RED DOT DECISION SUMMARY

The practice of VCAT is to designate cases of interest as 'Red Dot Decisions'. A summary is published and the reasons why the decision is of interest or significance are identified. The full text of the decision follows. This Red Dot Summary does not form part of the decision or reasons for decision.

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
ADMINISTRATIVE DIVISION

VCAT REFERENCE NO. P2159/2013

PLANNING AND ENVIRONMENT LIST

IN THE MATTER OF Mason & Ors v Greater Geelong City Council (includes Summary) (Red Dot) [2013] VCAT 2057

BEFORE Mark Dwyer, Deputy President

DATE OF DECISION 16 December 2013

NATURE OF CASE	Telecommunications facility –electromagnetic radiation issues
POTENTIAL GUIDELINE DECISION	Yes
REASONS WHY DECISION IS OF INTEREST OR SIGNIFICANCE	
PRACTICE OR PROCEDURE– consideration of individual instance or systemic issues	VCAT is unable to consider emissions of electromagnetic radiation as a relevant or determinative issue where the relevant Commonwealth ARPANSA standard will be met

SUMMARY

Public health concerns about electromagnetic radiation are often raised in planning cases about a telecommunications facility. However, it is not the role of VCAT to second-guess the expert authorities that regulate the area.

The Australian Communications and Media Authority has set a clear regulatory standard – the ARPANSA standard - under Commonwealth law, to protect the health or safety of those who may be affected by the operation of a telecommunications network or facility from the potential impacts of electromagnetic radiation. Compliance with that standard has been effectively incorporated into the Victorian planning framework through clause 52.19 of all Victorian planning schemes and the requirements of *'A Code of Practice for Telecommunications Facilities in Victoria'*. VCAT cannot look behind the ARPANSA standard where it will be met, nor does it have the expertise to do so.

The amount of electromagnetic radiation emitted by a telecommunications facility may well be a legitimate issue of public concern. However, VCAT is not a forum for addressing all issues of social or community concern, nor is it an investigative body. It cannot give great weight to unsupported assertions about

public health concerns in the context of an individual planning application, particularly in relation to matters outside its own expertise or beyond the limited ambit of its statutory role or discretion in relation to that application. Accordingly, VCAT is not the appropriate forum where generalised opposition to telecommunications facilities based on public health concerns can or should be raised. It is a waste of the parties' and the Tribunal's resources as, ultimately, VCAT is essentially bound to apply the ARPANSA standard.

Allowing objectors to continue to air their concerns about electromagnetic radiation at a VCAT hearing creates false expectations about the role of VCAT and the ambit of its discretion, and the extent to which it can realistically deal with such issues.

It follows that objectors should not raise the issue of electromagnetic radiation in VCAT proceedings about telecommunications facilities where the ARPANSA standard will be met. If they attempt to do so in their statements of grounds in the future, they can anticipate that the issue will be summarily dismissed without debate.

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P2159/2013
PERMIT APPLICATION NO. 514/2013

APPLICANTS FOR REVIEW	Yvonne Mason & others
RESPONSIBLE AUTHORITY	Greater Geelong City Council
PERMIT APPLICANT	Aurecon Australia Pty Ltd
RESPONDENT	Telstra Corporation
SUBJECT LAND	34-66 Calvert Street HAMLYN HEIGHTS 3215
WHERE HELD	Melbourne
BEFORE	Mark Dwyer, Deputy President
HEARING TYPE	Practice Day Hearing
DATE OF HEARING	15 November 2013
DATE OF ORDER	16 December 2013
CITATION	Mason & Ors v Greater Geelong City Council and Telstra Corporation (includes Summary) (Red Dot) [2013] VCAT 2057

ORDER

1 The proceeding is listed for hearing at **10.00 am on 17 March 2014** for one day before a town planner member.

2 In relation to the statement of grounds lodged by the objectors (the joint applicants for review), the following grounds are struck out and may not be relied upon at the hearing:

(a) the ground relating to concerns over the impacts of electromagnetic radiation from the proposed telecommunications facility;

(b) the grounds relating to concerns about the impacts on public health and/or to the users of nearby land, insofar as they relate to radiofrequency fields or electromagnetic radiation from the proposed telecommunications facility.

