VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P812/2013

CATCHWORDS

Telecommunications facility – Aboriginal cultural heritage – *Aboriginal Heritage Act* 2006 – Aboriginal Heritage Regulations 2007 – need for cultural heritage management plan – accessroute as part of telecommunications facility – clause 59.19 Campaspe Planning Scheme – Code of Practice for Telecommunications Facilities in Victoria

APPLICANTS	Jodie Pfarr and Steffen Pfarr, Geoff & Mary Healy
RESPONSIBLE AUTHORITY	Campaspe Shire Council
RESPONDENT	NBN Co Ltd
SUBJECT LAND	Gibb Road TOOLLEEN VIC 3551
WHERE HELD	55 King Street, Melbourne
BEFORE	Helen Gibson, Deputy President
HEARING TYPE	Practice Day Hearing
DATE OF HEARING	9 May 2014
DATE OF ORDER	18 July 2014
CITATION	Pfarr v Campaspe SC [2014] VCAT 872

ORDER

1 I rule that preparation of a Cultural Heritage Management Plan under the *Aboriginal Heritage Act* 2006 and the Aboriginal Heritage Regulations 2007 is not required.

2 The proceeding is listed for hearing on **12 November 2014**, before two members, including a member with experience in aboriginal cultural heritage, with a time estimate of 2 days.

3 By not later than 10 business days before the date listed for the hearing, each party must file with the Tribunal and serve on the other parties a copy of each document and statement of the evidence or report of each witness, whether that witness be an expert or a lay witness, on which that party intends to rely at the hearing not yet filed and served.

Helen Gibson
Deputy President

APPEARANCES:

For Jodie Pfarr and Steffen Pfarr	Mr Michael Burke, solicitor, of Pearce Webster Dugdales
For Geoff & Mary Healy	Mr and Mrs Healy, in person
For Campaspe Shire Council	No appearance
For NBN Co Ltd	Ms Juliet Forsyth of counsel, instructed by Clayton Utz

REASONS

WHAT IS THIS PROCEEDING ABOUT?

1 This proceeding involves two applications for review by objectors under section 82 of the *Planning and Environment Act* 1987 against the decision of Campaspe Shire Council (the council) to grant a permit for:

> Use and development of the land for a telecommunications facility in the Farming Zone and Salinity Management Overlay in accordance with the endorsed plans.

2 The statements of grounds of both sets of applicants (the Pfarrs and the Healys) raise issues relating to adverse impact on soil stability and soil erosion, aboriginal cultural heritage, non-compliance with the Code of Practice for Telecommunications Facilities in Victoria[1] (the Code of Practice), adverse impact on landscape and visual amenity issues, amongst other matters.

3 The purpose of this practice day hearing was set out in the Tribunal's order dated 24 February 2014 to consider:

a) Whether a CHMP is required for construction of the access track.

b) To what extent, if any, matters of aboriginal cultural heritage are relevant to the permit application.

c) The relevance of the various grounds raised in the applications by Geoff and Mary Healy, and Jodie Pfarr.

4 The Tribunal's order dated 24 February 2014 also required the permit applicant to give notice of the permit application in this proceeding to the relevant Registered Aboriginal Party, Taungurung Clans Aboriginal Corporation and provide information that they may be joined as a party to the proceeding pursuant to section 60 of the *Victorian Civil & Administrative Tribunal Act* 1998.

5 I am satisfied that this order was complied with, but no application has been made by Taungurung Clans Aboriginal Corporation to be joined as a party. It is most unfortunate that the Registered Aboriginal Party has chosen not to engage in this proceeding given the apparent aboriginal cultural heritage significance of the land and the area.

WHAT IS PROPOSED?

