11.1 Telecommunications Facility - Basalt Court

enquiries refer
John Truman
in reply please quote
Optus Facility Basalt Court Lennox Head

8 June 2011

The Telecommunications Industry Ombudsman
debra.lusty@tio.com.au

Dear Ms Lusty

Re: Complaint Number 11155658 – Proposed Telecommunications Facility Basalt Court Lennox Head

In reference to your recent discussions with Mr John Truman, I wish to confirm that Ballina Shire Council has formally resolved to lodge an objection with your office in respect to the proposal by Optus to install a communications facility at Basalt Court, Lennox Head.

In preparing this submission Council has noted your advice in regard to the extent of reasons that an objector can rely upon within the Telecommunications Code of Practice. However, Council is hopeful that your office will give due consideration to the concerns we have outlined as they remain of high importance to Council and the community.

To assist with your review Council has also attached the following documents.

Optus Notice 10 March 2011
Optus Submission to Council

Set out below is summary of the concerns expressed by the community and in particular by residents who live in close proximity to the proposed site. The concerns are listed in accordance with the information submitted by the residents.

1. Low Impact Determination

As the carrier is the organisation responsible for determining compliance with the Low Impact Determination there are concerns that this has not been a unbiased and independent evaluation. Therefore Council requests your review of the assessment and its compliance with the Australian Communications Forum Industry Code.

2. Consultation

Residents have expressed concerns regarding the consultation process undertaken by Optus. They are concerned that there was inadequate notice with only two households receiving the information and only four households were personally door knocked.

3. Consultation Report

We understand that the consultation report has not been provided to residents. This again increases the community's concerns regarding the proposal.

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4. Inaccuracies in Optus documentation provided to residents

It is understood that Optus have confirmed that certain information provided in the preliminary consultation phase was either incomplete, lacking in certain details or was altered after consultation documents were provided.

5. Threat to the environment, public, private nuisance and property values

Residents remain unconvinced that there will not be a threat to the environment through this infrastructure and similarly the proposal will have a negative impact on property values.

6. Children's Park

The infrastructure is to be placed immediately opposite a children's park. As I'm sure you can appreciate the potential for impact on children is of extreme concern to the residents.

7. Failure to avoid community sensitive locations.

Council and the community are aware of other locations that Optus has considered. Some of these options do not impact on neighbouring residents and even though Optus has to date, ruled these locations out, Council would prefer to see the alternate sites re-considered, even if this results in the need for different technology to service the area.

8. Precautionary Approach

One of the residential properties at this location is within six metres of the proposed installation. Whilst the regulatory standards and controls in respect of electromagnetic emissions are understood, the Council and the community are of the view that a precautionary approach should apply in case future science determines that this exposure is a risk to human health. This is particularly of interest due to the recent World Health Organisation's report on prolonged mobile phone use.

9. Amenity

The residents remain concerned with the loss of amenity arising from the proposal. The loss of amenity comes from additional infrastructure placed within the view of their property, and the noise and disruption that comes from the operation and maintenance of the equipment. To assist with your understanding of the amenity issues, we have attached a series of photographs provided by the residents who live adjacent to the proposed site.

10. Transparency

Overall the residents remain concerned that there has been a lack of transparency throughout this entire process. Therefore it is imperative that your office undertake a thorough review of this proposal.

In addition to these matters, Council would appreciate your advice in respect of any options it may have under the relevant statute to pursue its objection. Council would also like to invite you to attend a site inspection to assist in your understanding of the circumstances specific to this location. Council is able to meet your costs for such an inspection.

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I wish to express Council's appreciation for your consideration of this submission and I look forward to receiving your response in the near future. Should you need any further information please contact Mr Truman on 02 66861256. Alternatively should you need clarification of the position of the residents, Ms Sue Hetherington is able to speak with you, on their behalf. Ms Hetherington's telephone contact is 0400 052 505.

Yours faithfully

Paul Hickey
General Manager

Encl.

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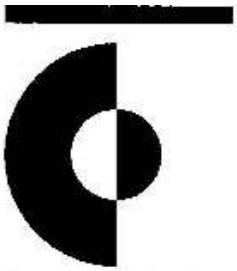

Telecommunications
Industry
Ombudsman

Simon Cohen
Ombudsman

8 June 2011

Paul Hickey
General Manager
Ballina Shire Council
PO Box 450
BALLINA NSW 2478

ATTN: Mr John Truman

Dear Mr Hickey

TIO reference: 11/155658

I refer to my conversation of 30 May 2011 with Mr John Truman and thank you for your letter of 8 June 2011. Your letter outlines a number of concerns of Balina Shire Council (Council) and local residents about the proposed installation of an Optus telecommunications facility on Council land.

