre Zone / Light Historic (Conservation) Policy Area 9</td>
</tr>
<tr>
<td><strong>Details of Proposal</strong></td>
<td>24m monopole with tuft antenna, total height 27m, with the base station equipment to be accommodated within the Telstra Telephone Exchange building on the site</td>
</tr>
<tr>
<td><strong>Issues raised/dealt with</strong></td>
<td>Refusal by Council</td>
</tr>
</tbody>
</table>
| **Summary**     | The Court agreed with planning evidence to the effect that the amenity of the area was ‘highly variable….with mixed character….mixed public realm and private amenity levels’.  

As is the case with all proposals, a large number of sites were investigated prior to selection of the Appeal site – some 11 sites initially, with additional sites pursued and tested during the Appeal process, for RF ability and likelihood of tenancy. Recognizing this extensive investigation, Commissioner Green noted in his determination:

> ‘47 On the evidence of Mr Edwards (Exhibit A3, clause 40 and Attachment A), Telstra has investigated some 11 potential locations for a new facility in the central area of Gawler, including some on top of taller existing building elements. He gave extensive evidence as to the subject land proposal, being the preferred site for the appellant, not the least reason of which appeared to be its co-location benefits with the telephone exchange building, thereby avoiding additional external infrastructure and sheds, and with acceptable tenure, access and suitable coverage. He concluded “that there is no other available solution (from a technical or operational perspective) that is as good as or better than that proposed ... and which has the same or less impact on the community and the environment.”’

Submissions were made to the Court about the merit of ‘disguising’ the TF with cladding, a structure (clock tower) or the like. On balance, and bearing in mind nearby heritage items and the reality that it is not possible to conceal a TF owing to the necessary height required, the Court allowed a condition for the placement of fence screening to a height of 2.4m’s along the High Street frontage.

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21. Telstra Corporation Ltd v City of Burnside

<table>
<thead>
<tr>
<th>Case Number</th>
<th>[2008] SAERDC 345</th>
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<tbody>
<tr>
<td>Date</td>
<td>24 February 2009</td>
</tr>
<tr>
<td>Link</td>
<td>N/A</td>
</tr>
<tr>
<td>Details of Court</td>
<td>Environment Resources and Development Court Commissioner Hodgson</td>
</tr>
<tr>
<td>Zoning</td>
<td>Local Centre Zone (immediately abutting residential zone)</td>
</tr>
<tr>
<td>Details of Proposal</td>
<td>25m monopole with tuft antenna and equipment cabin</td>
</tr>
<tr>
<td>Issues raised/dealt with</td>
<td>Refusal by Council</td>
</tr>
</tbody>
</table>

**Summary**

This Appeal related to a proposal that was substantially the same, and in the same position, as that applied for in the case of **Network Design & Construction v City of Burnside [2005] SAERDC 41** (Case #13 above).

Four years after this site was first ‘tested’ for approval in respect of a much needed TF to meet service demand in the Burnside area, and following the change in judicial understanding about the Commonwealth and State legislative framework for Telecommunications facilities, approval was finally granted by consent orders issued by the Court – following the lodgement of Appeal (the Council Planner had written a favourable report, but members had refused approval).

**Outcome**

Consent orders issued

22. Optus Mobile P/L v City of Onkaparinga & Anor

<table>
<thead>
<tr>
<th>Case Number</th>
<th>[2012] SAERDC 34</th>
</tr>
</thead>
<tbody>
<tr>
<td>Date</td>
<td>25 May 2012</td>
</tr>
<tr>
<td>Details of Court</td>
<td>Environment Resources and Development Court Commissioner Hamnett</td>
</tr>
<tr>
<td>Zoning</td>
<td>Residential (Foothills) Zone</td>
</tr>
<tr>
<td>Details of Proposal</td>
<td>Monopole and antennas – total height 14.3m – and equipment shelter</td>
</tr>
<tr>
<td>Issues raised/dealt with</td>
<td>Refusal by Council</td>
</tr>
</tbody>
</table>

**Summary**

Following refusal of the original development application, an Appeal was lodged and parties joined. Amended plans were accepted as the basis of the Appeal, primarily in an attempt to minimise the visual impact of the proposal.

The amenity of the area, with views over a nearby reservoir was accepted as of high amenity value, where the introduction of a TF could impact that amenity. Submissions were put to distinguish the decision from the earlier **Hutchison 3g Australia P/L v City of Mitcham & Anor [2004] SAERDC 94**, (and subsequent Appeal to the Supreme Court), on the basis that:
‘38...in neither of those cases did the proponents take sufficient steps to minimise the visual impact of their proposals nor, in the latter case, did the proponent demonstrate that there were no alternative ways of meeting its technical objectives. In the present case, however, Optus had demonstrated that the use of the subject land was unavoidable and had taken all reasonable steps to minimise visual impact. I agree with this submission.’

The Court also heard evidence about concerns relating to noise and health but found no basis for concern.

| Outcome     | Appeal allowed, decision of Council reversed |

23. Telstra Corporation Ltd v The Corp of the City of Whyalla

<table>
<thead>
<tr>
<th>Case Number</th>
<th>[2012] SAERDC 43</th>
</tr>
</thead>
<tbody>
<tr>
<td>Date</td>
<td>27 July 2012</td>
</tr>
<tr>
<td>Link</td>
<td><a href="http://classic.austlii.edu.au/au/cases/sa/SAERDC/2012/43.html">http://classic.austlii.edu.au/au/cases/sa/SAERDC/2012/43.html</a></td>
</tr>
<tr>
<td>Details of Court</td>
<td>Environment Resources and Development Court Commissioner Green</td>
</tr>
<tr>
<td>Zoning</td>
<td>Residential Zone</td>
</tr>
<tr>
<td>Details of Proposal</td>
<td>30m monopole and antennas – total height 32m. Equipment located in Telstra exchange building on the same site</td>
</tr>
<tr>
<td>Issues raised/dealt with</td>
<td>Refusal by Council</td>
</tr>
<tr>
<td>Summary</td>
<td>The surrounding residential area had single storey dwellings, or vacant / divided land to be developed. The Assessment approach adopted by Commissioner Green was methodical and noteworthy (emphasis added to subjects dealt with):</td>
</tr>
</tbody>
</table>

‘24 I have had regard to case law dealing with telecommunications facility appeals and particularly DAC v 3GIS Pty Ltd [2007] SASC 216 particularly at paras 44-48 and 69-76; Hutchison 3G P/L v City of Mitcham & Ors [2005] SASC 249; City of Burnside v City Apartments Pty Ltd [2004] SASC 294 regarding ‘minimisation’; and a number of other judgments of this Court, particularly in the metropolitan Adelaide area. Being mindful of the approach and outline to assessment in those judgments I note that some of the key aspects include:

- that the Development Plan expressly recognises in the objectives, that telecommunications facilities are essential infrastructure required to meet the rapidly increasing community demand for communication technology, and that demand is assumed;
- the Development Plan assumes that telecommunications facilities will be constructed in the Council area in order to satisfy the community need for such relevant telecommunication technology;
it is appropriate to ensure that the necessary facilities are constructed in a manner which ensures that coverage is available to satisfy the need, but in a way which minimises the visual impact of those facilities on the amenity of the local environment;

it is not a matter of balancing the impact of a particular development on the amenity against some demonstrated demand need as the demand need is given;

with respect to the facility need (as opposed to demand need), the weighing process is not a balancing of the need against the effect of development on visual amenity but a weighing of available alternatives and options and the extent to which they would each minimise visual impacts on the amenity of the locality;

in considering minimising the effect on the environment, the planning authority is to consider alternative sites or low impact facilities, whether minimisation can be better achieved by installation of a facility at some other site but the other so-called preferred or possible site will need to meet the facility demand and if it does not, it may be discarded from the search;

with regard to the role of alternative sites it is appropriate to consider obvious alternative sites which would clearly better meet the objectives and principles of the Plan and to consider them in a practical and commonsense fashion; and

where alternative sites are under consideration, the Court is required to consider only the proposed facility and not whether some alternative site with some modified form of development would be more environmentally sensitive. An alternative site would have to be a reasonably practical alternative that would meet the facility demand and be a feasible alternative.

Commissioner Green went on to assess the evidence against these criteria, together with the suggestion of fenceline screening to the adjacent residential property.