6 The applicant proposes to construct a telecommunications facility comprising a 25 metre high lattice tower, equipment and associated antennas on the top of Mt Camel, off Gibb Road, Toolleen. The proposed facility will provide fixed wireless broadband coverage to the Mt Camel area and is part of the broader NBN Network. The tower and associated

[1] Department of Sustainability and Environment, 2004

infrastructure will be located in a fenced compound measuring 8 metres by 12 metres (96 square metres). It will be accessed by a 3.3 kilometre route from Pook Road to the east.[2] The route traverses private land and requires the following upgrade works to be undertaken to make it suitable for accessing the proposed facility during construction:

- Establishment of a small culvert;
- Upgrade of an existing culvert;
- Formation of the last 600m of the track to the proposed facility;
- Minor upgrade works to parts of the existing access route; and
- Installation of a new access gateway into the parcel on which the proposed facility will be constructed.

7 The upgrade to the access route over the last 600 metres of the track is not required for ongoing maintenance of the facility as all weather 4WD access is available, which is sufficient for maintenance purposes. The access route is only required on a temporary basis for the construction of the facility, and, so the applicant advised, could be removed if required at the conclusion of construction (although this is not proposed).

8 The majority of the access track is already formed and will only require minor upgrade works in some parts. The applicant advised that the construction of the access track does not involve the disturbance of top soil or surface rock layer. It involves an upgrade of the existing access path with a top dressing design solution of parts of the track only where necessary to facilitate heavy vehicle movements.

9 The last 600 metres of the access route up to the hill summit construction area is steep, not formed and rocky in sections. To provide traction for the heavier construction vehicles and to prevent surface damage certain sections of the access route are to be treated with a top dressing design solution. This will involve the build up of layers of materials on geotextile matting over the access route to prevent disturbance.[3] Visionstream has revised its plans for the temporary access track to take further account of the slope/gradient and these changes are incorporated in its statement dated 6 May 2014. The design of the last 600 metres of the access track now relied upon by the applicant is that set out in the plan by Visionstream Pty Ltd, drawing No 3BEN-51-27-MOC-C5 Revision 2 dated 6 May 2014.

WHAT IS THE ABORIGINAL CULTURAL SIGNIFICANCE OF THE LAND?

10 Mt Camel is within an area of cultural heritage sensitivity under the Aboriginal Heritage Regulations 2007 because it is within a Greenstone

[2] The permit application was amended in February 2013 to lower the height of the tower from 30 metres to 25 metres and alter the access route to the facility from a route from Gibb Road to the west to a route from Pook Road to the east.
[3] Statement by Visionstream 30 April 2014

Outcrop Area.[4] Part of the access route, including the last 600 metres, is also within the same area of cultural heritage sensitivity. Mt Camel is part of the Mt Camel range, an area of particular aboriginal cultural heritage significance. On its lower slopes is an important aboriginal axe quarry.

11 The acknowledged significance of the area led the permit applicant in late 2013 to request an adjournment of the hearing of this proceeding to enable it to complete a voluntary Cultural Heritage Management Plan (CHMP) under the *Aboriginal Heritage Act* 2006 in relation to the land the subject of the permit application. At the time, the permit applicant said:

> While there is some doubt over whether or not a CHMP is required, particularly having regard to the exemption in favour of telecommunications facilities and the design of the ancillary aspects of the proposed facility, NBN Co has determined to adopt a cautious approach in dealing with this issue.

12 The firm, Archaeology at Tardis, was engaged to prepare the CHMP. Unfortunately, the relevant Registered Aboriginal Party, the Taungurung Clans Aboriginal Corporation, has not proved to be cooperative. At the practice day hearing, a letter from Archaeology at Tardis dated 28 April 2014 was tabled outlining its attempts to gain the co-operation and necessary engagement from the Taungurung Clans Aboriginal Corporation. As a result of Archaeology at Tardis being unable to complete the CHMP voluntarily, the permit applicant has now requested that the hearing proceed in the absence of a CHMP. It submits that the proposal is exempt from the need for a CHMP.

13 The applicants for review say that the whole of the Mt Camel area, particularly the summit and the slopes where the access track will be installed, have such great aboriginal cultural heritage significance that a cultural heritage management plan should be prepared and that aboriginal cultural heritage will be very important to consider at the final hearing.

