

## INQUIRY INTO NEW SOUTH WALES PLANNING FRAMEWORK

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The Director  
Standing Committee on State Development  
Legislative Council  
Parliament House, Macquarie Street  
Sydney NSW 2000

Dear Sir/Madam

**Mobile Carriers Forum Submission to the Standing Committee on State Development's Inquiry into the NSW Planning Framework**

The Mobile Carriers Forum (MCF) is an industry group representing the four mobile phone carriers deploying networks in Australia, namely Telstra, Optus, Vodafone and Hutchison. The MCF is a division of the Australian Mobile Telecommunications Association (AMTA).

Mobile phone use has increased from less than 7 million subscribers throughout Australia in 1998/99 to a current level of around 21 million mobile phone subscribers. A substantial proportion of these live in NSW. Consistent with this trend since the 2001 financial year, there have been more mobile services connected in Australia than fixed line services. Industry analysts and the Australian Communications and Media Authority (ACMA) have also observed an increasing trend for residents to substitute their fixed line service with a mobile service.

The demand for new telecommunications services such as video-conferencing, interactive services and video streaming is increasing. These are services that rely on broadband connectivity through reliable telecommunications networks. Mobile coverage therefore has an integral role in providing the community with essential communication services required for the future.

As is to be expected in the circumstances, the level of consumer demand for mobile phone telecommunications services continues to grow and will continue to place significant pressure on carriers (and governments) to ensure that telecommunications infrastructure is deployed in a timely fashion; in suitable locations and is maintained and developed as technologies evolve.

To give an indication of the quantum of telecommunications developments that are subject to the policies and regulations of the NSW planning system, there are more than 1000 different sites in acquisition at any one time in NSW with one third of these requiring full development applications.

The MCF welcomes the opportunity to make a submission to the Standing Committee on State Development in relation to the inquiry into the NSW planning framework and offers the following comments in relation to the terms of reference 1(a) and 1(b).

*Terms of Reference 1(a): The need, if any, for further development of NSW planning legislation over the next five years, and the principles that should guide such development*

Significant concerns have been raised by the MCF over many years with the NSW State Government, local government peak bodies and individual councils in relation to

telecommunications deployment and the difficulties of navigating the planning system to achieve positive planning outcomes.

The reasons for these difficulties have arisen from the absence of a consistent approach across local government areas (LGA's) for the inclusion of appropriate zoning controls and siting, design and development assessment provisions in local environmental plans (LEPs) or development control plans (DCPs).

Additionally the provisions of Section 79 (C) of the Environmental Planning and Assessment Act specify that public interest and submissions on applications must be taken into account when assessing development applications regardless of whether applications comply with all other policy and legislative requirements.

This has led to the common scenario where carriers may have met all the stated policy requirements in their development application, but can still be refused due to community concerns, which may or may not be based on substantiated evidence.

This has created a climate of uncertainty and diminishing confidence in the NSW planning system as the financial costs of pursuing uncertain planning outcomes and navigating a process, which can be markedly different between councils, is borne by the carriers.

The MCF has been encouraged by the gazettal on 21 December 2007 of State Environmental Planning Policy (Infrastructure) otherwise known as the 'Infrastructure SEPP', which seeks to address matters of state significance relating to the development of key infrastructure.

The inclusion of a specific division relating to telecommunication facilities, which has the effect of making telecommunications facilities permissible in all land use zones, reflects the communications and submissions made by the MCF to the NSW Government over recent years and is a significant step forward in improving the efficiency of the system.

The SEPP provides a mechanism for review after 12 months and the MCF supports current initiatives by the NSW Government to supplement its provisions so that it will:

- Provide consistent principles (by reference to a NSW Telecommunications Facilities Code currently under development) for the siting and design of telecommunications infrastructure and matters to be considered by local councils when assessing development applications for telecommunications infrastructure (including Broadband).
- Expand the range of telecommunication infrastructure categories (including Broadband) that can be classed as exempt or complying development.

The MCF envisages a continuing role for the NSW Government in the development of NSW planning legislation over the next five years that continues to:

1. Simplify the system by identifying telecommunications (and other) categories of development that can be classed as exempt or complying development.
2. Standardise statutory based matters for consideration when assessing development applications.
3. Review and refine the administrative aspects of the development assessment/approval processes at state and local government levels.

