FEDERAL COURT OF AUSTRALIA

The Summit Group (Australia) Pty Ltd v Owners Corporation 1 Plan No PS746020J [2020] FCA 1847

File number:	VID 479 of 2020
Judgment of:	**COLVIN J**
Date of judgment:	23 December 2020
Catchwords:	**COMMUNICATIONS LAW** - application for declaration that carrier entitled to access property to install radio communications antennas and equipment - application for injunction restraining respondents from preventing carrier from carrying out works on property - where carrier gave notice of intention to access property under *Telecommunications Act 1997* (Cth) - where notice specified range of dates proposed to enter property - where range of dates included dates before required period of notice - whether notice allowed required period of notice - whether proposed activities in respect of low-impact facilities - whether period of notice affected validity of notice - application dismissed
Legislation:	*Telecommunications Act 1997* (Cth) Part 6, Schedule 3, cl 15, cl 17
Cases cited:	*Australian Mines and Metals Association Inc v Construction, Forestry, Maritime, Mining and Energy Union* [2018] FCAFC 223; (2018) 268 FCR 128 *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* [2012] HCA 56; (2012) 248 CLR 378 *Forrest & Forrest Pty Ltd v Wilson* [2017] HCA 30; (2017) 262 CLR 510 *Hutchison 3G Australia Pty Ltd v Director of Housing* [2004] VSCA 99 *Minister for Employment and Workplace Relations v Gribbles Radiology Pty Ltd* [2005] HCA 9; (2005) 222 CLR 194 *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; (2017) 262 CLR 362
Division:	General Division

Registry:	Victoria
National Practice Area:	Other Federal Jurisdiction
Number of paragraphs:	83
Date of last submissions:	18 December 2020 (Applicant) 21 December 2020 (Respondents)
Date of hearing:	14 December 2020
Counsel for the Applicant:	Mr M Hoyne
Solicitor for the Applicant:	South East Lawyers
Counsel for the Respondents:	Mr J Lipinski
Solicitor for the Respondents:	SBA Law

ORDERS

VID 479 of 2020

BETWEEN:	**THE SUMMIT GROUP (AUSTRALIA) PTY LTD** Applicant
AND:	**OWNERS CORPORATION 1 PLAN NO PS746020J** First Respondent
	OWNERS CORPORATION 2 PLAN NO PS746020J Second Respondent
	OWNERS CORPORATION 8 PLAN NO PS746020J Third Respondent
	OWNERS CORPORATION 5 PS746020J Fourth Respondent
	OWNERS CORPORATION 6 PS746020J Fifth Respondent

ORDER MADE BY: **COLVIN J**

DATE OF ORDER: **23 DECEMBER 2020**

THE COURT ORDERS THAT:

1. The application is dismissed.

2. The applicant pay the respondents' costs of the application to be assessed if not agreed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

COLVIN J:

1 The Summit Group (Australia) Pty Ltd (**Summit**) seeks to install radio communications antennas and associated equipment on the common property of a building in Port Melbourne that is the subject of a strata plan. On 18 May 2020, Summit gave notice of its intention to access the common property (**Notice**). The respondents represent those with an interest in the common property (**Owners**).

2 The Notice was purportedly given under the terms of a regulatory regime established by the *Telecommunications Act 1997* (Cth). The Owners maintain that the Notice did not comply with the legislative requirements and was therefore invalid and for that reason Summit is not entitled to access the common property. Summit seeks a declaration that it is entitled to access the common property for the purposes of carrying out the activities set out in the Notice, alternatively an injunction restraining the Owners from preventing Summit from doing so. It also claims damages for alleged breach of statutory duty. The matter proceeded on the basis that there would first be a determination of all issues other than those arising on the claim that there had been a breach of statutory duty by the Owners.

Issues

3 Broadly speaking, the Owners' contention as to the invalidity of the Notice depended upon two arguments. First, a claim that the Notice did not allow the required period of notice. Second, a claim that the proposed activities the subject of the Notice were not 'low-impact facilities' and therefore could not be undertaken using the relevant notice procedure. Relief was sought by Summit on the basis that both claims were without foundation. As to the first claim it was also claimed by Summit, in the alternative, that any issue with the period of notice did not affect the validity of the Notice but rather only affected when the proposed activities might be undertaken. If the Notice did comply, there was a further issue as to whether the relief sought should be granted in circumstances where the dates specified in the Notice as to when Summit proposed to carry out the specified activities have now passed.

4 Therefore, there are four issues:

(1) Did the Notice allow the required period of notice?

(2) Are the proposed activities in respect of 'low-impact facilities'?

(3) Did any issue with the period of notice affect its validity such that the proposed activities might not be undertaken based upon the Notice?

(4) If there is no issue with the Notice, can Summit undertake the proposed activities based upon the Notice even though the specified dates have now passed?

The relevant factual context

5 The relevant facts were not in dispute. Events began when Summit sent the Notice by post to the Owners on 18 May 2020.

6 The Owners accepted that the Notice had actually been received some time on or prior to 29 May 2020. However, it is common ground that, under applicable regulations, the Notice was deemed to have been received by the Owners on 25 May 2020 (being five business days after posting). It is to be noted that just before the dispatch of the Notice (on 16 May 2020) the relevant regulations were changed to increase the period of deemed receipt from three days to five days after posting.