14 The Healys, in particular, dispute the comments in the statement by Archaeology at Tardis dated 28 April 2014 that no aboriginal cultural heritage was located during the initial survey of the activity area. They say that from their personal knowledge, areas at the peak are strewn with uncut rocks, large and small, from the stone axe quarry. Stone axes from the Mt Camel quarry have been found within a radius of about 700 kilometres to the north and west of Mt Camel. The whole of this part of the Mt Camel Range is significant, not just the stone axe quarry, especially the summit where the tower will be located and the slopes leading up to the summit, which the access track will traverse.

IS A CHMP REQUIRED?

15 Regulation 6 of the Aboriginal Heritage Regulations 2007 provides that:

[4] Regulation 32 Aboriginal Heritage Regulations 2007

> A cultural heritage management plan is required for an activity if –
>
> (a) all or part of the activity area for the activity is an area of cultural heritage sensitivity; and
>
> (b) all or part of the activity is a high impact activity.

16 It is common ground that the activity area for the activity is an area of cultural heritage sensitivity. The question that arises is whether all or any part of the activity is a high impact activity.

17 'Activity' under the Act and the Regulations means the development or use of land.[5]

18 There are three components of the proposed activity:

- The telecommunications facility itself and associated works;
- The access route; and
- The overhead power line connection to the proposed facility.

Power line

19 At the hearing, I was advised by the permit applicant that:

> Powercor, who have been engaged to design and construct the overhead power line connection to the proposed facility, made a decision to undertake a Cultural Heritage Management Plan (CHMP) for the power line.

20 A permit for the power line is not part of the permit application that is the subject of the present proceeding. No further information was provided about the power line connection or whether, in fact, a CHMP has been undertaken for it. A power line appears to fall within the definition of a high impact activity under Regulation 43(1)(b)(xxiii)(A) – the works are a linear project that is the construction of an overhead power line with a length exceeding one kilometre or for which more than 10 power poles are erected.[6]

21 In the circumstances, I have not considered the issue of a cultural heritage management plan for the power line because it is not part of the permit application. However, that does not mean that a CHMP is not required for the power line. This is a separate issue, which needs to be resolved by the permit applicant in conjunction with Powercor.

Telecommunications tower and associated works

22 With respect to the telecommunications tower and its associated works, including the compound within which it will sit, a telecommunications facility is not specified as a high impact activity under the Regulations.

23 Regulation 43(1) provides that:

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[5] Section 4 *Aboriginal Heritage Act* 2006
[6] See also Regulation 68.

(1) The construction of a building or the construction or carrying out of works on land is a high impact activity if the construction of the building or the construction or carrying out of the works—

(a) would result in significant ground disturbance; and

(b) is for or associated with the use of the land for any one or more of the following purposes—

…

(xxiii) a utility installation, other than a telecommunications facility, …

24 A telecommunications facility is therefore excluded from the specification of what constitutes a high impact activity under the Regulations.

25 A telecommunications facility is defined in the Campaspe Planning Scheme[7] as follows:

> Land used to accommodate any part of the infrastructure of a Telecommunications network. It includes any telecommunications line, equipment, apparatus, telecommunications 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.

26 Having regard to this definition, I find that the telecommunications tower, equipment and associated antennas, and the fenced compound within which they will be located, constitute a telecommunications facility. A telecommunications facility is not a high impact activity within the meaning of the Aboriginal Heritage Regulations 2007 and therefore this part of the activity does not require a CHMP.

Access route

27 The next issue in question is whether the access route is a high impact activity and whether this part of the activity requires a CHMP.

28 The permit applicant submitted that the access route must be considered to be "for or associated with the use of the land" for a "telecommunications facility" within the meaning of Regulation 43(1)(b) (xxiii). It submitted that the sole purpose of the works is to form an access route for the construction of the telecommunications tower. The words "for or associated with" are broad words based upon their plain and ordinary meaning. There is no reason why they should be read down as a matter of statutory construction. The works are clearly "for or associated with" the telecommunications facility.