Mark Dwyer
Deputy President

APPEARANCES:

For Yvonne Mason & Ors (Applicants for Review)	Mr Dennis Foster and Mr Steve Mason, in person
For Responsible Authority	Mr Hugh Griffiths, town planner
For Telstra Corporation	Ms Katherine Lake, solicitor

REASONS

What was the practice day hearing about?

1 A group of objectors has lodged a joint application to review a decision by the responsible authority to grant a permit for a telecommunications facility and associated equipment (essentially a mobile phone tower) on land at Hamlyn Heights, Geelong. The land is in a public park and recreation zone.

2 A practice day hearing was convened, amongst other things, to consider 'which of the statements of grounds in the application are relevant planning grounds that may be considered at a hearing and which should be struck out'.

3 A number of the objectors' grounds raise legitimate planning issues, such as the visual impact of the proposed telecommunications facility, and the location of the development of the facility in and adjacent to a public park. Without expressing any view on the ultimates merits of these grounds, those grounds are deserving of a hearing in due course.

4 However, a number of the objectors' grounds in this proceeding also raise issues about electromagnetic radiation and/or related public health concerns stemming from the operation of the proposed facility.

5 This is not uncommon in matters concerning telecommunications facilities. However, whilst these grounds may reflect genuinely held beliefs or fears, they are not substantiated with any direct evidence. The grounds are simply expressed as 'community concerns' or 'significant anxiety from local residents' or a 'groundswell of objections nationally to such installations'. Allowing these grounds to proceed to a hearing and/or allowing objectors at a hearing to air these concerns, creates false expectations about the role of VCAT and the ambit of its discretion, and the extent to which it can deal with such issues.

6 This decision, stemming from the practice day hearing, is intended:

- to explain why VCAT cannot deal with the issue of electromagnetic radiation in an individual case about a telecommunications facility

where the relevant regulatory standard set by the Commonwealth (the ARPANSA standard) will be met; and

- to provide guidance for this and future matters to the extent that objectors should not raise the issue of electromagnetic radiation in VCAT proceedings about telecommunications facilities where the ARPANSA standard will be met and, if they attempt to do so in their statements of grounds, they can anticipate that the issue will be summarily dismissed without debate.

The Commonwealth 'ARPANSA standard' and its application within the planning framework

7 Clause 52.19 of all Victorian planning schemes contains a particular provision dealing with telecommunications facilities. As clause 52.19-1 indicates, the provision applies within the limits of what is otherwise an area regulated by the Commonwealth under the *Telecommunications Act 1997* (Commonwealth) and the determinations and codes of practice made under that Act.

8 Under s 376 of the *Telecommunications Act 1997* (Commonwealth), the Australian Communications and Media Authority (ACMA) is given power to make technical standards regarding certain matters. These technical standards include standards necessary or convenient to protect the health or safety of those who operate, work on, use the services of, or are otherwise reasonably likely to be affected by the operation of a telecommunications network or facility. A similar power arises under s 162 of the *Radiocommunications Act 1992* (Commonwealth) in relation to radio-communications transmitters and receivers.

9 For these purposes, the ACMA has adopted a mandatory standard through the *Radiocommunications (Electromagnetic Radiation – Human Exposure) Standard 2003* (as amended in 2007). The standard makes mandatory the exposure limits in the *Radiation Protection Standard for Maximum Exposure Levels to Radiofrequency Fields – 3 kHz to 300 GHz* determined by the Australian Radiation Protection and Nuclear Safety Agency (ARPANSA). The standard is thus often referred to as the ARPANSA standard.

10 The relevant ACMA fact sheet indicates that this ARPANSA standard represents world's best practice, is consistent with World Health Organisation guidelines, adopts a precautionary approach, and sets exposure limits many time below levels known to have potential adverse health effects.

11 Clause 52.19 of the planning scheme also requires an applicant for a planning permit for a telecommunications facility to explain how the siting and operation of the facility will meet the principles and requirements of *'A Code of Practice for Telecommunications Facilities in Victoria'*. The

current version of that Code of Practice is also an incorporated document under clause 81 of all Victorian planning schemes.

12 Principle 3 of the Code of Practice requires that health standards for exposure to radio emissions will be met. In particular, a telecommunications facility must be designed and installed so that the maximum human exposure levels to radio frequency emissions complies with the ARPANSA standard. Compliance with the ARPANSA standard is thus effectively incorporated within the Victorian planning framework.