Current NSW Government initiatives in regard to the amendment of the Infrastructure SEPP will greatly assist in the realisation of points 1 and 2 above and the ongoing SEPP review process should ensure that the SEPP provisions and any accompanying Telecommunications Facilities Code continue to operate effectively to achieve desired social, economic and environmental outcomes.

The MCF is of the view however, that two areas of the planning system that impinge on the deployment of telecommunications infrastructure require fundamental review. These are:

- In relation to point 2 above, the use of development control plans by local councils to control the siting and design of telecommunication facilities.
- In relation to point 3 above, a development assessment process at local council level that more effectively promotes an objective merit based assessment of telecommunication facility proposals.

### **Development Control Plans**

Currently, the provisions of development control plans adopted by local councils for telecommunications facilities vary considerably and display wide ranging and inconsistent approaches to dealing with mobile network telecommunications facilities.

Many display a general misunderstanding and/or lack of knowledge of the physical characteristics of telecommunications facilities, particularly in relation to electromagnetic emissions (EME), even though they purport to provide guidance and controls for their location and development.

Many DCPs are also discriminatory in that they seek to apply a different and more onerous public consultation regime for telecommunications facilities than is applied to other development forms (particularly other infrastructure forms).

The MCF questions the need for specific DCPs for telecommunications facilities, particularly if clear and consistent development guidelines are established through the revised Infrastructure SEPP and accompanying Telecommunications Facilities Code.

Guidance to local councils is required from the State Government to the effect that DCPs for telecommunication facilities are either not appropriate or, at the very least, should include only a limited range of matters for consideration.

### **Objective merit based development assessment**

The Standing Committee Discussion Paper references the Leading Practice Model for Development Assessment and the MCF is of the view that the overwhelming majority of proposals for telecommunications facilities can be appropriately assessed and determined by pathways 1, 3, 4 or 5. The MCF is encouraged that revisions to the Infrastructure SEPP are likely to identify telecommunication facilities that can be appropriately assessed and determined by way of pathways 1 or 3.

Certain proposals for telecommunication facilities will still require the lodgement of development applications. As indicated previously however, the provisions of Section 79 (C) of the EPA Act have led to a common scenario where carriers may have met all the stated policy or development control requirements in their development application, but can still be refused due to community concerns, which may or may not be based on substantiated evidence.

MCF members' experiences have been that decisions by councils to refuse development applications have invariably been made by the elected council body. In the majority of instances, councillors have ignored or overruled recommendations for approval made by professional assessing staff employed by councils. Attached in Appendix 1 are some examples that demonstrate deficiencies in the current development assessment framework.

The MCF supports the use of assessment pathways 4 (Code assess) or 5 (Merit assess) where development applications are lodged with councils.

The current development assessment processes administered by local councils are largely determined by local policy and administrative conventions. There are a number of deficiencies with this approach as follows:

- While administrative conventions exist to enable council professional assessing staff to determine straightforward applications under delegation, these powers are often circumscribed by supplementary conventions that negate the delegation where public submissions have been received.
- In many instances councillors retain the right to call in applications for determination by the elected body, irrespective of whether delegation protocols could otherwise be applied.
- Some councils have policies where all telecommunications proposals must be referred to the elected body for determination irrespective of whether there have been public submissions or not.

The MCF believes that there is a pressing need for the NSW State Government to continue to review development assessment procedures with the aims of:

- Better aligning development assessment processes in NSW with the Leading Practice Model for Development Assessment, and
- Establishing and promoting to local councils a consistent set of guidelines for the circumstances under which particular development assessment pathway types should be applied.

*Terms of Reference 1(b): The implications of the Council of Australian Governments (COAG) reform agenda for planning in NSW*

The MCF believes that the reforms and discussions at the COAG level are directly relevant to, and important for, the future development of the NSW planning framework. As the discussion paper notes, recent amendments to the EPA Act and the workings of the Department of Planning reflect initiatives promoted through COAG and the Development Assessment Forum.

In this respect, the expansion of exempt and complying development categories, supported by detailed Codes such as the recently promulgated Housing Code and the current NSW Government initiatives in regard to telecommunications facilities infrastructure, are examples of improvements that have been made to the planning assessment system in NSW as a result of the NSW Government's participation in the COAG reform agenda.

The COAG reform agenda is also important because it provides the opportunity for greater national consistency in planning legislation across Australia.