29 The permit applicant referred me to the case of *Optus Mobile Pty Ltd v Yarra Ranges SC*[8] in which case the Tribunal found that certain works

[7] Pursuant to Regulation 43(1)(2) the terms used in sub-regulation (1)(b) have the same meanings as they have in the Victoria Planning Provisions and hence within the Campaspe Planning Scheme.
[8] [2011] VCAT 2414.

associated with the construction of a monopole, including an access track, together with the monopole itself, constituted the relevant "activity". However, I note that in that case, the access track was only about 30 metres in length.

30 The permit applicant also submitted that the access route is not a "road" as that term is used in Regulation 44 of the Regulations and is therefore not a high impact activity in its own right, even if it is found not to be for or associated with the use of the land for a telecommunications facility.

31 Regulation 44 provides that:

> (1) The construction of any one or more of the following is a high impact activity if the construction would result in significant ground disturbance—
>
> …
>
> (e) a road with a length exceeding 100 metres;

32 "Road" is defined in the Regulations as follows:

> "road" has the same meaning as in the Road Management Act 2004

33 "Road" is defined in the *Road Management Act* 2004 as follows:

> (a) any public highway;
>
> (b) any ancillary area;
>
> (c) any land declared to be a road under section 11 or forming part of a public highway or ancillary area;

34 It is clear from the definition of "road" in the Regulations that the inclusion of "a road with a length exceeding 100 metres" within Regulation 44 as an item of infrastructure that is a high impact activity is only relevant if the "road" is, in essence, a public road.

35 This conclusion is reinforced by having regard to the definition of "roadway" in the Regulations. It too refers to the definition in the *Road Management Act* 2004, which defines roadway as follows:

> "roadway" means—
>
> (a) in the case of a public road, the area of the public road that is open to or used by members of the public and is developed by a road authority for the driving or riding of motor vehicles;
>
> (b) in the case of any other road, the area of the road within the meaning of road in section 3(1) of the Road Safety Act 1986 —
>
> but does not include a driveway providing access to the public road or other road from adjoining land.

36 The only reference to "roadway" in the Aboriginal Heritage Regulations 2007 is in Regulation 12 dealing with minor works as exempt activities. Regulation 12(2)(a) provides that the construction or carrying out of the following works is an exempt activity –

(a) works on, over or under an existing roadway or existing rail infrastructure;

37 When read together, I conclude that the Regulations intend to exclude works associated with access routes or driveways on private land, which are not open to or used by the public, from the need for a CHMP. Such access routes being on private land fall outside the definition of high impact activity.

38 On this basis, I find that the access route is not a "road" within the meaning of the *Aboriginal Heritage Act* 2006 or the Aboriginal Heritage Regulations 2007 and no CHMP is required for it if it is considered to be a separate activity.

39 It remains to consider whether the access route is an activity in its own right or falls within the ambit of works "for or associated with the use of the land" for a telecommunications facility, as submitted by the permit applicant.

40 On the one hand, it might be argued that the length of the route – 3.3 kilometres – and consequently its scale, take the construction of the route out of the ambit of being ancillary to the telecommunications facility and mean that the works must be considered in their own right. On the other hand, the access route would have no purpose and would not be constructed if the telecommunications facility itself were not constructed.

41 I have concluded that notwithstanding its length, the access route is for or associated with use of the land for a telecommunications facility. The route is required to enable construction of the facility. It has no other purpose. If the tower were located in a different location close to a road, there would be no debate about a driveway or access track being part of the facility, such as occurred in the case of *Optus Mobile Pty Ltd v Yarra Ranges SC*. I do not consider the situation is any different in the present case just because the tower is more remotely located. Construction of the route is required solely because of construction of the tower. I therefore conclude that because it is for or associated with the use of the land for a telecommunications facility it falls within the exemption of a telecommunications facility.