Your letter advises that Council seeks to lodge an objection with the Telecommunications Industry Ombudsman (TIO) about the proposed installation. As discussed on 30 May 2011, in this case the TIO is unable to consider the objection made by Council because Council did not ask for Optus to refer the matter to the TIO within the timeframes specified under the *Telecommunications Code of Practice 1997* (the Code). Below I have endeavoured to explain this in more detail. I have also tried to provide some general information about the issues the residents have raised.

I must preface the information I provide by noting that it is very general in nature and does not represent legal advice. Land access activity issues are inherently complex and are governed by a number of pieces of legislation. I have, where possible, tried to simplify the information I have provided by using plain English. Should Council wish to obtain a definitive view on any of the matters it has raised or should it wish to object to land access activities in future, it may be prudent for Council to seek independent legal advice.

Legislative scheme for the installation of telecommunications facilities

By way of background, the rights and obligations of telecommunications carriers in respect of owners and occupiers of land affected by low-impact facilities are governed by Schedule 3 to the *Telecommunication Act 1997*, the Code and the *Telecommunications (Low-impact Facilities) Determination 1997* (the Determination).

Schedule 3 to the Act attempts to balance certain powers and immunities enjoyed by carriers to roll out telecommunications infrastructure with the rights of owners and occupiers of the land. The Code regulates the processes by which this balance is to be achieved. The Determination sets out what types of infrastructure are, as a matter of law, defined as low-impact in nature.

A carrier proposing to install low-impact telecommunications facilities may engage in low-impact facility activities without the consent of the affected owner or occupier. The combined effect of Schedule 3 to the Act and the Code is that in order to exercise its rights, a carrier must give written notice of its proposed activity to an owner or occupier of the affected land. In turn, the owner or occupier has limited rights of objection to the proposed activity.

The Code specifies, among other things, that:

- An owner/occupier of land needs to lodge a written objection with a carrier at least 5 business days before the carrier proposes to engage in the activity

- If an objection is received by the carrier it must make reasonable attempts to consult with the owner/occupier within 20 days in an effort to resolve the objection

- If the objection is not resolved during the consultation period the carrier needs to give the owner/occupier written notice within 25 business days after receiving the initial objection, indicating whether or not they propose to change the activity

- After receiving the above notice, if the objection has not been resolved, the owner/occupier has five business days to write to the carrier asking it to refer the objection to the TIO for a decision.

I understand that Council acknowledges that in this instance it did not ask Optus to refer the matter to the TIO within five business days of receiving Optus's notice indicating whether or not it proposed to change the activity. Under such circumstances, and in accordance with the Code, this means that the TIO is unable to consider the objection and that Optus is free to proceed with the proposed activity.

Owners of land versus concerned local residents

A further issue of relevance is that the Code only requires that notice be given to, and consultation occur with, the owner/occupier of the land. There is no provision in the Code for notice to be given to other parties who do not own or occupy the land on which the carrier proposes to carry out an activity. It follows that the TIO is only able to consider objections made by owners and/or occupiers of land, and not by other parties such as concerned citizens or, as in this case, residents of the local area.

For the above reasons, the TIO is not able to consider this matter. However, below I have endeavoured to provide you with information in response to the additional issues you have raised, using your numbered headings. This may be of assistance to you in taking some issues further or, more likely, in the event that you receive another land access activity notice in future.

1. *Low Impact Determination*

As noted above, the *Telecommunications (low-impact facilities) Determination* 1997 sets out what types of infrastructure are, as a matter of law, defined as low-impact in nature. If the infrastructure listed on the notice issued by Optus is in the Determination then it is a low impact facility. You will note that the Determination doe not impose limitations on the number of individual pieces of infrastructure (such as antennas) which can be installed in any one location.

Under this heading you have also raised the issue of compliance with the ACIF Code *C564:2004 Deployment of Mobile Network Infrastructure* (the ACIF Code). A claim that a carrier has not complied with this code is not a valid ground for objecting to the proposed installation of a low-impact facility under the Code of Practice. The TIO's role is not to examine whether or not a carrier has complied with the ACIF Code. Rather, complaints about non-compliance with the consultation arrangements suggested under the ACIF Code can sometimes be made to the industry regulator, the Australian Communications and Media Authority (ACMA). The ACMA's website is www.acma.gov.au .