13 As part of its application in the present case, Telstra has complied with clause 52.19 and provided a report to the responsible authority (the Greater Geelong Council) summarising the estimated radiofrequency electromagnetic radiation emissions for the proposed Hamlyn Heights site. The emissions are calculated in accordance with the ARPANSA standard, and apply the ARPANSA methodology and procedures. The methodology requires a maximum cumulative level to be stated for all carriers at a site, as a percentage of the ARPANSA public exposure limits.

14 The report indicates that the maximum electromagnetic radiation emissions at the Hamlyn Heights site will be 1.14% of the ARPANSA exposure limit at 109.25 metres from the antennas. The emissions will be less when closer (e.g. a maximum 0.045% in the area 0-50 metres), and less when further away (e.g. a maximum 0.43% in the area 200-300 metres). That is, the estimated emissions will comprise a very small percentage of what is already a conservative standard.

15 Neither the responsible authority nor VCAT has the expertise to second-guess the ARPANSA standard, nor to impose a different standard. The most the responsible authority can do is to ensure the permit applicant has provided the relevant information as part of its planning application and, if a permit is granted (and although perhaps a little superfluous), impose a permit condition mandating compliance with the ARPANSA standard. That has occurred here.

Role of Tribunal

16 The Tribunal has previously indicated[1] that town planning is not a panacea for all perceived social ills, nor is the hearing of a planning matter at VCAT a forum for addressing all issues of social or community concern. It has also acknowledged[2] that objectors often mistakenly view VCAT as a forum to express their *general* opposition to a proposal, and express frustration when the tribunal does not seem to have regard to issues that they consider important. However, VCAT is limited by its statutory jurisdiction. It can only decide a matter based on the actual application before it, and for the limited purpose for which a planning permit is required, and having regard to the relevant provisions and decision guidelines in the *Planning and*

[1] *Hunt Club Commercial Ply Ltd v Casey CC* (Red Dot) [2013] VCAT 725 at[15]-[16] per Dwyer DP
[2] *Woolworths Ltd v Yarra Ranges SC* [2008] VCAT 789 at [8]-[9] per Dwyer DP & Harty M

Environment Act 1987 and in the planning scheme that relate to that permit requirement. Those are the planning controls approved by the Minister for Planning and local government, and which are intended to balance competing interests in favour of net community benefit and sustainable development.

17 The views of the community or the local council are important, but within the confines of what are the relevant and determinative planning issues in a particular case. It is not simply a matter of what certain individuals like or don't like, or what they want or don't want. Indeed, VCAT itself doesn't decide the matter according to the individual likes or dislikes of the presiding members. VCAT must objectively apply the law and the provisions of the planning scheme, as it exists, to the application before it. In doing so, VCAT relies upon relevant probative material, legal authority and logical reasoning in considering the grounds of a party in a proceeding. VCAT is not an investigative body, and cannot give great weight to unsupported assertions – particularly in relation to matters outside its own expertise or beyond the ambit of its statutory role or discretion.

Application of principle to objectors' grounds raising electromagnetic radiation

18 In adopting sentiments similar to those above, the Tribunal has also recently confirmed[3] that it is not the role of VCAT to set standards in relation to public health, nor to second-guess the considered statements of expert authorities or bodies that regulate the area.

19 As indicated, VCAT is not an investigative body nor, despite its general expertise in planning and related matters, does it have any specific scientific expertise in matters of electromagnetic radiation.

20 This has been a long held position. In 1999, VCAT considered an argument that the Australian standard regulating radio frequency emissions from telecommunication facilities gave insufficient regard to the effect of such frequencies on human health. The Tribunal, constituted with its then President stated:

> ... The Tribunal is obliged to apply the relevant regulatory standards as it finds them, not to pioneer standards of its own. The creation of new standards is a matter for other authorities. ...[4]

21 There are many similar decisions. More recently, in the context of an NBN tower, VCAT has indicated:

> With respect to health hazards of electro-magnetic radiation from mobile phone tower installations, the Tribunal has held that whilst the objectors beliefs were sincerely held, the Tribunal is obliged to apply the relevant regulatory standards as it finds them, not to pioneer

[3] *Cherry Tree Wind Farm Pty Ltd v Mitchell SC* [2013] VCAT 1939 at [16]-[17] per Wright QC SM & Liston SM