42 As such, it is not necessary to consider whether the access route works would result in significant ground disturbance. Whether considered as part of the telecommunications facility or as works in their own right, the access route does not require a CHMP.

43 The applicants for review submitted that it was strange that a walking track with a length exceeding 100 metres[9] is a high impact activity, but an access route with a length of 3.3 kilometres[10] is not a high impact activity even though there is a likelihood that scattered uncut rocks from the stone axe

[9] Regulation 44(1)(f).
[10] or even 600 metres if only the last section of the route is considered

quarry littering the surface of the slope and the summit of Mt Camel are likely to be disturbed.

44 There may well be an anomaly in the Regulations in this respect, but just because ground disturbance may occur does not mean that the activity is a high impact activity or that the disturbance will fall within the definition of "significant ground disturbance". Indeed, any activity that is an exempt activity or which is not a high impact activity will not require preparation of the CHMP before a permit is granted or the activity is undertaken even though it may be within an area of cultural heritage significance and may involve significant ground disturbance. Notwithstanding this, the Tribunal must administer the Act and the Regulations as it finds them. In this particular case, I find that the development and use of the land for the access route is not a high impact activity and therefore no CHMP is required in respect of the access route.

Conclusion about CHMP

45 As a result, the use and development for which the permit application in this proceeding relates, namely the telecommunications facility and associated works, including the access route, do not require a CHMP.

46 So far as the power line is concerned, that is a separate issue and not one before me. Prima facie, it appears that a CHMP may be required for the power line, but this is not a matter I need to deal with as part of this proceeding and I make no specific findings about it.

WHAT MATTERS WILL BE RELEVANT AT THE HEARING?

47 The matters that may be relied upon by the applicants at the hearing depend upon the reasons why a permit is required and whether there are any exemptions from third party notice and review rights.

Why is a permit required?

48 The land is within a Farming Zone and subject to a Salinity Management Overlay. In addition, Clause 52.19 is relevant, which is the particular provision dealing with telecommunications facility.

Use of land under the Farming Zone

49 In the Farming Zone, any use listed in Clause 62.01 does not require a permit subject to the condition that the use must meet the requirements of Clause 62.01; otherwise, a permit is required under section 2 of Clause 35.07-1.

50 Clause 62.01 provides that a permit is not required for:

- The use of land for a Telecommunications facility if the associated buildings and works meet the requirements of Clause 52.19.

51 When considering whether a cultural heritage management plan was required, I found that the access route was "for or associated with the use of the land" for a "telecommunications facility". For similar reasons, I find that under the planning scheme the access route is ancillary to the use of the land for a telecommunications facility. It is not a separate use in its own right.

52 Whether a permit is required for use of the land for a telecommunications facility under the Farming Zone will therefore depend on whether the associated buildings and works meet the requirements of clause 52.19, in which case it is a section 1 use and does not require a permit. If not, it will be a section 2 use and a permit will be required.

Buildings and works under the Farming Zone

53 Clause 62.02-1 provides that:

> Any requirement in this scheme relating to the construction of a building or the construction or carrying out of works, other than a requirement in the Public Conservation and Resource Zone, does not apply to:
>
> - Buildings and works associated with a telecommunications facility if the requirements of clause 52.19 are met.

54 Therefore, the question of whether a telecommunications facility is a section 1 or section 2 use in the Farming Zone, and hence whether a permit is required for buildings and works, will depend on whether the requirements of clause 52.19 are met.

Buildings and works under the Salinity Management Overlay

55 Clause 44.02-1 of the Salinity Management Overlay provides that a permit is required to construct a building or construct or carry out works, but this does not apply if a schedule to the overlay specifically states that a permit is not required. There is nothing in the overlay schedule that specifically states that a permit is not required for a telecommunications facility.

56 Clause 62.02-1 applies to buildings and works under the Salinity Management Overlay. The situation is the same as under the Farming Zone. The need for a permit will depend on whether the requirements of clause 52.19 are met.