2. *Consultation*

As noted earlier, there is no requirement in the Code of Practice for a carrier to consult with parties who do not own or occupy the land on which a carrier proposes to install a facility. Complaints about failure to consult the broader community as suggested in the ACIF Code may be made to the ACMA, contact details above.

3. *Consultation report*

As above

4. *Inaccuracies in Optus documentation provided to residents*

As above

5. *Threat to the environment, public, private nuisance and property values*

It is important to note that Schedule 3 of the Act specifically exempts carriers from complying with normal state and territory laws as they pertain to planning and many other issues. This is because the facilities in question are defined as "low-impact" as opposed to high impact facilities such as mobile base towers. The latter are not exempt from State and Territory planning laws.

The Code of Practice sets down very limited criteria under which owners/occupiers of land can object to low-impact facilities and it would be fair to say that the general aim of the objection process is not to prevent a low-impact facility activity from occurring but, rather, to see if a compromise can be reached about the way in which the activity occurs (this can include a compromise about the location of the activity).

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The potential impact of a facility on land (as opposed to use of land) may be one ground for objection, but this depends on the precise concerns being raised and whether there is a likelihood that the land will be impacted on by the proposed activity. However, this needs to be tempered with the carrier's obligations to restore the land to a similar (not the same) condition as before the activity occurred.

A concern about a carrier's *proposals* to minimise detriment and inconvenience in carrying out an activity may also be a ground for objection in some circumstances. Such an objection would need to raise concerns that had not already been dealt with by the carrier's notice or its general obligations under Chapter 4, Part 2 of the Code of Practice. The latter sets out the requirements for carriers to, among other things, take all reasonable steps to act in accordance with good engineering practice and protect the safety of persons and property.

A complaint about reduced property values as a result of a low-impact facility activity is not a ground for objecting under the Code. Rather, Clause 42 of Schedule 3 of the Act provides a mechanism under which claims for compensation can be dealt with *after* the activity in situations where a person has suffered financial loss or damage because of a carrier's actions under Schedule 3.

6, 7 & 8 Children's park, Sensitive locations and Precautionary approach

I have grouped the above issues under the one heading because they appear to me to relate predominantly to concerns about electromagnetic radiation (EMR). Such concerns, whether real or perceived, do not form a valid ground for objection under the Code of Practice. This is because to be valid under the Code of Practice an objection must be about the affect of the activity on the land, not on people. For this reason the TIO cannot deal with such issues.

The ACIF Code, mentioned above, has been designed with a view to addressing community concerns about EMR. I have earlier pointed out that the ACMA is probably the most appropriate body to contact about concerns with ACIF Code compliance. The ACMA website also contains up to date information about EMR.

9. Amenity

Low- impact facilities are classified as such because they are considered, among other things, to have a low visual impact. This does not mean that they have no visual impact. Once again, the visual impact of a low-impact facility is not a valid ground for objection under the Code of Practice.

10. Transparency

I refer to my prior advice about the ACIF Code and the fact that complaints about non-adherence with this do not form a valid ground for objection under the Code of Practice and are not something that falls within the TIO's jurisdiction or power to consider.

Site visit

Thank you very much for extending me an invitation to visit the proposed site. As the Council did not meet the timeframe for asking that the objection be referred to the TIO, the

TIO has no further role to play in this particular matter. For this reason it would not be useful for me to accept your offer.

However, and as noted earlier, land access issues can be exceptionally complex. For future reference, the TIO is available to discuss such issues and, where it can, provide information to both carriers and owners/occupiers of land on a case by case basis. I invite you to make use of our services in future in this regard.

Yours sincerely

Debra Lusty.

Debra Lusty
Investigations Manager - Complex Cases

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From: Megan Wynnik [mailto:Megan.Wynnik@acma.gov.au] **On Behalf Of** LAIS
Sent: Thursday, 14 July 2011 1:28 PM
To: John Truman
Subject: RE: Complaint - Proposed Telecommunications Facility Basalt Court Lennox Head [SEC=UNCLASSIFIED]

Hello John,

As advised yesterday, the council firstly needs to make its complaint in writing directly to Optus. However, we didn't discuss the other matter in your email about the fact that the council doesn't believe the facility is low-impact.