The MCF recognises that not all the deliberations and initiatives of the COAG reform agenda will necessarily be applicable or relevant to NSW but looks forward to continued NSW Government participation in COAG and the Government's implementation and/or adaptation of policy initiatives arising from the COAG reform agenda.

In conclusion, the MCF appreciates the opportunity to make a submission to the Inquiry and would be happy to discuss the submission in more detail to assist in the Committee's deliberations if required.

The MCF also commends the State Government on its recent initiatives to simplify consent procedures for telecommunications facilities and other development types and looks forward to continued dialogue with the Government in relation to the further refinement of development control and assessment processes that apply to telecommunications facilities infrastructure in NSW.

If you require further information please contact me on 0425-702-007 or via email [matt.evans@amta.org.au](mailto:matt.evans@amta.org.au)

Yours sincerely

A handwritten signature in black ink, appearing to read 'M Evans', written in a cursive style.

Matt Evans  
Program Manager  
Mobile Carriers Forum

**Attached:**

- Recent case studies

## MCF - Some Recent Case Studies

### Hornsby Council.

#### **Proposal at Cheltenham Recreation Club for Telstra**

- Network deficiency identified and instructions issued to identify a new site on 21 July 2003
- Preferred site identified Q1 of 2004
- Heads of terms resolved with land owner in Q2 of 2004
- DA lodged with Hornsby Council August 2004.
- DA refused on 17 November 2004 despite a recommendation for approval from Council's town planners. The single reason for refusal was:  
*"The applicant has not provided definite proof that the electromagnetic radiation from the high frequency waves will not have short or long term injurious effects to the residents, to school children, or to members and visitors of the Recreation Club"*
- In December 2005, Telstra sought to inform the council of the standing of the ARPANSA standard and reinforce that the reason for refusal was not a valid ground for objection. Telstra complies (and by a wide margin) with the regulated standard imposed by the federal authorities. It is those authorities who are accountable for the adequacy of the standard, not those licensed to apply it.
- The DA was re-lodged pursuant to section 82A on 31 May 2005 with the following given as reasons for reconsideration:
  - \* *Telstra has provided the latest scientific evidence to Council which shows that there is no evidence that mobile phone base stations cause any adverse health effects;*
  - \* *The revenue generated by the facility will directly benefit the club and the local community;*
  - \* *This is a very well designed facility, which specifically reduces the visual and environmental impact on the local area. Council should be encouraging good design;*
  - \* *Telstra has confirmed they will appeal the decision in the Land & Environment Court and will be requesting that costs be awarded. Case history on the mobile phone base station health issue indicates a very high probability of success for the operator.*
- Council's Town planners again recommended approval but on 17 August 2005, the DA was refused on the same grounds.
- Telstra lodged an appeal with the NSW Land & Environment Court and briefed local and international experts in electro-magnetic energy from mobile facilities. The Court provided Council with a draft report from Dr David Black and Telstra sought the co-operation of Council. In view of the evidence that Dr Black was to give, Council could have avoided further costs for itself and Telstra by entering into consent orders. The offer was refused and proceedings commenced on 6 March 2006.
- On 24 March 2006 Preston CJ handed down a 90 page judgement, *Telstra Corporation Limited v Hornsby Shire Council [2006] NSWLEC 133*, in favour of Telstra.
- On 9 May 2006, Telstra made an application to the NSW L&E Court for costs
- On 30 May 2006 Preston CJ handed down a 13 page judgement *Telstra Corporation Limited v Hornsby Shire Council [2006] NSWLEC 285* in favour of Telstra and was particularly critical of Hornsby Council.
- On 24 September 2007 Council paid Telstra's costs as assessed by the Court. It was over a period of two (2) years from the time agreed commercial terms were initially reached with the Land Owner to the point of finally securing consent to build the facility. Both Telstra and Council were put to considerable costs which could have been avoided with an initial approval back in November 2004.
- Telstra resources in managing the planning consent and recovering some its appeal costs, were employed on this one project for a period of over four (4)



Above Photo: The completed site showing the two false chimneys

This case highlights the need for Local Government Authorities (LGAs) to demonstrate as well as undertake their responsibilities consistent with the planning merit of a proposal and not respond to ill-founded perceptions of potential adverse health implications, which are in any event regulated by the Commonwealth.