Clause 52.19

57 Clause 52.19 includes its own permit trigger for buildings and works for a telecommunications facility separate to any other requirements under a zone or overlay.

58 Clause 52.19-2 provides as follows:

> **Permit requirement**

A permit is required to construct a building or construct or carry out works for a Telecommunications facility.

This does not apply to:

- Buildings and works associated with:
  - A low-impact facility as described in the Telecommunications (Low-impact) Facilities Determination 1997.
  - The inspection and maintenance of a Telecommunications facility as defined in the Telecommunications Act 1997 (Cwth).
  - A facility authorised by a Facilities Installation Permit issued under the Telecommunications Act 1997 (Cwth).
  - A temporary defence facility.
  - The connection of a building, structure, caravan or mobile home to a Telecommunications line forming part of a Telecommunications network.
  - Any Telecommunications facility described in A Code of Practice for Telecommunications Facilities in Victoria which complies with the requirements of the Code.
- Buildings and works associated with activities which are:
  - Authorised under Clause 6(2) of Division 3 of Schedule 3 of the Telecommunications Act 1997 (Cwth).
  - Carried out by bodies listed in Sections 46 to 51 (inclusive) of the Telecommunications Act 1997 (Cwth) pursuant to legislation applying to those bodies.

59 In the present case, clause 52.19-2 means that a permit is required to construct a building or construct or carry out works for a telecommunications facility unless the telecommunications facility complies with the requirements of the Code of Practice, in which case no permit is required.

60 The Code of Practice for Telecommunications Facilities in Victoria sets out the circumstances and requirements under which land may be developed for a telecommunications facility without the need for a planning permit. If a planning permit is required, it sets out principles for the design, siting, construction and operation of a telecommunications facility, which must be considered when deciding on an application for a planning permit.

61 In determining whether a planning permit is required, the type of telecommunications facility proposed must correspond with a description in section 5 of the Code of Practice and meet the listed requirements. The list of telecommunications facilities included in section 5 of the Code of Practice include the following: a microcell; an above ground housing; a temporary facility; underground cable or duct; boring cable; a radio communications dish; replacement of a tower or a facility associated with a

tower to enable co-location; co-location of a facility on an existing tower; a telecommunications facility located inside a building, structure or tunnel; a telecommunications facility located on a roof; a repeater installation; a telecommunications facility attached to infrastructure within a Road Zone Category 1; and an optical fibre ground wire on high voltage transmission towers.

62 The telecommunications facility in the current case is not one of these facilities. Consequently, I find that a permit is required under clause 52.19.

63 Having regard to clause 52.19 and the specific provisions of the Code of Practice, the question then arises whether the provisions of clause 62.01 and 62.02-1 apply to exempt the telecommunications facility from the need for a permit for use or buildings and works in the Faming Zone or under the Salinity Management Overlay.

64 Clause 62.01 provides that any requirement in the scheme relating to the use of land does not apply to the use of land for a telecommunications facility if the associated buildings and works meet the requirements of clause 52.19. Equally, clause 62.02-1 provides that any requirement in the scheme relating to the construction of a building or the construction or carrying out of works does not apply to buildings and works associated with a telecommunications facility if the requirements of clause 52.19 are met.

65 These provisions are poorly drafted. They do not make it clear whether, if a permit is required for buildings and works under clause 52.19-2, then no permit is required under any other provision. Alternatively, and more logically, it would seem that the intent is that if a telecommunications facility does not require a permit under clause 52.19-2 for any reason, including that it is described in the Code of Practice and complies with the requirements of the Code, then both use and development are exempt from the need for a permit under both clauses 62.01 and clause 62.02-1. I have interpreted these provisions in this way.

66 This interpretation is consistent with the provisions of the Code of Practice itself. It states that the purpose of the 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.

67 In describing how to use the Code, section 3 states:

> Clause 52.19 of the planning scheme sets out the requirements which apply to a telecommunications facility. … Clause 52.19-2 provides that a permit is required for a telecommunications facility, including any facility described in this code if the requirements of the code are not met.