Outcome

Appel allowed, decision of Council reversed

24. Telstra Corporation Ltd v City of Prospect

<table>
<thead>
<tr>
<th>Case Number</th>
<th>[2013] SAERDC 9</th>
</tr>
</thead>
<tbody>
<tr>
<td>Date</td>
<td>15 March 2013</td>
</tr>
<tr>
<td>Details of Court</td>
<td>Environment Resources and Development Court Commissioner Mosel</td>
</tr>
<tr>
<td>Zoning</td>
<td>Neighbourhood Centre Zone – Prospect Road Policy Area</td>
</tr>
<tr>
<td>Details of Proposal</td>
<td>Monopole and antennas – total height 27m – and equipment shelter</td>
</tr>
<tr>
<td>Issues raised/dealt with</td>
<td>Refusal by Council</td>
</tr>
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<td>-------------------------</td>
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</table>
| Summary | The Court accepted that demand for Telecommunications services has grown rapidly, reporting in the determination, many paragraphs of background RF evidence from the expert statement prepared by Mr Andrew Edwards of Telstra. Increase in demand must be met by provision of services. Assessment of the proposal led to a finding by the Court that:

‘22 The case for the Council did not challenge the evidence of Mr Edwards to the effect that the facility is needed for the community within the target area to gain access to current telecommunications technology. Nor did it challenge, from a technical standpoint, Telstra’s assertion that the land was the site that optimised Telstra’s performance objectives. Furthermore, the Council did not present any evidence to the effect that the existing telecommunications facilities in the region generally could properly service the target area. Nor did the Council show that the target area could be properly serviced by a series of low impact facilities.

The proposal was to be located at the rear of a shop premises on Prospect Road. The rear land abutted a communal parking area, and the parties agreed that some public art on the fenceline, to be in keeping with similar fence adornment nearby, was acceptable. A condition of Approval was so noted. |
| Outcome | Appeal allowed, decision of Council reversed |

25. Telstra Corporation Ltd v. City of Onkaparinga & Anor (Aldinga)

<table>
<thead>
<tr>
<th>Case Number</th>
<th>[2013] SAERDC 25</th>
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</thead>
<tbody>
<tr>
<td>Date</td>
<td>22 May 2013</td>
</tr>
<tr>
<td>Details of Court</td>
<td>Environment Resources and Development Court</td>
</tr>
<tr>
<td>Zoning</td>
<td>Residential Zone</td>
</tr>
<tr>
<td>Details of Proposal</td>
<td>Monopole and antennas – total height 28.4m – and equipment shelter</td>
</tr>
<tr>
<td>Issues raised/dealt with</td>
<td>Refusal by Council</td>
</tr>
<tr>
<td>Summary</td>
<td>The TF was to be constructed at the rear of a shop, that was one of a group. Nearby residents joined in the proceedings. Given the proximity to the shoreline/ coast, and being a tall element that would be visible in the area, much of the evidence related to visibility and impairment of amenity. In his approach to assessment, Commissioner Green opined:</td>
</tr>
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</table>

‘29 In terms of s 35(5) and the relevant provisions of the Development Plan, the proposal is for consideration on its...
merits against the Development Plan guidelines and involves weighing up the pros and cons and considering whether it is sufficiently conducive to the overall intent, purpose and desired character and amenity of the RZ and tested in the specific site and locality context. The Development Plan is also to be utilised as a flexible, advisory planning policy document, not as a mandatory legal statute and as a practical guide for practical application, superimposed upon an existing state of development on the site and in the relevant locality. Ultimately, a planning judgment is to be made on a fact and degree basis as to whether the specific proposal sufficiently meets the Development Plan and having regard to all relevant matters, warrants consent.’

The Court concluded that notwithstanding ‘it will cause significant visual amenity loss to nearby residents’, on balance:

‘...I have concluded after considering the evidence, what I saw on the view, and from my planning assessment and judgment, that the facilities and demand need, and minimisation of visual impact to amenity and character of the locality, having regard to several alternate locations and designs, sufficiently fulfill the specific TF related guidelines in the Development Plan assessed in the context of case law, particularly derived from DAC v 3GIS Pty Ltd [2007] SASC 216, and that the proposal sufficiently meets the Development Plan as a whole and is acceptable and warranting of conditional Development Plan Consent. I find that it is not seriously at variance with the Plan when properly assessed.’

<table>
<thead>
<tr>
<th>Outcome</th>
<th>Appeal allowed, decision of Council reversed</th>
</tr>
</thead>
</table>

### 26. Telstra Corporation Ltd v. City of Onkaparinga & Anor (Sellicks Beach)

<table>
<thead>
<tr>
<th>Case Number</th>
<th>[2013] SAERDC 28</th>
</tr>
</thead>
<tbody>
<tr>
<td>Date</td>
<td>6 June 2013</td>
</tr>
<tr>
<td>Link</td>
<td>[2013] SAERDC 28</td>
</tr>
<tr>
<td>Details of Court</td>
<td>Environment Resources and Development Court Commissioner Green</td>
</tr>
<tr>
<td>Zoning</td>
<td>Urban Zone</td>
</tr>
<tr>
<td>Details of Proposal</td>
<td>35m monopole, antennas and equipment shelter</td>
</tr>
<tr>
<td>Issues raised/dealt with</td>
<td>Refusal by Council</td>
</tr>
<tr>
<td>Summary</td>
<td>The TF was to be developed on rural land (dissected by the Sellicks Creek), in close proximity to a new residential subdivision, and close to coastal areas. Concern was had about proximity to residential areas, and loss of amenity associated with visual impact to coastal and rural scenes. Referral was made to the Adelaide and Mt Lofty Ranges</td>
</tr>
</tbody>
</table>

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23 Telstra Corporation Ltd v. City of Onkaparinga & Anor (Aldinga) [2013] SAERDC 25 at para’s 29 and 51.
Natural Resources Board with respect to advice on creek protection and remediation.

In his approach to assessment, Commissioner Green summarised the judicial approach to assessment as described in recent cases past, and he stated at para 25 of the determination:

‘I have had regard to case law dealing with telecommunications facility appeals and particularly DAC v 3GIS Pty Ltd [2007] SASC 216 particularly at paras 44-48 and 69-76; Hutchison 3G Pty Ltd v City of Mitcham & Ors [2005] SASC 249; and City of Burnside v City Apartments Pty Ltd [2004] SASC 294 regarding ‘minimisation’; and a number of other judgments of this Court, particularly in the metropolitan Adelaide area. Being mindful of the approach and outline to assessment in those judgments I note that some of the key aspects include:

- that the Development Plan expressly recognises in its objectives, that telecommunications facilities are essential infrastructure required to meet the rapidly increasing community demand for communication technology, and that demand is assumed;
- the Development Plan assumes that telecommunications facilities will be constructed in the Council area in order to satisfy the community need for such relevant telecommunication technology;
- it is appropriate to ensure that the necessary facilities are constructed in a manner which ensures that coverage is available to satisfy the need (in the target search area and the radio frequency (RF hereafter) technology need in the context of surrounding facilities and demand growth), but in a way which minimises the visual impact of those facilities on the amenity of the local environment;
- it is not a matter of balancing the impact of a particular development on the amenity against some demonstrated demand need as the demand need is given;
- with respect to the facility need (as opposed to demand need), the weighing process is not a balancing of the need against the effect of development on visual amenity but a weighing of available alternatives and options and the extent to which they would each minimise visual impacts on the amenity of the locality;
- in considering minimising the effect on the environment, the planning authority is to consider alternative sites or low impact facilities, whether minimisation can be better achieved by installation of a facility at some other site(s) but the other so-called preferred or possible site(s) will need to meet the facility demand and if they do not, they may be discarded from the search;
- with regard to the role of alternative sites it is appropriate to consider obvious alternative sites
which would clearly better meet the objectives and principles of the Plan and to consider them in a practical and commonsense fashion; and

- where alternative sites are under consideration, the Court is required to consider only the proposed facility and not whether some alternative site with some modified form of development would be more environmentally sensitive. An alternative site would have to be a reasonably practical alternative (including the likelihood of tenure being obtained) that would meet the facility demand and be a feasible alternative.

Key in the assessment of this case was the distinction between Facility need and Community (or ‘demand’) need for the TF, and the fact that there is NO need to balance impact on amenity against demand need as demand need is a given.

**Facility Need:** The Court accepted evidence of need for the additional facility, and in doing so (and bearing in mind the prevailing topography), noted that existing surrounding TF’s needed to be tilted to service prescribed areas (to the extent of the capacity of each to do so) to ensure that interference did not occur over the broader network. Also noted and endorsed was the carriers’ determination to find a solution that would be of high standard, and anticipate future need given ‘...the apparent

**Community Need:** The community need for TF’s is established by the Commonwealth Telecommunications Act 1997, and is therefore paramount over State based legislation.

Many Alternative sites were tested, including consideration of siting the TF in a different location on the subject land (which was acceptable to the land owner).