Regrettably, the ACMA does not have powers under the Telecommunications Act to make a ruling about whether a facility is low-impact or not. Similarly, the ACMA cannot rule or make a recommendation about whether a carrier should place a facility on an alternative site or install a facility in a particular way.

If the Ballina Shire Council does not agree with a Optus that proposed telecommunications facility at Lennox Head is low-impact, the council should seek legal advice from a qualified legal practitioner. Only a court of law can make a ruling on the interpretation of legislation.

Regards,
Megan
Megan Wynnik
Senior Project Manager
Licensing

Australian Communications and Media Authority

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Our Ref: CLH:ljm:110284
Your Ref: John Truman

11 August 2011

Mr John Truman
Group Manager
Civil Services Group
Ballina Shire Council
DX 27789 BALLINA

Dear Mr Truman

RE: OPTUS PROJECT – BASALT COURT

We refer to your attendance at our office last week and to your email of 8 August 2011. We also make reference to the email from your Paul Hickey to the writer dated 10 August 2011 specifically as to whether Council has any legal avenue to stop Optus proceeding.

Clause 6 of Division 3 of Schedule of the Telecommunications Act 1997 Commonwealth allows the holder of a telecommunications carrier licence granted under section 56 of the Telecommunications Act to enter onto and occupy land for the purposes of carrying out the installation of a "low impact" facility. A low impact facility is as defined in the *Telecommunications (Low-impact Facilities) Determination 1997.* That is, if the facility is "low impact" Council cannot stop Optus proceeding.

If the self classification of the facility as a "low impact" facility is valid then whilst entry onto the land remains subject to compliance with the Telecommunications Code of Practice 1997, these provisions are largely procedural and do not interfere with the carriers substantive right to enter and carry out the installation of the low impact facility.

If the self classification by Optus of the facility as a "low impact" facility is invalid then Optus cannot avail itself of the benefits of Schedule 3 to the *Telecommunications Act* and *Telecommunications Code of Practice 1997* and Council can require the development to cease.

The *Telecommunications (Low Impact Facilities) Determination 1997* states:

3 Panel, yagi or other like antenna:
(a) not more than 2.8 metres long; and
(b) if the antenna is attached to a structure – protruding from the structure by not more than 3 metres; and
(c) either:
(i) Colour-matched to its background; or
(ii) in a colour agreed in writing between the carrier and the relevant local authority.

We note the works are as set out in plans authored by Daly International which show in the diagram entitled Notice of Motion Telecommunications Tower at Lennox Head, a north eastern elevation of 12.3m. That same diagram shows the top of the existing reservoir at an elevation of 8m. This appears to demonstrate a protrusion from the existing structure of 4.3m.

It is our view Items 3 (a) and (b) of Part 1 of the Schedule to the *Telecommunications (Low Impact Facilities) Determination 1997* is open to at least four interpretations.

As far as we have been able to ascertain, there has been no judicial interpretation of this provision. We have however, had confirmation from the Telecommunications Ombudsman that he has not been asked to determine this issue.

We are awaiting advice from ACMA as to whether they are aware of any interpretation of the provisions and will advise the outcome of that enquiry.

We have also made enquiries of the Department of Broadband, Communications and the Digital Economy (DBCDE) and are awaiting a return call.

If there has already been some determination of the provisions, it may be we will not need to burden you with the detail of the four interpretations we consider are open. We would therefore prefer to await receipt of that information before advising further.

In the meantime, we concur with the suggestion of your John Truman that it may be prudent to ask Optus to justify its self classification of the facility as a "low impact" facility before taking the matter further. Please forward a draft of your letter to Optus in that regard to us before sending it.

We will advise you when we have had a response from ACMA and DBCDE.

Yours faithfully

CLARISSA HUEGILL

From: Peter Collie |Peter.Collie@optus.com.au|
Sent: Monday, 15 August 2011 7:37:19 AM
To: John Truman
Subject: Basalt Court Lennox Head - Telecommunication Facilities

Hi John,

Telecommunications (Low-impact Facilities) Determination 1997

The Skennars Head proposal is proceeding under Federal legislation *Telecommunications (Low-impact Facilities) Determination 1997* (the Determination). The Determination is Federal legislation that governs all "low-impact" deployment in Australia. The aim of this legislation was to ensure the smooth deployment of telecommunications facilities which complied with certain dimensions/criteria.

Your letter refers to council' s view that the reservoir is the structure –referred to in item b) below. It is Optus view that this is not the case.