To determine whether a proposed telecommunications facility may be constructed without the need for a planning permit:

- determine if the type of telecommunications facility proposed corresponds with a description in section 5
- determine whether the listed requirements are met.

If the facility corresponds with a description in section 5 and the relevant requirements are met, no planning permit is required. If the requirements of the code are not met, a permit is required.

68 As a result, I find that when clauses 62.01 and 62.02-1 refer to buildings and works associated with a telecommunications facility meeting the requirements of clause 52.19, they are referring to buildings and works that:

- are associated with one of the telecommunications facilities described in section 5 of the Code of Practice; and
- the requirements set out in section 5 in respect of the particular type of telecommunications facility in question are met.

Conclusions about permit requirements

69 In the circumstances of the present case, I therefore find that:

- A permit is required for buildings and works for the telecommunications facility pursuant to clause 52.19-2.
- Use of the land for a telecommunications facility is not exempt under clause 62.01.
- A permit is required for use of the land for a telecommunications facility under section 2 of clause 35.07-1. Because the use does not comply with clause 62.01, which would make it a section 1 use, it falls within the category "any other use not in section 1 or 3" and is therefore a section 2 use in the Farming Zone.
- A permit is required for buildings and works associated with a use in section 2 of clause 35.07-1 pursuant to clause 35.07-4. The requirement for a permit for buildings and works in the Farming Zone is not exempt from the need for a permit under clause 62.02-1 because the requirements of clause 52.19 are not met.
- A permit is required for buildings and works associated with the use of the land for a telecommunications facility under clause 44.02-1 of the Salinity Management Overlay. The buildings and works are not exempt under clause 62.02-1 because the requirements of clause 52.19 are not met.
- The buildings and works for which a permit is required include the telecommunications tower, associated equipment and antennas, the fenced compound and the full length of the access route.

Are any of the permit requirements exempt from third party notice and review rights?

70 The requirements for a permit for use and development under the Farming Zone are not exempt from third party notice and review rights.

71 The permit for buildings and works under the Salinity Management Overlay is exempt from third party review rights pursuant to clause 44.02-6 of the Campaspe Planning Scheme. This means that the applicants for review may not oppose this aspect of the proceeding at the hearing.

72 Clause 52.19-4 provides that an application for a permit for a telecommunications facility is exempt from third party notice and review rights unless:

- The Telecommunications facility is:
  - A radio communications dish greater than 1.2 metres in diameter or
  - A Telecommunications tower (other than a low-impact facility described in the Telecommunications (Low-impact Facilities) Determination 1997).
- The land is located in an Environmental Significance Overlay, a Vegetation Protection Overlay, a Significant Landscape Overlay, a Heritage Overlay, a Design and Development Overlay or an Erosion Management Overlay.
- The land is public land not in a public land zone and the responsible authority is not the public land manager.

73 In the present case, the telecommunications facility falls within the second sub-category of the first dot point. In other words, it is a telecommunications tower (other than a low impact facility described in the Telecommunications (Low Impact Facilities) Determination 1997.

74 The telecommunications facility does not fall within either the second or third categories specified under clause 52.19-4.

75 There was some discussion at the practice day hearing about whether it was necessary for all three dot points of clause 52.19-4 to be satisfied before the permit application was not exempt. I invited further submissions on the point. I have had regard to the submissions made by the permit applicant and agree with their construction that the list of alternatives is a list of cumulative alternatives. In other words any one of the alternatives must be satisfied, but more than one can also be satisfied, in order to take the application for permit out of the exemption from the third party notice and review rights set out in clause 52.19-4.

76 I note that the list is not linked by the words “and” or “or” so there is no guidance to be gained from this aspect of the wording of the clause.

77 I am grateful to the permit applicant for the detailed investigation and analysis of the history of the provision and comparison with other lists of

sub-clauses within the planning scheme. I agree with their assessment that there is little that can be gained from an assessment of the legislative history of the clause or from the Code of Practice.