**Outcome**

Appeal allowed, decision of Council reversed

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### 27. Bettcher v City of Charles Sturt & Anor

<table>
<thead>
<tr>
<th>Case Number</th>
<th>[2013] SAERDC 39</th>
</tr>
</thead>
<tbody>
<tr>
<td>Date</td>
<td>14 August 2013</td>
</tr>
<tr>
<td>Details of Court</td>
<td>Environment Resources and Development Court Commissioner Hamnett</td>
</tr>
<tr>
<td>Zoning</td>
<td>Mixed Use Zone (adjacent residential zone)</td>
</tr>
<tr>
<td>Details of Proposal</td>
<td>Monopole and antennas – total height 33m – and equipment shelter</td>
</tr>
<tr>
<td>Issues raised/dealt with</td>
<td>Third Party Appeal against Council approval</td>
</tr>
<tr>
<td>Summary</td>
<td>As the TF was positioned in a petrol station, bollards to protect against vehicle impact were also proposed. The TF was to be positioned in close proximity to the neighbouring residence/orchid home business, with the owner alleging breaches of Occupational Health, safety and</td>
</tr>
</tbody>
</table>
welfare codes. This concern was not made out. The owner also asserted that the RF impacts of the TF would kill or damage the flowering ability of the orchids grown on his land. This assertion was not made out, and no expert evidence was led to support the assertion.

Many alternative sites were investigated, but none were available, nor able to provide a better RF solution in the area of need. Further, notwithstanding the close proximity of the TF to the boundary fence / residence adjoining, as there was nowhere else to locate the TF, the Commissioner was satisfied that ‘all that is possible has been done to minimise the visual impact of the proposed facility on the amenity of the locality’

In keeping with the approach to assessment followed by the ERD Court cases heard after the Development Assessment Commission v 3GIS Pty Ltd & Anor [2007] SASC 216, Commissioner Hamnett said at para’s 13 and 14:

13. The Supreme Court has provided some clear guidance on the approach to be taken when assessing proposals for telecommunications facilities, most particularly in Development Assessment Commission v 3GIS Pty Ltd & Anor,[4] an authority referred to by both the Council and the Second Respondent. In that decision the Full Court explicited the relationship between the Commonwealth Telecommunications Act 1997 (the “Telco Act”) and Development Plans prepared in accord with the South Australian Development Act 1993 and had the following to say at paras 43-47:

... 43... The objectives of the Telco Act assume the need for advanced telecommunication services, and the Act provides for a number of coercive powers to be exercised in order to fulfil that need in the most efficient manner. That is one of the community needs which this Development Plan identifies as providing the background to the Plan, and in particular to that part of the Plan relating to telecommunications facilities...

44 The Development Plan in respect of telecommunications facilities recognises that coercive powers will be exercised to fulfil that recognised need, and that in many cases, those powers will be exercised to the exclusion of the operation of State planning legislation. Consistent with the background which informs those provisions of the Plan, the Plan expressly recognises in the Objectives that telecommunications facilities are “an essential infrastructure required to meet the rapidly increasing community demand for communications technologies”. The demand is assumed. In order to meet that assumed demand the plan recognises the need for new facilities to be constructed. It specifically recognises that new development of facilities “will be unavoidable” in more sensitive
areas “in order to achieve coverage for users of communications technologies”.

45 Where Objective 87 refers to the “needs of the community” and Principle 294(a) speaks of the need to locate and design facilities to meet the “communications needs of the community”, those provisions are referring to those needs acknowledged and assumed by the Development Plan, not to any demand need that must be established in respect of each particular application.

46 Telecommunications facilities are therefore to be constructed in the area covered by the Development Plan in order to satisfy the community need for access to the relevant telecommunications technologies. The concern of the Development Plan then is to ensure that those necessary facilities are constructed in a manner which ensures that coverage is available to satisfy the need, but in a way which minimises the visual impact of those facilities on the amenity of the local environment.

... 

49 It follows that the Environment Court was correct in holding that a planning authority was not required to assess the social utility of the 3G services provided by the respondent. The questions which it was required to address, and which the Court in due course did address, were whether this facility was needed to provide the service in the relevant area and whether it was located and designed to minimise the visual impact on the amenity of the locality.

... 

14 The Development Plan provisions in the present matter are not identical to those which were considered in Development Assessment Commission v 3GIS. The relevant Development Plan for the Charles Sturt Council now adopts the common format set out in the South Australian Planning Policy Library and, in regard to Telecommunications Facilities, contains the Objectives and Principles of Development Control set out earlier at p 6 of this judgment. As will be seen, there are two objectives. The first of these deals with the provision of telecommunications facilities “to meet the needs of the community”, while the second requires facilities to be “sited and designed to minimise visual impact on the amenity of the local environment”.

Outcome

Appeal dismissed, decision of Council affirmed

28. Vodafone Hutchison Australia v City of Holdfast Bay

Case Number [2015] SAERDC 20
Date 11 June 2015
Details of Court Environment Resources and Development Court Commissioner Nolan
<table>
<thead>
<tr>
<th>Zoning</th>
<th>Neighbourhood Centre Zone (abutting residential zone)</th>
</tr>
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<tbody>
<tr>
<td>Details of Proposal</td>
<td>20m monopole, antennas and equipment shelter</td>
</tr>
<tr>
<td>Issues raised/dealt with</td>
<td>Refusal by Council</td>
</tr>
<tr>
<td><strong>Summary</strong></td>
<td>The telecommunications facility to be constructed on Brighton Road, Hove, was a replacement for a former facility at Minda. The evidence highlighted the importance of 'locating sites close to the intended area of coverage....ensuring that they will achieve their objectives'(^{24}). Regard was had to the site selection process, and the lack of suitability of availability of other suggested alternative sites, including consideration of sites not available for greater than a 5-year period (and therefore not feasible on a commercial basis). Specifically, in relation to the evidence given suggesting that a Carrier must choose the best alternative site even if it is not a commercially workable option, Commissioner Nolan opined:</td>
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<td></td>
<td>'47. I cannot adopt the respondent’s approach. If a provider of a facility was required to adopt any terms put to them by the owner of a prospective site in order to secure the “best” alternative then it is difficult to see how either the objects of the <em>Telecommunications Act</em> or the Development Plan can be met(^{25}).</td>
</tr>
<tr>
<td><strong>Outcome</strong></td>
<td>Appeal allowed, decision of Council reversed</td>
</tr>
</tbody>
</table>

29. Alessandrini & Ors v The Corp of the City of Campbelltown & Ors

<table>
<thead>
<tr>
<th>Case Number</th>
<th>[2018] SAERDC 4</th>
</tr>
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<tbody>
<tr>
<td>Date</td>
<td>24 January 2018</td>
</tr>
<tr>
<td><strong>Details of Court</strong></td>
<td>Environment Resources and Development Court</td>
</tr>
<tr>
<td></td>
<td>Full Court, ERD Court: Judge Cole, Commissioners Rumsby and Hamnett</td>
</tr>
<tr>
<td><strong>Zoning</strong></td>
<td>Hills Face Zone</td>
</tr>
<tr>
<td><strong>Details of Proposal</strong></td>
<td>26m lattice tower, six antennas and equipment shelter</td>
</tr>
<tr>
<td><strong>Issues raised/dealt with</strong></td>
<td>Third party appeal</td>
</tr>
<tr>
<td><strong>Summary</strong></td>
<td>NuSkope Internet proposed to construct a 26m lattice tower in a triangular configuration of 850mm long sides at the base, with 6 antennas, and equipment hut. Notwithstanding that the proposal was a non-complying form of development within the zone, the Council approved the development as appropriate when measured against the BDP model of development plan provisions. Importantly, it was recognized that providers of internet services are Carriers for the purposes of the Commonwealth <em>Telecommunications Act</em>, and further, that Wi-Fi infrastructure comprise ‘telecommunications facilities’ as defined.</td>
</tr>
</tbody>
</table>

\(^{24}\) Vodafone Hutchison Australia v City of Holdfast Bay [2015] SAERDC at para 24

\(^{25}\) Ibid at para 47
Third Parties appealed against the approval granted, amongst other matters of contention, asserting that the development was in the nature of a ‘Wi-Fi tower’, and not a ‘telecommunications facility’. Further, it was asserted (in effect) that as a form of non-complying development for the Hills Face zone, the proposal must not be approved as it would be significantly at variance with the provisions of the development plan zone provisions. Lack of consideration of alternative sites was also alleged, with the suggestion that ‘there must be other places to go’.