Part 1 Radio facilities Item No 3.
Panel, yagi and other like antenna:
(a) Not more than 2.8m long; and
(b) If the antenna is attached to a structure – protruding from the structure by not more than 3m;...

This is a "co-located facility", as defined by Part 7 of the Low Impact Determination, which establishes that radio facilities are able to be erected on an existing structure or reservoir. Part1 then defines the radio facilities that are able to be erected upon such existing structures or reservoirs - which includes antennas and their mounting structures.

The 3m protrusion referred to excludes the antenna. Accordingly, the antenna mount to the bottom of the antenna can protrude a maximum of 3m from the host structure, (in this case the water reservoir). In addition, the antenna can be a maximum of 2.8m tall providing for a total maximum protrusion of 5.8m.

This issue has been considered in a number of Court cases. In particular it was directly addressed by the Supreme Court of South Australia in City of Mitcham v Hutchison 3G Australia (11 March 2005) SASC 78. In that case/Judgement the Court held that the correct interpretation of the Telecommunications, (Low Impact Facilities) Determination 1997. (as amended) was that a panel antenna could protrude a maximum distance of 3m, plus the length of the antenna from the structure to which it was attached. measured to the top of the antenna.

I would note this Judgement of the Supreme Court of South Australia was subsequently upheld by the High Court of Australia

Regards

Peter Collie | Project Manager | SingTel Optus Pty Limited | Mobile Network

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Our Ref: CLH:ljm:110284
Your Ref: John Truman

16 August 2011

Mr John Truman
Group Manager
Civil Services Group
Ballina Shire Council
DX 27789 BALLINA

Dear Mr Truman

RE: OPTUS PROJECT – BASALT COURT

We refer to our letter dated 11 August 2011, your email to Peter Collie of Optus dated 12 August 2011 and his reply dated 15 August 2011.

As set out in our letter dated 11 August 2011, Schedule 3 to the *Telecommunications (Low Impact Facilities) Determination 1997* states:

3 *Panel, yagi or other like antenna:*
- (a) *not more than 2.8 metres long; and*
- (b) *if the antenna is attached to a structure – protruding from the structure by not more than 3 metres; and*
- (c) *either:*
  - *(i) Colour-matched to its background; or*
  - *(ii) in a colour agreed in writing between the carrier and the relevant local authority.*

In his email, Mr Collie makes reference to a decision of the Supreme Court of South Australia namely *City Of Mitcham V Hutchison 3g Australia Ltd & Ors [2005] SASC 78 (11 March 2005)*. That decision, among other things, does consider the meaning of Schedule 3 to the *Telecommunications Act* and *Telecommunications Code of Practice 1997*.

There is also a relevant decision of the NSW Land & Environment Court namely *Hurstville City Council v Hutchinson 3G Australia Pty Ltd [2003] NSWLEC 52 (18 March 2003)* which has interpreted Schedule 3 to the *Telecommunications Act* and *Telecommunications Code of Practice 1997* in the same way.

Both decisions support and rely on the reasoning of Trenorden J in *Telstra Corporation Ltd –v- City of Onkaparinga [2001] SAERDC 55* who found the words "protruding from the structure by not more than 3 metres" means that distance between the nearest point of the antenna to the existing structure, and the existing structure, should not exceed 3.0 metres. Pain J in *Hurstville City Council v Hutchinson 3G Australia Pty Ltd* in reliance upon this reasoning accepts the submission (at [36]) that "Based on this reasoning it is clear that an antenna can stretch 5.8 metres beyond the structure to which it is attached... Further, the antenna panel proposed does not exceed 2.8 metres in height, and is within the limits set in Item 3 of Pt 1 of the Schedule to the Determination."

The works set out in plans authored by Daly International for the Basalt Court site, show the mounting at an elevation of 12.3m with the top of the existing reservoir at an elevation of 8m. This therefore demonstrates a protrusion from the existing structure of 4.3m. The plans also show the new panel antenna elevation at 13.6m, presumably therefore demonstrating that the antenna height is 1.3m. That is, the antenna will stretch 5.6m beyond the structure to which it is attached and therefore fall within the parameters of Schedule 3 to the *Telecommunications (Low Impact Facilities) Determination 1997.*

Accordingly we are of the opinion that the self classification by Optus of the facility as a "low impact" facility is valid and Council cannot lawfully stop Optus proceeding.

Should you wish to discuss the matter, please do not hesitate to call or email.

Yours faithfully

CLARISSA HUEGILL