78 The permit applicant submits that a wide reading of the exemption could be taken (and hence a narrow reading of the exemption within the exemption), meaning that all three limbs would need to be satisfied before advertising was required and appeal right conferred. I disagree with this interpretation. In support of this construction, the permit applicant relies on the purpose of clause 52.19 to encourage the provision of telecommunications facilities and to ensure that telecommunications infrastructure and services are provided in an efficient and cost effective manner to meet community needs.

79 However, to require compliance with all three limbs of clause 52.19-4 would mean that the exemption from the exemption would be narrowed to a point of virtual extinction. Rather, I consider that each of the limbs provides an exemption from the exemption. Only one of the limbs needs to be complied with in order to make the application for a permit exempt from the general exemption from third party notice and review rights.

80 In the present case, the permit application is for a telecommunications facility, which is a telecommunications tower (other than a low impact facility described in the Telecommunications (Low Impact Facilities) Determination 1997). I therefore find that the exemption from third party notice and review rights set out in clause 52.19-4 does not apply to this permit application.

81 Accordingly, the two applications for review by the Healys and the Pfarrs are valid applications for review under the Farming Zone and clause 52.19, but not the Salinity Management Overlay.

Decision guidelines and relevant grounds

82 The matters that will be relevant to the decision whether to grant a permit for use and development under the Farming Zone will be those matters set out in the decision guidelines under clause 35.07-6 and clause 65.

83 The matters that will be relevant in deciding whether to grant a permit under clause 52.19 will be those matters set out in the decision guidelines in clause 52.19-6, the decision guidelines of clause 65 and, in particular, the principles for the design, sighting, construction and operation of telecommunications facilities set out in section 4 of the Code of Practice.

84 Principle 1 set out under section 4.1 of the Code is that a telecommunications facility should be sited to minimise visual impact. I note that in the application of this principle set out in the Code of Practice it states that:

- On, or in the vicinity of a heritage place, a telecommunications facility should be sited and designed with external colours, finishes and scale sympathetic to those of the heritage place. A

heritage place is a heritage place listed in the schedule to the Heritage Overlay in the planning scheme.

85 This principle does not refer to aboriginal cultural heritage. Indeed, there is nothing in the Code of Practice relevant to aboriginal cultural heritage. Nevertheless, I consider that aboriginal cultural heritage would be a relevant consideration having regard to:

- The objective of planning in Victoria to conserve and enhance those places which are of scientific, aesthetic, or historical interest, or otherwise of special cultural value[11].
- It is a matter that has been raised in objections to the responsible authority and in this application for review.
- Clause 15.03-2 of the State Planning Policy Framework has the objective to ensure the protection and conservation of places of aboriginal cultural heritage significance and as a strategy to provide for the protection and conservation of pre and post contact aboriginal cultural heritage places.

86 Of course, the Tribunal will be required to balance any issues relating to aboriginal cultural heritage with other relevant considerations in the interests of net community benefit and sustainable development.[12]

87 Other issues raised by the applicants for review in their statement of grounds that will be relevant include:

- Visual impact
- Effect on flora and fauna
- Effect on amenity of the area
- Response to the principles set out in section 4 of the Code of Practice
- Soil erosion and stability

88 However, the following issues will not be relevant:

- Extent of notice of the permit application
- Issues associated with processing the permit application
- Issues associated with alternative technologies

FUTURE CONDUCT

89 My finding that there is no requirement for preparation of a cultural heritage management plan for the telecommunications facility, including the access route, means that the proceeding may now be listed for a hearing.

90 I have outlined the reasons why a permit is required and the matters that will be relevant to a consideration of why a permit is required.

[11] Section 4(1)(d) *Planning and Environment Act* 1987
[12] See clause 10.02 Campaspe Planning Scheme

91 I will list the proceeding for a hearing for 2 days before a two member Tribunal, including a member with experience involving aboriginal cultural heritage.

Helen Gibson
Deputy President