The Court had regard to range of case law leading up to consideration of the issues to be tested and questioned the proper and appropriate manner that telecommunication facilities must be considered, bearing in mind the requirements and objectives laid down in the Commonwealth Telecommunications Act 1997. The Full Court usefully summarized the evolution of the past approaches taken about the regard that must be had to assessment of a proposal, concluding:

62. ‘The community need or demand for improved internet services, as made clear under the Telco Act, can be assumed. This position is also expressed under the Development Plan, viz:

TELECOMMUNICATIONS FACILITIES

OBJECTIVES

1. Telecommunications facilities provided to deliver communication services to the community.

63. The issue here is whether the evident demand or need is appropriately met by the proposed telecommunications facility – particularly with its HFZ location where such a use is listed as non-complying.

Federal and State Law

64. The Development Plan in this matter, as do all Development Plans, includes policies appearing in the General Section applying Council-wide under the heading “Telecommunications Facilities”. When first introduced as a Ministerial amendment in August 2000, background material accompanied these provisions, confirming the “pre-eminence” of the Telco Act when assessing how conflicting Development Plan policies are to be read. It also drew directly from the language of the Telco Act where it cited the “community need” for telecommunications facilities. Under the Better Development Plan conversion undertaken in 2011,
the background material has been deleted and policies have been reworded somewhat.

65. However, the Court does not need to draw upon the pre-BDP editions of the Development Plan to reach a view as to the importance of the telecommunications facilities provisions or how these are to be read where in conflict with other Development Plan provisions.

66. This was made clear by the Supreme Court in 3GIS where it cited the High Court in Hutchison 3G Australia Pty Ltd v City of Mitcham as follows:

[50] ... the constitutional paramountcy of federal law is a contextual consideration that informs the resolution of the contested issues of interpretation argued in this appeal. Moreover, as will be shown, co-operation between the relevant federal and State instrumentalties is a policy mandated by both federal and State law.

67. Telecommunications services are essential infrastructure that is expected to be delivered equitably, affordably and to a good standard to the benefit of all communities. The Objects of the Telco Act include the following:

3 Objects
(1) The main object of this Act ... is to provide a regulatory framework that promotes:

... (c) the availability of accessible and affordable carriage services that enhance the welfare of Australians;

... (2) The other objects of this Act, ... are as follows:

... (d) to promote the development of an Australian telecommunications industry that is efficient, competitive and responsive to the needs of the Australian community;

... (g) to promote the equitable distribution of benefits from improvements in the efficiency and effectiveness of:

(i) the provision of telecommunications networks and facilities; and

(ii) the supply of carriage services;

68. It was common ground that the proposal was not an exempted facility from the provisions of the Development
Act, the tower not being a low impact facility. It stands therefore to be assessed against the relevant Development Plan provisions.

69. For reasons including those set out in 3GIS, as an essential service demanded throughout Australia, the HFZ is not embargoed to telecommunications facilities:

[49] It follows that the Environment Court was correct in holding that a planning authority was not required to assess the social utility of the 3G services provided by the respondent. The questions which it was required to address, and which the Court in due course did address, were whether this facility was needed to provide the service in the relevant area and whether it was located and designed to minimise the visual impact on the amenity of the locality. [emphasis added]

70. Hence, the Court is required to assess whether there are alternative, less visually exposed options on less sensitive sites available to meet the foreseen demand need. If there are no viable alternatives, the Court must consider whether the proposal is conducive to the HFZ Objectives and suitably manages its visual impacts'.

On the issue of assessment of proposals in the Hill Face Zone, Counsel for the Appellants said that the form of the proposal was in conflict with the zone criteria. As the bulk and form of telecommunications facilities are not in the nature of dwellings or other larger buildings, the Court did not agree, saying:

115. ‘Policy measures incorporated in the HFZ addressing the visual impact of buildings and structures are principally directed to the siting and design of dwellings and associated outbuildings. As such, they have limited relevance to the essential form of a telecommunications tower’.

116. Further, whilst buildings and structures are expected to be positioned so as to limit their visibility from the Adelaide Plains or from local roads in the district, it is essential that the tower antennas enjoy a direct line of sight to the roofs of its catchment households at Rostrevor and beyond. As the proposed tower is to be sited on the west-facing hills escarpment this of itself is at some odds with the pertinent policy measures. However, the tower is to be placed within a setting of large mature trees. Together with the proposed supplementary screening, the visible length of the tower above the established tree-line will be set against the visual backdrop of the hills escarpment beyond, except perhaps as viewed from nearby vantages at the edge of the residential foothills. In our view, other than from the nearest vantages, the uppermost portion of the tower will not “skyline” or be silhouetted against the sky so as to cause an evident physical protrusion. Given also the largely transparent form
of the tower it will not disrupt the natural undulating land form dominated by open woodland vegetation’.

On balance, the Court found that the proposed structure was in acceptable conformance with the Hills Face Zone provisions in the Development Plan and dismissed the third-party appeal.

| Outcome       | Appeal dismissed, decision of Council affirmed. |
Cases Appealed to the Supreme Court

1. Corp of the City of Marion v Network Design and Construct Ltd

<table>
<thead>
<tr>
<th>Case Number</th>
<th>[2000] SASC 185</th>
</tr>
</thead>
<tbody>
<tr>
<td>Date</td>
<td>30 June 2000</td>
</tr>
<tr>
<td>Details of Court</td>
<td>SA Supreme Court</td>
</tr>
<tr>
<td></td>
<td>Full Bench, 3 Judges. Main Judgement by Gray J.</td>
</tr>
<tr>
<td>Zoning</td>
<td>Hills Face Zone</td>
</tr>
<tr>
<td>Details of Proposal</td>
<td>30m lattice tower monopole plus antennas and equipment hut</td>
</tr>
<tr>
<td>Issues raised/dealt with</td>
<td>Appeal from the decision of Judge Trenorden in ERD case #4 above: (Network Design &amp; Construction v City of Marion ERD-00-23 [2000] SAERDC 31)</td>
</tr>
</tbody>
</table>

Summary

The Court was asked to determine the nature of the development (that is, whether the 30m lattice tower + antenna’s and equipment hut was a ‘Transmitting Station’ as that term is used in the Council’s Development Plan, specifically in the Hills Face Zone provisions, as if so, the development would be non-complying).

City of Marion argued that Trenorden J had erred in finding that the development was a ‘Telecommunications Station’ (a term not used in the Marion development plan), in favour of categorizing it as ‘Transmitting Station’ (a term used in the Hills Face Zone, and denoting that use as non-complying for the zone).

In her ERD Court decision (finding that the development was a Telecommunications Station, Judge Trenorden followed the decision by Judge Bowering in the earlier Optus Mobile Pty Ltd v City of Tea Tree Gully [1998] SAERDC 503 (ERD case #2 above) where Bowering J ‘referred to the term “Telecommunications Station” for a facility with essentially the same functions …..as being the term used in common parlance to describe such a facility. 27

Trenorden J’s finding followed her reason that ‘...it would be inappropriate to determine the nature of the proposed development by characterizing it by reference to the separate activities that make up the function of the whole….’28. Her Honour chose to use terminology not articulated in the development plan, in favour of a description of the development used in common parlance.

The Full bench of the Supreme Court (Gray J (who wrote the judgment), with Olsson and Wicks JJ) unanimously rejected the Trenorden decision, finding that the ‘facility the subject of the development

27 (Network Design & Construction v City of Marion [2000] SAERDC 31 at page 3
28 Ibid at page 4
application is a Transmitting Station and hence a non-complying development in the Marion Council area.\(^29\)

| Outcome | Appeal allowed, the facility is a ‘transmitting station’. |

### 2. Telstra Corp Ltd v Corp of the City of Mitcham

<table>
<thead>
<tr>
<th>Case Number</th>
<th>[2001] SASC 166</th>
</tr>
</thead>
<tbody>
<tr>
<td>Date</td>
<td>24 May 2001</td>
</tr>
<tr>
<td>Details of Court</td>
<td>SA Supreme Court Full Bench, 5 Judges. Main Judgement by Debelle J.</td>
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<tr>
<td>Zoning</td>
<td>N/A</td>
</tr>
<tr>
<td>Details of Proposal</td>
<td>N/A</td>
</tr>
<tr>
<td>Issues raised/dealt with</td>
<td>Appeal from the decision of Judge Bowering in ERD case #8 above: Telstra Corporation Limited v City of Mitcham ERD-00-884 [2000] SAERDC 77, 2 November 2000</td>
</tr>
</tbody>
</table>

**Summary**

The Appeal was to test the decision of the 3-member bench in the *Marion* case #1 above), hence 5 judges were required. This case also considered the correct classification of the nature of the development (the development here included roof mounted antennas on a former cinema complex on Goodwood Road, and base station within that building), as the City of Mitcham Development Plan used two expressions – ‘transmitting station’ and ‘telecommunications station’, neither of which terms being defined in the Development Plan or *Development Regulations 1993*. Lists of non-complying developments included ‘transmitting station’, but not telecommunications station within the State Heritage Area (Colonel Light Gardens. Bowering J, bound by the superior Court finding of Gray J in *Corp of the City of Marion v Network Design and Construct Ltd* (case #1 above), had determined that the use was properly categorised as a ‘Transmitting Station’. Bowering J said, the ‘purpose, function and use’ of the proposed development was the same as that development proposed in *Corp of the City of Marion v Network Design and Construct* (Supreme Court case #1 above).