[4] *Hyett v Corangamite SC and Telstra* [1999] VCAT 794 at p7 per Justice Kellam P & Marsden M

> standards of its own. The creation of new standards is a matter for other authorities. This principle has been followed in numerous other decisions wherein the Tribunal has found that a telecommunications facility is obliged to meet the relevant standards that apply but it is not a basis to reject an application for reasons relating to potential health impacts if the relevant standards are met.[5]

22 None of the above statements should be taken to mean that the electromagnetic radiation emitted by a telecommunications facility is, of itself, a totally irrelevant consideration from a town planning perspective. The spatial context of planning is to generally avoid siting incompatible uses or development together. If electromagnetic radiation was wholly unregulated, there may be an argument that a facility emitting such radiation should not be sited close to where people commonly live, work or congregate. However, emissions of electromagnetic radiation from telecommunications facilities *are* regulated. There is a clear regulatory standard – the ARPANSA standard - fixed by the appropriate Commonwealth authority, and recognised within the Victorian planning framework, that limits the amount of electromagnetic radiation from a telecommunications facility in order to protect and safeguard public health. If the ARPANSA standard is clearly met (as here, by an order of magnitude), VCAT cannot and should not second-guess it.

23 VCAT has rightly stated[6] that, if there was compelling evidence that a regulatory standard was not appropriate in a particular case, or no longer appropriate generally, then that may be matter for argument in that particular proceeding. That is certainly not the case here, nor generally at this point of time in relation to the ARPANSA standard for electromagnetic radiation, particularly given its existence under Commonwealth law and its reference and incorporation into the Victorian planning framework. Indeed, it is difficult to conceive of any circumstance under the current regulatory framework where *compelling* evidence contrary to the ARPANSA standard could realistically exist or be considered in a determinative way by VCAT. At things stand, compliance with the ARPANSA standard is a sufficient response to the issue.

24 At most, the objectors in this case indicated that they may have called evidence from a local doctor about community health concerns. Realistically, it must be self-evident that VCAT could not give great weight to the opinion (albeit genuinely held) of a single medical practitioner in comparison to a Commonwealth standard developed over time by an expert multi-disciplinary agency, and referenced in the planning scheme.

25 Again, none of these statements should be taken to mean that electromagnetic radiation emitted by a telecommunications facility is not a legitimate issue of public concern. It is simply the situation that VCAT is

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[5] *McClelland v Golden Plains SC* [2013]VCAT 59 at [6]-[7] per Gibson DP

[6] *Cherry Tree Wind Farm Pty Ltd v Mitchell SC* [2013] VCAT 1939 at [35] per Wright QC SM & Liston SM

essentially bound to apply the ARPANSA standard and, accordingly, VCAT is not the appropriate forum where general opposition to telecommunications facilities based on public health concerns can or should be raised.

26 It is thus a waste of the parties' and Tribunal resources to deal with the issue at a VCAT hearing in almost every case about a telecommunications facility. As I have said, it creates false expectations in the minds of objectors that it is a relevant determinative issue that VCAT can deal with.

27 In this case, based on the material before me and the matters discussed above, it is therefore appropriate to strike out the objectors' grounds in this proceeding that raise issues about electromagnetic radiation and/or related public health concerns stemming from the operation of the proposed facility. These grounds are not relevant to the planning assessment of a telecommunications facility where the ARPANSA standard will be met. Even if these grounds are at least arguably planning-related, they are misconceived and lacking in substance on the facts of this case given compliance with the ARPANSA standard.

28 The objectors may nonetheless raise at the future hearing their other legitimate planning issues, such as the visual impact of the proposed telecommunications facility, and the location of the development of the facility in and adjacent to a public park.

29 For the record, I note that the responsible authority here also sought to have struck out the objectors' ground relating to the 'probability of the proposed facility being expanded in the future'. I agree with the responsible authority's submission that VCAT is only dealing with the actual application before it. I did not however hear sufficient material to strike out this ground, and I do not know what evidence may exist here about the likely co-location of telecommunications facilities. If the objectors seek to proceed with this ground at the hearing, they will however need to provide material to demonstrate how this ground is relevant in this case. The objectors cannot simply make bare assertions, or deal hypothetically with what may (or may not) be the subject of some future application. VCAT will consider the planning merits of what is comprised in the application before it.

Mark Dwyer
Deputy President