Nor should LGAs seek to pacify community concerns in this regard by manufacturing other grounds for refusal to disguise the real intention. Any refusal which is contrary to the recommendations of Council's professional staff should be subject to review by the Department of Planning / Minister's office, which should be empowered to overturn such refusals.

### **Ryde City Council**

#### **Proposal at Kotara Park, Eastwood for 3GIS**

- ❑ Network deficiency identified and instructions issued to identify a new site on 17/06/2005
- ❑ A preferred candidate was identified in Ferrabetta Ave, Eastwood on 04/08/2005
- ❑ The proposal is within a residential neighbourhood and provides for the installation of antennas on two existing power poles along with the installation of an equipment shelter in the front garden of one of the residential properties.
- ❑ The facility is exempt from statutory planning approval pursuant to the provisions of the Telecommunications (Low Impact Facilities) Determination 1997
- ❑ Heads of terms were secured from the land owner on 09/11/05 for the equipment cabinets and a master agreement is in place with Energy Australia for the installation on their light poles



- Telstra, as agent for 3GIS, commenced consultation and notifications pursuant to its obligation under the Deployment of Mobile Phone Network infrastructure Code (ACIF c564:2004) on 06/01/2006.
- Following representations from adjoining residents, the Council and the Federal Member (past Prime Minister Howard) at meeting held in May 2006, Telstra worked with the stakeholders to identify an alternative location.
- The new location as identified and recommended by Council was at Kotara Park (owned by Council) and the proposal entailed the replacement of an existing light pole at the tennis courts, with a taller pole supporting the antennas.
- 3GIS was to replace the pole at its cost and install the facility pursuant to the Telecommunications (Low Impact Facilities) Determination. Telstra on behalf of 3GIS undertook the mandated consultation and notifications pursuant to its obligation under the Deployment of Mobile Phone Network infrastructure Code (ACIF c564:2004) on 08/12/06 and also held a community drop in session at Kotara Reserve on 18/12/06.
- However in early 2007 Council then advised that the proposal required consent via the statutory process.
- Council gave its consent to the lodgement of a development application on 08/05/07
- Telstra lodged the DA on 10/05/07
- Council sought more information which was provided on 29/08/07
- Council's town planning staff prepared a report for council recommending approval which was submitted for determination on 06/11/07
- The Councillors return the report with a direction that grounds for refusal be provided by the Director of Planning.
- On 04/12/07 the Council determined the application by refusal for the following reasons, paraphrased below.  
'Perceived adverse health implications from the electromagnetic energy (repeated 3 time but worded differently);  
and the inadequate assessment of alternative sites.'  
None of the reasons for refusal are valid and could not be sustained upon appeal in the NSW Land & Environment Court. CJ Preston considered this matters in a landmark decision Telstra v Hornsby Council in March 2006 and cost were subsequently awarded to Telstra. Council is aware of this decision.
- The maximum EME from the facility is predicted to be just 0.058% of the mandated ARPANSA Standard. However normal operating levels will be between 1/20<sup>th</sup> and 1/10<sup>th</sup> of this worst case prediction or 0.0029%-0.0058%.
- Telstra/ 3GIS are now appealing the refusal with the LEC hearing set down for 27 February 2009 with a judgement unlikely before the end of March 2009.
- As council is the owner of Kotara Park, it could withhold consent to enter into a lease notwithstanding the likely favourable judgement from the NSW L&E Court Should this occur, 3GIS will revert to the original candidate in Ferrabetta Avenue.
- In this instance, it would appear that the Councillors had no intention of ever approving the application and deliberately set out to misdirect Telstra resources.
- 3GIS have expended in excess of \$150,000 in this futile exercise and the delivery of enhanced telecommunications services to this community has been delayed some 3.75 years.

Council has in recent time approved development applications at Marsfield Park at Macquarie Pk and TG Millner Sportsground at Marsfield and this decision is inconsistent with previous deliberations. It should be noted that the predicted Electromagnetic emissions from the proposed facility at Kotara Park are just 0.058% of the ARPANSA Standard being less than that at the other recently approved sites.

Notwithstanding that the facility should not have required the lodgement of a development application; the reasons for subsequent refusal of the DA are not matters for which statutory planning authorities are empowered to determine.

Amendment to the Infrastructure SEPP and Standard LEP is required to exclude these reasons as valid ground for refusal.