The question for the Full Bench (5 members) of the Supreme Court to decide, was whether this was a correct categorization given the specific terminology used in the Mitcham Development Plan, which was different in terminology to the terms opted for the Marion development plan.

The Mitcham development plan used 2 expressions, ‘Telecommunications Station’ and ‘Transmitting Station’. Neither was defined in the Development Plan, nor the Development Regulations. Historically, the plan included only the term ‘Transmitting Station’, with the term ‘Telecommunications Station’ appearing sometime after 1994.

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\(^{29}\) *Corp of the City of Marion v Network design and Construct Ltd* [2000] SASC 185 at page 5
In discussing the nature of the use of the proposal, Debelle J said:

‘16 The proposed Telstra mobile phone base station performs the function, among others, of transmitting signals. It is one of its critical functions. The fact that the station also receives signals does not necessarily mean that it does not qualify as a transmitting station. The station might, therefore, be considered to be a transmitting station. The base station might also be described, perhaps a little more accurately, as a telecommunications station. However, that does not mean that it cannot also be described as a transmitting station. As this application is for a facility which has the function of, among others, transmitting, it relates to a development described in the Development Plan as a transmitting station. By virtue of Principle 50 it is, therefore a non-complying development. The fact that it might also be described as a telecommunications station does not mean that it is not a transmitting station. This is not a case where the nature of the proposed development constitutes one kind of development exclusive of another. Instead, it is a case where the Development Plan describes two kinds of development and the proposed development matches both descriptions.’

The Court went on to compare and analyse the zones within which one or other of the terms appeared and concluded that there was no consistency in the use of one or other expression. This observation led Debelle J to say:

‘For these reasons, it cannot be concluded that the expression “telecommunications station” is the only expression capable of applying to a base station of this kind. Thus, although the Council’s Plan refers to both a transmitting station and a telecommunications station, there is nothing in the Plan which suggests the expressions necessarily bear different meanings.’

Debelle J repeated the long-held position that Development Plans are not to be constructed like a statute but said that it would ‘plainly be desirable in the interest of certainty for terms to be used in a consistent manner in the Development Plan’\textsuperscript{30}.

His Honour went on to say that in order to determine the intended meaning ‘it may be necessary to have regard to either or both the overall purpose and objectives of the relevant zone and of the Plan. Debelle J concluded that the Council was correct in deciding that the proposal was a ‘Transmitting Station’, and therefore non-complying in the State Heritage Area (Colonel Light Gardens) Zone.

\textbf{Outcome} \\
Appeal dismissed

\textsuperscript{30} Telstra Corp Ltd v Corp of the City of Mitcham [2001] SASC 166 at para 26
3. Telstra Corp Ltd v Corp of the City of Marion

<table>
<thead>
<tr>
<th>Case Number</th>
<th>[2001] SASC 350</th>
</tr>
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<tbody>
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<td>Date</td>
<td>17 October 2001</td>
</tr>
<tr>
<td>Details of Court</td>
<td>SA Supreme Court</td>
</tr>
<tr>
<td></td>
<td>Debelle J</td>
</tr>
<tr>
<td>Zoning</td>
<td>N/A</td>
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<tr>
<td>Details of Proposal</td>
<td>N/A</td>
</tr>
<tr>
<td>Issues raised/dealt with</td>
<td>Enforcement Notice</td>
</tr>
</tbody>
</table>

**Summary**

This Appeal related to an Enforcement Notice, in circumstances where an additional development application was being considered. Telstra asked the Court to permanently stay the proceedings, fearing for future need in respect of the alternative proposal pathway. The Council asked that that Appeal be dismissed and sought costs.

The Appeal was dismissed for want of prosecution. Debelle J noted that the decision not to proceed with the Appeal was ‘understandable’ in the circumstances.

**Outcome**

Appeal dismissed (ex tempore)

4. City of Mitcham v Hutchison 3G Australia Pty Ltd & Ors

<table>
<thead>
<tr>
<th>Case Number</th>
<th>[2004] SASC 18</th>
</tr>
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<td>Date</td>
<td>15 January 2004</td>
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<td>SA Supreme Court</td>
</tr>
<tr>
<td></td>
<td>Debelle J</td>
</tr>
<tr>
<td>Zoning</td>
<td>N/A</td>
</tr>
<tr>
<td>Details of Proposal</td>
<td>N/A</td>
</tr>
<tr>
<td>Issues raised/dealt with</td>
<td>Use of Stobie poles for the siting of telecommunication facilities</td>
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</table>

**Summary**

After several hearing days, counsel for the respondent requested that Debelle J disqualify himself by reason of the appearance of bias. Past cases relating to ‘perception of bias’ were sited by Debelle J, who had divulged (to the parties) the fact that he owned a property on which a Stobie pole was erected. His Honour indicated that in the event that a Carrier served notice to add a telecommunications facility to the Stobie pole, he may wish to object.

Debelle J did disqualify himself from proceeding with the hearing.

The Parties requested that a case be stated to the Full Court.

**Outcome**

The case was referred to the Full bench of the Supreme Court – see Case #5
5. City of Mitcham v Hutchison 3G Australia Pty Ltd & Ors

<table>
<thead>
<tr>
<th>Case Number</th>
<th>[2005] SASC 78</th>
</tr>
</thead>
<tbody>
<tr>
<td>Date</td>
<td>11 March 2005</td>
</tr>
<tr>
<td>Details of Court</td>
<td>SA Supreme Court</td>
</tr>
<tr>
<td></td>
<td>Full Bench: Perry, Bleby and Gray JJ.</td>
</tr>
<tr>
<td>Zoning</td>
<td>N/A</td>
</tr>
<tr>
<td>Details of Proposal</td>
<td>N/A</td>
</tr>
<tr>
<td>Issues raised/dealt with</td>
<td>Use of Stobie poles for the siting of telecommunication facilities</td>
</tr>
<tr>
<td>Summary</td>
<td>This Appeal arose as a Special Case stated by Debelle J following Supreme Court case #4 above, in which he disqualified himself.</td>
</tr>
</tbody>
</table>

In light of an arguable s109 of the Commonwealth Constitution issue as to whether s49A Development Act 1993 was invalid to the extent of any inconsistency with the relevant provisions of the Telecommunications Act 1997 (and the Ministerial Low Impact Facilities determination made pursuant to that Act), the Court directed that notice of a constitutional matter be given to pursuant to sec 78B Judiciary Act (Cth). In response, the South Australian Solicitor-General intervened, but no other State participated in proceedings. In the main, the Solicitor-General supported the case for the Council.

Putting aside details of the relevant legislation underpinning the issues in this matter, suffice it to say that the Appellant had served notice on ETSA, with the intention of adding antenna’s to Stobie poles. It purported to do pursuant to the Low Impact Facilities determination. However, it occurred that it had to ‘swap out’ some of the Stobie poles with better engineered larger Stobie poles, add equipment shelters and other equipment etc. Subsequently, a number of questions were put in the case stated as follows:

1. In the events which have happened except at Clarence Gardens,

1.1 are the stobie poles erected by ETSA when fitted with the facilities placed upon each by Hutchison, a tower within the meaning of clause 6 of Schedule 3 of the Telecommunications Act 1997 (Cth)?

1.2 has Hutchison erected low-impact facilities within the meaning of the Telecommunications (Low-Impact Facilities) Determination 1997 having regard to the facts that:

(a) the new or replaced stobie pole together with the facilities installed by Hutchison constitute more than a 25% increase in the apparent volume of the original stobie pole; or
2. In the events which have happened at the Clarence Gardens site, is the downlink facility established by Hutchison a low-impact facility within the meaning of the Telecommunications (Low-Impact Facilities) Determination 1997 having regard to the facts that:

(a) the air conditioning units in the equipment shelter for the facility emit noise; or

(b) the distance from the top of the stobie pole to the top of the panel antennae exceed 3 metres?

3. Is the Council entitled to a declaration in respect of each site that the replacement of the stobie poles (save for Clarence Gardens) together with the installation of the telecommunications facilities thereon is development which requires development approval pursuant to the Development Act 1993?

