Attachment 2

MICHAEL RODER SC
BARRISTER

3 May 2013

Norman Waterhouse Lawyers
Level 15, 45 Pirie Street
ADELAIDE SA 5000

Attention: David Billington

Dear David

City of Onkaparinga – Telstra Tower

I have read the Commissioner's memorandum and your email to the Council about that decision.

In my view the approaches of the Full Courts in the two cases you have mentioned are irreconcilable. The first decision (*Hutchison 3G Australia Pty Ltd v City of Mitcham* (2005) 141 LGERA 93) requires a balancing exercise between the affect on amenity and the facility need. The availability of alternative sites is an aspect of that need. Ultimately the question is whether the impact on visual amenity is reduced to an acceptable extent balanced against the need including the availability of alternative sites (*Hutchison 3G* at [45]).

The second decision (*Development Assessment Commission v 3GIS Pty Ltd* (2007) 154 LGERA 72) purports to apply *Hutchison 3G* but states that it is not necessary to weigh amenity impacts against need. It says the only "weighing" exercise involves an assessment of alternative sites. I do not agree that this can stand with *Hutchison*. *Hutchison* requires weighing the visual impact against the need and regards the question of alternative sites as an aspect of need.

There are a number of other propositions introduced by *3GIS* which go yet further away from the balancing exercise suggested in *Hutchison*. These include the proposition that whether demand could be met by a different facility or facilities than the one proposed is irrelevant. Thus, it would seem that it is irrelevant that the demand could be met by two smaller facilities in different sites each with little impact. Why that is said to be so is not apparent to me.

It is also implicit that there is a need to identify whether the alternative site can be secured. The ERD Court has taken the approach that the objector or the Council must prove that any alternate site can be obtained.

All Correspondence to: GPO Box 1570, ADELAIDE SA 5001
12/211 Victoria Square, ADELAIDE SA 5000 | Phone: (08) 8211 7677 | mroder@hzc.com.au

I have a great difficulty with the approach that has been taken to these matters since *3GIS*. It seems to me that they lead to a situation where telecommunication towers must almost inevitably be approved regardless of their impact. The apparent onus on a resident or Council to identify other ways in which a carrier's needs may be met by the same facility (a virtually impossible task for a Council or a resident to undertake) and to prove that Telstra could secure sites (where it has not asked) renders the whole planning assessment virtually illusory.

It is not at all clear to me why a Development Plan should be read in that way, so that the provision of the carrier's desired level of coverage and its desired type of facility is given pre-eminence over all other considerations.

I do not consider that the approach can be justified on the basis that the Plan envisages some amenity impact and simply calls for minimisation. The fact that the Plan envisages some amenity impact (although undoubtedly true) does not mean that all amenity impacts are acceptable unless the Council can prove (somehow) that the carrier's desired level of coverage and type of facility can be established in that form on other land to which it will be granted access.

On balance I consider that the two Full Court cases conflict and that *3GIS* should be reconsidered. A single judge would be bound to follow *3GIS* and a Full Court may consider itself bound by the later decision (*3GIS*) unless a bench of 5 sat on the matter. It may be that the Chief Justice would suggest that the matter be first heard by a bench of 3 and if they considered it necessary that a bench of 5 be convened.

In that respect it may be a little more expensive than an ordinary Full Court hearing. I also think that in this case I would need to thoroughly understand the detailed evidence. I estimate counsel fees in the order of $20,000. That estimate is given on the basis that the single judge refers the appeal to the Full Court without hearing it first. That is the most likely outcome.

I consider that the decision in *3GIS* is incorrect and should be overturned. It sets a very bad precedent in my view. However, the task of overturning a recent unanimous Full Court decision, written by a judge who was very experienced in this field should not be underestimated. I would regard the prospects of doing so as reasonable, but less than even.

Another possible problem is what the correct decision would have been for the Sellicks Beach case even if the *Hutchison 3G* approach had been adopted. It might be said that the position is at best equivocal on the evidence.

I think at best the matter would be remitted back to the ERD Court (probably the same Commissioner) to reconsider the matter based on the correct legal test. There would be a substantial risk, in my experience, that the ERD Court would arrive at the same result. Thus although the point of principle may be dealt with (and this may have an enduring benefit in town planning terms), the Sellicks Beach development may well still be approved.

I have also considered the other errors in the Commissioner's judgment referred to in your email. If we were to appeal, leave should be sought to challenge those errors of fact. I think the ones in respect of Site N are promising. However, again it seems to me that, at best, the matter would be remitted to the Court for further consideration if the appeal succeeded on that ground.

I consider that Telstra would likely seek leave to appeal to the High Court if it lost at the Supreme Court level. The High Court has shown interest in the area of telecommunications development and control. Whilst it is very difficult to obtain special leave, I consider there is at least some prospect thatTelstra would obtain special leave

Yours faithfully

Michael Roder SC