With the exception of the Stobie pole that had already been replaced by ETSA (Clarence Gardens), the Court found (Bleby J dissenting), that the remaining Stobie poles were ‘towers’ within the meaning of Schedule 3, Telecommunications Act 1997 (Cth); that they did not constitute low-impact facilities within the meaning of the Low Impact Determination, and that the combination of the Stobie poles and equipment constituted development for which approval was required under the Development Act 1993.

The Case stated was answered accordingly.

Leave to Appeal to the High Court was sought and granted and Hutchison subsequently succeeded in having this Full Court decision set aside. See High Court case # 2 below.

| Outcome | Appeal upheld |

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31 City of Mitcham v Hutchison 3G Australia Pty Ltd & Ors [2005] SASC 78 at pages 10-11
6. Hutchison 3G Australia Pty Ltd v City of Mitcham & Ors

<table>
<thead>
<tr>
<th>Case Number</th>
<th>[2005] SASC 249</th>
</tr>
</thead>
<tbody>
<tr>
<td>Date</td>
<td>5 July 2005</td>
</tr>
<tr>
<td>Details of Court</td>
<td>SA Supreme Court Full Bench: Besanko, Anderson and Layton JJ</td>
</tr>
<tr>
<td>Zoning</td>
<td>N/A</td>
</tr>
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<td>Details of Proposal</td>
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</tr>
<tr>
<td>Issues raised/dealt with</td>
<td>Appeal from the decision of the ERD Court in Hutchison 3g Australia P/L v City of Mitcham &amp; Anor [2004] SAERDC 94 - case #12 above.</td>
</tr>
</tbody>
</table>

**Summary**

Hutchison 3G Australia submitted that the ERD Court had erred in approach it took to:

- the consideration about the availability of alternative sites, and
- the geographical area that would be impacted in terms of visual amenity – The appellant submitted that the area to be serviced by the proposed development was a much larger geographical area than the locality found by the ERD Court.

Issues about minimising visual impact were of great importance in the consideration of this, and the previous case, as was the evidence given in the ERD Court that a variety of alternative sites ‘may be available’, but such sites had not been explored, tested for availability or feasibility.

In response to the issues submitted as erroneously dealt with by the ERD Court, it is worth noting the way that the Full Court reached its conclusion that the Appeal should be dismissed – which is set out as follows:

41. ‘....... the appellant submitted that the ERD Court erred in the approach it took to the availability of alternative sites. The appellant submitted that alternative sites were not relevant, or alternatively, only an obvious alternative site was relevant. The ERD Court did not identify an obvious alternative site. The appellant submitted that either there were no obvious alternative sites and therefore the ERD Court erred in taking into account what it referred to as “many options” or, if there were, the reasons of the ERD Court are inadequate in that they do not address in detail the obvious alternative sites. It was in relation to this alternative submission that the appellant said that the ERD Court erred in law in failing to give adequate reasons.

42. In City of Burnside & Ors v City Apartments Pty Ltd (supra) this Court considered an appeal from the ERD Court. That Court had granted provisional development consent for the construction of a detached dwelling, with associated earthworks and road works, retaining walls and landscaping in the Hills Face Zone. The relevant provisions of the Development Plan provided that the development should
minimise the threat and impact of bushfire and should minimise the excavation and filling of the land. The City of Burnside and two objectors appealed to this Court. They argued that because of the repeated references in the relevant provisions of the Development Plan to the need to minimise bushfire risk and the excavation and filling of the land, the ERD Court must consider alternative locations on the land and had to be able to find that there was no alternative site on the land for the proposed development that would reduce the bushfire risk and the amount of excavation and visual intrusion compared with the proposed site. The ERD Court considered other possible sites in a general way, but did not embark on a detailed examination of the alternatives. Doyle CJ (with whom Nyland and Gray JJ agreed) doubted whether it was possible to state a principle of universal application dealing with the extent to which the ERD Court should consider other possible sites on the land which would or might accommodate the proposed development, and would better conform with the relevant provisions of the Development Plan [29]. The Chief Justice said [at [31] and [33]]:

In a particular case there might be an obvious alternative site for proposed development which would clearly better meet the objectives and principles of the Plan. If that were so, that circumstance might affect the ERD Court’s assessment of the proposal before it. It would be a matter for the ERD Court to consider in a practical and commonsense fashion. However, it would remain the ERD Court’s task to assess the proposed development against the Plan, but bearing in mind, if it were the case, the existence of an alternative site that would accommodate the proposed development and that would better conform to the provisions of the Plan.

... I agree with Mr Roder’s submission that it would not be possible for a relevant authority to assess a proposed development against the Plan if it had to consider a variety of different locations, and also changes to a proposed development to accommodate those different locations, with a view to deciding whether the hypothetical proposal would better conform to the provisions of the Plan than the proposed development.

43. The Chief Justice then considered whether the reference in the Development Plan to “minimising” certain matters called for a different approach and he made the observations in the passage cited by the ERD Court and referred to in [22] above.

44. The Chief Justice said that the ERD Court was not required to exclude the possibility of an alternative site for the proposed development that would better conform to the provisions of the Plan.

45. With respect, I do not disagree with what the Chief Justice said in City of Burnside & Ors v City Apartments Pty Ltd (supra). However, as his Honour noted, it is doubtful
whether it is possible to state a principle of universal application, and I think that by reason of the relevant provisions of the Development Plan a different approach is called for in this case. It seems to me that the assumption behind those provisions is that telecommunications facilities involving a tower are likely to be unsightly and low-impact facilities are likely to be less intrusive. However, the effect on visual amenity is not the only matter relevant to the planning assessment. The Plan recognises that in certain circumstances there will be a need for a telecommunications facility. The need might be for a facility in the general area or it might be for a particular facility in a particular location. The question of need is relevant to the planning assessment and is to be weighed against the effect on visual amenity. I think it is inherent in the question of need (which was an important part of the appellant’s case) that other options or alternatives be considered. Provisions in the Development Plan which refer to where the facility is “located” (Objective 29) or “sited” (Principle 188(f)), which encourage low-impact facilities and which recognise that, on occasions, new facilities in more sensitive areas will be “unavoidable” reinforce the conclusion that an examination of the need and the available alternatives and options was not only permitted but in fact was required.

46. It follows that this case called for a different approach from that taken in City of Burnside and Ors v City Apartments Pty Ltd (supra).

47. In this case it was quite proper for the ERD Court to conclude that there was a need for a facility in this area. Equally, it was quite proper for the Court to consider if there were alternative locations or sites and to consider if the need could be met by low-impact facilities. There was no error in the approach adopted by the ERD Court.

48. The ERD Court found that the appellant had many options, some of which would not require the erection of a tower, but would instead involve the establishment of several low-impact facilities under the Determination. I have read the relevant evidence and I have no doubt that it supports the conclusion that the need identified by the appellant could be met by the establishment of several low-impact facilities. The finding of the ERD Court that there were other alternatives or options involving the erection of a tower is more finely balanced in terms of whether it is supported by the evidence, but this is not an appeal on a question of fact. In any event, I would only interfere with this finding of fact if clearly persuaded that it was wrong and I am not so persuaded. It was not an error of law for the ERD Court not to identify in its reasons the options or alternatives having regard to my view as to the proper approach to the question of need and alternative locations or sites as outlined above.

49. The Court weighed up its finding as to the effect of the tower on visual amenity, its finding as to the community
need for the facility and its finding as to the other options available to the appellant and considered those matters in light of the relevant provisions of the Development Plan. It decided that provisional development plan consent should be refused. That is quintessentially a planning judgment and there is no warrant for this Court to interfere with that judgment.

50. For these reasons, the appeal should be dismissed.

Outcome
Appeal dismissed

7. Development Assessment Commission v 3GIS Pty Ltd & Anor

Case Number [2007] SASC 216
Date 18 June 2007

Details of Court
SA Supreme Court
Full Bench: Chief Justice Doyle, Bleby and Sulan JJ.

Zoning N/A

Details of Proposal N/A

Issues raised/dealt with Appeal by the DAC against the approval for development allowed by the ERD Court in case #18 above.

Summary
In the ERD Court, the DAC had asked that the Court find that there was a demand need for the services to be provided, as opposed to a need for a facility to provide those services in the area of need. The ERD Court did not agree, and found (at para 27 of the determination) that:

'It is not ... the task of a planning authority in a planning assessment to assess the social utility of providing the latest generation of telecommunications services. The question to be addressed in a planning assessment is whether the particular facility proposed is needed to provide the service and, if so, whether it has been located and designed to minimise visual impact. The preference in the Development Plan for low impact facilities and for co-located facilities will enter into this assessment.'

In recognising the pre-eminence of the Commonwealth Telecommunications Act, the Supreme Court disagreed with the submission put by the DAC and went on to conclude (at para 44):

44. 'The Development Plan in respect of telecommunications facilities recognises that coercive powers will be exercised to fulfil that recognised need, and that in many cases, those powers will be exercised to the exclusion of the operation of State planning legislation. Consistent with the background which informs those provisions of the Plan, the Plan expressly recognises in the Objectives that telecommunications facilities are "an essential infrastructure required to meet the rapidly increasing community demand for communications technologies". The demand is assumed. In order to meet that assumed demand the plan recognises the need for new facilities to be constructed. It specifically
recognises that new development of facilities "will be unavoidable" in more sensitive areas "in order to achieve coverage for users of communications technologies".

The Court, in para 51 went on to find that it is ‘evident from the Development Plan itself that it seeks to co-operate and to work in harmony with the Federal law, and that on the proper construction of the development plan there is not inconsistency by intrusion of the State law into the field covered by the Telco Act. The Court held, to the extent that the DAC argued that the Development Act and Development Plan ‘required proof of demand need for 3G services’, such argument was inconsistent with the Commonwealth Telecommunications Act and to the extent of any inconsistency, the offending provision/s was invalid.

The other important finding of the Supreme Court in this case related to the weight that should be given to the Development Plan requirement facing Carriers, to minimise the visual impact a telecommunications facility will have on the local environment. The Court found that ‘It is not a matter of balancing the facility need with the environmental effects and then deciding whether the facility should be installed’. In other words, it is not a balancing exercise:

71. ‘The provisions of the Development Plan relating to telecommunications facilities are not cast in the form of weighing that need against any other objectives or principles of the Plan, such as Objective 82. It recognises and assumes that telecommunications facilities will have a detrimental effect on visual amenity. Objective 88 makes this clear when it speaks of locating and designing facilities "to minimise" visual impact on the amenity of the local environment. For that reason the Plan encourages the development of low-impact facilities where possible "to minimise" visual impact on local environments. It encourages construction of such facilities in industrial and commercial and appropriate non-residential zones, and it requires facility design and location to ensure that visual impacts on the amenity of local environments are "minimised". Those objectives are developed further in Principles 294-298.’

72. To the extent that a planning authority must ensure that the installation of a proposed facility will minimise the effect on the environment, the planning authority will need to consider, where alternative sites or low-impact facilities are suggested, whether that minimisation can be better achieved by installation of a facility at some other preferred site. But it will also need to consider whether that possible preferred site will meet the facility demand. If it will not, it may be discarded. There may be other reasons why a particular alternative site is inappropriate or impracticable.’

The Supreme Court found that the ERD Court had made no error of law or fact and went on to dismiss the Appeal.

**Outcome**  
Appeal dismissed
Cases Appealed to the High Court

1. Bayside City Council v Telstra Corp Ltd

<table>
<thead>
<tr>
<th>Case Number</th>
<th>[2004] HCA 19</th>
</tr>
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<tr>
<td>Date</td>
<td>28 April 2004</td>
</tr>
<tr>
<td>Details of Court</td>
<td>High Court of Australia McHugh, Gummow, Kirby, Hayne, Callinan &amp; Heydon JJ</td>
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<tr>
<td>Issues raised/dealt with</td>
<td>Levying of fees on carriers</td>
</tr>
</tbody>
</table>
| Summary | This case involved a number of Appeals by Local Authorities against the decision of the Federal Court in respect of the levying of fees on Carriers for co-axial cables and underground cables on Local Authority owned land and infrastructure. The Federal Court declared invalid ‘certain legislation of those States to the extent to which the legislation authorised local authorities to impose charges in respect of the possession, occupation and enjoyment of telecommunications cables on, under, or over a public place, or to levy rates in respect of land or space occupied by such cables’.

The Full Court of the Federal Court had upheld an argument of Telstra and Optus that the State legislation under which the rates and charges were levied and imposed was, to the extent to which such legislation authorised the rates and charges, inconsistent with a provision of the Telco Act, and invalid pursuant to s 109 of the Constitution[3].

By an overwhelming majority, the High Court ended up finding for the Carriers. In doing so, the Court laid out its reasoning, reciting specific provisions in the Commonwealth Telecommunications Act that clearly describe the intention of the Commonwealth Parliament that State Laws must not be inconsistent with the provisions of the Telecommunications Act, and to the extent of any inconsistency, the offending State law provisions are invalid.

The Court referred to Section 484 of the Telecommunications Act dealing with Carriers powers and immunities. The section states simply that Schedule 3 (some 57 pages) applies. Schedule 3, in a nutshell, allows a Carrier to enter on land and install and maintain a facility on the land. "Installation" is defined to include activities ancillary or incidental to installation (Sched 3 cl 2), ‘and would embrace occupation of land by facilities. The power of installation is limited to certain kinds of facility, and its exercise requires a permit. The circumstances in which permits will be issued are defined. A carrier exercising these powers must comply with certain conditions. One condition is that a carrier must take all reasonable steps to ensure that it causes as little detriment and inconvenience as is practicable. Only a carrier may install (Sched 3 cl 6) or enter land to maintain (Sched 3 cl 7) a facility. Division 7 of Pt 1 of the Schedule is headed "Exemptions from State
and Territory laws”. It provides (cl 36) that activities of carriers are not generally exempt from State and Territory laws, but cl 37 goes on to provide that activities authorised by Div 2, 3 or 4 may be carried on despite certain laws of a State or Territory, including environmental, heritage, and other specified kinds of law’.

Owing to the importance of the provisions, and the understanding of the clear intention that belies the Commonwealth’s wording in Schedule, set out in full is Div 8 of Pt 1 of the Schedule, and in particular clause 44, which was central to the Appeal. Clause 44 is concerned with State or Territory laws which impose discriminatory burdens upon carriers in carrying on activities as carriers authorised by the Telco Act.

It is in the following terms:

"44. (1) The following provisions have effect:
(a) a law of a State or Territory has no effect to the extent to which the law discriminates, or would have the effect (whether direct or indirect) of discriminating, against a particular carrier, against a particular class of carriers, or against carriers generally;

(b) without limiting paragraph (a), a person is not entitled to a right, privilege, immunity or benefit, and must not exercise a power, under a law of a State or Territory to the extent to which the law discriminates, or would have the effect (whether direct or indirect) of discriminating, against a particular carrier, against a particular class of carriers, or against carriers generally;

(c) without limiting paragraph (a), a person is not required to comply with a law of a State or Territory to the extent to which the law discriminates, or would have the effect (whether direct or indirect) of discriminating, against a particular carrier, against a particular class of carriers, or against carriers generally.

(2) The following provisions have effect:

(a) a law of a State or Territory has no effect to the extent to which the law discriminates, or would have the effect (whether direct or indirect) of discriminating, against a particular eligible user, against a particular class of eligible users, or against eligible users generally;

(b) without limiting paragraph (a), a person is not entitled to a right, privilege, immunity or benefit, and must not exercise a power, under a law of a State or Territory to the extent to which the law discriminates, or would have the effect (whether direct or indirect) of
discriminating, against a particular eligible user, against a particular class of eligible users, or against eligible users generally;

(c) without limiting paragraph (a), a person is not required to comply with a law of a State or Territory to the extent to which the law discriminates, or would have the effect (whether direct or indirect) of discriminating, against a particular eligible user, against a particular class of eligible users, or against eligible users generally.

(3) For the purposes of this clause, if a carriage service is, or is proposed to be, supplied to a person by means of a controlled network, or a controlled facility, of a carrier, the person is an eligible user.

(4) The Minister may, by written instrument, exempt a specified law of a State or Territory from subclause (1).

(5) The Minister may, by written instrument, exempt a specified law of a State or Territory from subclause (2).

(6) An exemption under subclause (4) or (5) may be unconditional or subject to such conditions (if any) as are specified in the exemption.

(7) An instrument under subclause (4) or (5) is a disallowable instrument for the purposes of section 46A of the Acts Interpretation Act 1901.

In conclusion (with Callahan J dissenting), the Court found in favour of the respondent Carriers. In doing so it said:

‘It is not necessary to resolve the question, raised by a submission of Telstra and Optus, whether it would be sufficient to constitute discrimination that there was even one substantial utility that received the benefit of exemptions denied to Telstra and Optus. Here there is a clear general pattern of exemptions, and it is sufficient to say that the existence of one other significant exception to that pattern (gas pipelines in New South Wales) does not negate discrimination. In addition, in the case of aerial cabling, there is an obvious basis of comparison, namely electricity facilities, which enjoy an exemption.’

**Outcome**

Appeal dismissed

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### 2. Hutchison 3G Australia Pty Ltd v City of Mitcham

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<tr>
<th>Case Number</th>
<th>[2006] HCA 12</th>
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<tr>
<td>Date</td>
<td>6 April 2006</td>
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<tr>
<td>Details of Court</td>
<td>High Court of Australia</td>
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Appeal from a Special Case Stated by the Debelle J of the Supreme Court of South Australia (following initial proceedings after s84 Enforcement Notices were served by City of Mitcham in April 2003, and proceedings in the ERD Court were stayed pending the Supreme Court hearing).

This case considered the Appellants placement of telecommunications facilities on electricity ("Stobie") poles. It is convenient to recite the Courts findings, as it succinctly summarises the specific questions raised by Justice Debelle in the case stated to the High Court:

1. ‘Appeal allowed.

2. Set aside so much of the order of the Full Court of the Supreme Court of South Australia made on 11 March 2005 as answered the questions set out in the Case Stated filed on 27 January 2004 and, in its place, order that the questions be answered as follows:

(1.1) Q. In the events which have happened except at Clarence Gardens, are the stobie poles erected by ETSA when fitted with the facilities placed upon each by Hutchison, a tower within the meaning of cl 6 of Sched 3 of the Telecommunications Act 1997 (Cth)?

A. No, because the stobie poles are not and do not become facilities for the purposes of the Telecommunications Act 1997 (Cth) notwithstanding the installation on them of Hutchison’s facilities. Therefore, the stobie poles are not and do not become towers within the meaning of cl 6 of Sched 3 of that Act.

(1.2) Q. In the events which have happened except at Clarence Gardens, has Hutchison erected low-impact facilities within the meaning of the Telecommunications (Low-impact Facilities) Determination 1997 (Cth) having regard to the facts that:

(a) the new or replaced stobie pole together with the facilities installed by Hutchison constitute more than a 25% increase in the apparent volume of the original stobie pole; or

(b) the air conditioning units in the equipment shelters for the facility emit noise; or

(c) the distance from the top of the stobie pole to the top of the panel antennae exceeds 3 metres?
A. Yes, and on the basis that the fact referred to in question 1.2(a) is not relevant to the identification of low-impact facilities in the Telecommunications (Low-impact Facilities) Determination 1997 (Cth).

(1.3) Q. In the events which have happened except at Clarence Gardens, is either or both Hutchison and ETSA required to obtain development approval from the relevant authority pursuant to the Development Act 1993 (SA) for the erection of the stobie poles replaced by ETSA and if so by which party?

A. No.

(2) Q. In the events which have happened at the Clarence Gardens site, is the downlink facility established by Hutchison a low-impact facility within the meaning of the Telecommunications (Low-impact Facilities) Determination 1997 (Cth) having regard to the facts that:

(a) the air conditioning units in the equipment shelter for the facility emit noise; or

(b) the distance from the top of the stobie pole to the top of the panel antennae exceeds 3 metres?

A. Yes.

(3) Q. Is the Council entitled to a declaration in respect of each site that the replacement of the stobie poles (save for Clarence Gardens) together with the installation of the telecommunications facilities thereon is development which requires development approval pursuant to the Development Act 1993 (SA)?

A. No.

3. Set aside order 1 of the Full Court of the Supreme Court of South Australia made on 11 March 2005 and, in its place, order that the City of Mitcham pay the costs of Hutchison, CKI Utilities Development Ltd, HEI Utilities Development Ltd, CKI Utilities Holdings Ltd, HEI Utilities Holdings Ltd and CKI/HEI Utilities Distribution Ltd of and incidental to the Case Stated.

4. The City of Mitcham and the Attorney-General for the State of South Australia pay Hutchison’s costs of the appeal to this Court.
In its conclusions, the Court specifically said that it was not minded to deal with the issue of inconsistency of laws. The conclusion reads as follows, and leaves the door open for further discussion:

‘We have been content to approach the issues in the present appeal on the basis chosen by both parties. However, in another case, the more fundamental question of constitutional inconsistency may need to be reconsidered, to decide whether it affords a more direct route to the conclusions now reached in this appeal. Assuming, as the parties did, that the federal law and the State Development Act can operate together without direct constitutional collision or incompatibility, the answers to the questions in the Case Stated are those now offered. Those answers happen to be consistent with a conclusion that upholds the primacy of the federal law and avoids any conflict with its provisions caused by the operation of the South Australian Development Act. It is therefore unnecessary to consider the deeper constitutional questions that might otherwise have arisen. They can be put aside to another day. This Court normally approaches such questions only when other solutions, based on the elucidation of statutory language, do not yield answers as they do, adequately, in this case.

| Outcome | Appeal upheld |

3. Telstra Corporation Limited v The Commonwealth

| Case Number | [2008] HCA 7 |
| Date | 6 March 2008 |
| Details of Court | High Court of Australia, Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ |
| Issues raised/dealt with | Enforcement Notice |

**Summary**

In this case Telstra asserted that, contrary to provisions in the Commonwealth Constitution that allow for the making of legislation, the telecommunications access regime provided for in provisions of the Trade Practices Act (Cth) effected an acquisition of Telstra’s property in some of its local loops, other than on just terms.

The questions reserved to the High Court related mainly to whether the Trade Practices Act provisions, in their application to two forms of use of local loops, were beyond the legislative competence of the Parliament.

The Court concluded that the provisions were not beyond power and ordered Telstra to pay the costs of the cases stated.
| Outcome       | Appeal dismissed |
INFRASTRUCTURE POLICY MODULE

OBJECTIVES

1. Infrastructure provided in an economical and environmentally sensitive manner.
2. Infrastructure, including social infrastructure, provided in advance of need.
3. Suitable land for infrastructure identified and set aside in advance of need.
4. The visual impact of infrastructure facilities minimized.
5. The efficient and cost-effective use of existing infrastructure.

PRINCIPLES OF DEVELOPMENT CONTROL

1. Development should not occur without the provision of essential infrastructure, including:
   (a) electricity supply
   (b) water supply
   (c) drainage and stormwater systems
   (d) waste disposal
   (e) effluent disposal systems
   (f) formed all-weather public roads
   (g) telecommunications services (including mobile telecommunications services)
   (h) social infrastructure, community services and facilities
   (i) gas services.

2. Development should only occur only where it provides, or has access to, relevant easements for the supply of infrastructure.

3. Development should incorporate provision for the supply of infrastructure services to be located within common service trenches where practicable.

4. Development should not take place until adequate and coordinated drainage of the land is assured.
Development in urban areas should not occur without provision of an adequate reticulated domestic quality mains water supply and an appropriate waste treatment system.

In areas where no reticulated water supply is available, buildings whose usage is reliant on a water supply should be equipped with an adequate and reliable on-site water storage system.

Urban development should not be dependent on an indirect water supply.

The visual impact of infrastructure facilities should be minimised, including through the use of appropriate materials, finishes and design and incorporating landscaping for screening.

In urban areas, electricity supply serving new development should be installed underground.

Essential infrastructure, including access roads and tracks, should be sited on areas already cleared of native vegetation. If this is not possible, their siting should cause minimal interference or disturbance to existing native vegetation and biodiversity.

Buildings and structures associated with essential infrastructure should be grouped with non-residential development where possible.

Telecommunications facilities should:

(a) be located to meet the communication needs of the community

(b) be located primarily in non-residential zones

(c) where technically feasible, be positioned or collocated with other infrastructure.

Infrastructure located in residential zones should be sited and designed to minimise visual impact by:

(a) using existing buildings and vegetation for screening

(b) where possible, incorporating the facility within existing structures that may serve another purpose and retaining that structure’s character.

Electricity infrastructure, telecommunications facilities and other similar infrastructure should be sited and designed to minimise impacts on the amenity, character and settings of heritage items, areas and places.
ANNEXURE C

LIST OF SUGGESTED EXEMPT/COMPLYING DEVELOPMENT
**Exempt Facilities**

- A temporary facility, not exceeding 25 metres in height and not existing on the land for more than 4 months in any 12 month period.
- Replacement of a tower or facility associated with a tower to enable collocation
- Extension of a tower or facility to enable collocation
- A telecommunication facility located within a road or rail reserve, not exceeding 25 metres in height

**Complying Facilities**

- New small cell structures up to 10 metres in height in any zone
- New monopoles up to 15 metres in height where located in a centre, commercial or like zone and more than 15 metres from a residential zone
- New monopoles up to 25 metres in height where located in a centre, commercial or like zone and more than 25 metres from a residential zone
- New monopoles up to 40 metres in height where located in an industrial or rural zone and more than 50 metres from a residential zone
- New monopoles and towers up to 50 metres in height where located in a rural zone and more than 100 metres from a residential zone