7 Relevantly for present purposes, the Notice stated:

DATE(S) PROPOSED TO ENTER PROPERTY, ENGAGE IN ACTIVITY AND DEPART	LOCATION/DESCRIPTION OF LAND AND PREMISES	PURPOSE OF ACCESS
Between 5th June and 7th August 2020	All external and interior areas of the land and buildings and any other fixtures on the Common Property of Plan No PS746020J 320 Plummer Street, Port Melbourne VIC 3207	To undertake the installation of 'Low-impact Facilities', being radio communications antennas and associated equipment

8 The Notice also referred to attached 'Additional Information' that was said to be specific information that the Telecommunications Code of Practice (**Code**) required Summit to provide. It concluded with the words: 'Any objections should be directed in writing to the person and at the address specified in the attached additional information'.

9 The attached information began by stating:

> Summit is required by law to give you at least 10 business days' notice before engaging in the activity proposed on your land and/or in your premises.

10 Then, after setting out a summary of Summit's statutory obligations when undertaking the proposed activities, the attached information described the right of objection under the Code. It then said:

> In order for any objection to be valid under the Code, your objection must be received at least 5 business days before Summit proposes to engage in the activities …

11 The additional information then described the process that would follow if there was an objection.

12 The Notice attached a Schedule that described the equipment and site layout in the following terms:

> **1. Equipment Overview**
>
> a. 3000mm mast installed at Location A. This mast is comprised of a pole of 2400mm in height with a 'headframe' of 600mm attached to its top. 3000mm mast installed at Location B.
>
> b. Antennas installed on the mast at Location A
>
> i. Four sector antennas (158mm x 391mm x 416mm)
>
> ii. Three dish antennas (680mm diameter)
>
> iii. Four panel antennas (400mm x 400mm x 100mm)
>
> c. Antennas installed on the mast at Location B
>
> i. Three dish antennas (680mm diameter)
>
> d. Summit Control Cabinet at Location C (600mm x 400mm x 300mm) (the equipment shelter)
>
> e. Data cables between Locations A, B, & C
>
> f. Earthing cables between Locations A, B, & C
>
> The Summit Installation meets the criteria for a Low Impact Facility set out in the Low Impact Facilities Determination (2018) as follows:
>
> - No dish antenna will protrude more than 2 meters from the supporting structure (Part 1, Item 6);
> - No dish antennas are more than 1.2 meters in diameter (Part 1, Item 6);
> - No panel antenna will protrude more than 3 meters from the supporting structure (Part 1, Item 4);
> - All panel antennas are less than 2.8 meters long (Part 1, Item 4); and
> - The equipment shelter is used solely to house equipment used to assist in providing a service by means of a facility mentioned in Part 1, is less than 3 meters high, has a base area of less than 7.5 square meters (Part 3, Item 5).

13 So it can be seen from the terms of the Notice that the proposed activities include the installation of masts at each of Locations A and B (as specified). The masts are proposed to be 3 metres in height and equipment is proposed to be attached to each mast. At Location A there

are to be four sector antennas, three dish antennas and four panel antennas. At Location B there are to be three dish antennas only.

14 On 2 June 2020, an email was sent on behalf of the Owners to Summit which stated that the Owners 'will conduct further investigate [sic] on the matter and will come back to you shortly'.

15 On the same day, a response was sent by Summit. It said:

> Thank you for your email.
>
> Your objection has not been received 5 days' prior to our proposed date of starting works, therefore, any objection in this matter is no longer deemed valid.
>
> We will be commencing works in line with the Land Access Notice issued in line with our statutory rights under the Act.

16 It may be observed that it was necessarily implicit in the email that Summit could commence the activities the subject of the notice on or after 5 June 2020. On the evidence, by this stage, there had been no communication with the Owners about the proposed date for engaging in the installation activities other than the content of the Notice itself. The Notice specified that the activities were proposed 'Between 5th June and 7th August 2020'.

17 At the hearing, Summit maintained that the Owners' email of 2 June 2020 was not an objection and that there was no valid objection until well after 7 August 2020. The Owners did not seriously dispute that position.

18 On 9 June 2020, lawyers acting for Summit sent an email to the Owners asserting that the period of objection had expired. They claimed that Summit was statutorily entitled to proceed with installation. They stated that Summit intended to commence installation on 16 June 2020 and would require access on each day of 16 to 18 June 2020. Implicit in the response was a claim that the period for objection was to be determined by reference to the dates specified in the Notice (particularly the date of 5 June 2020). If the date of 16 June 2020 was to be treated as the date when Summit proposed to engage in the notified activities then there was still time to object. However, Summit maintained that the time for objection had passed.

19 Lawyers acting for the Owners responded by email on 12 June 2020. They disputed the claim that the period for objection had expired. They maintained that the last day that an objection was permitted was five business days before Summit proposed to engage in the activities set out in the Notice which was now admitted to be 16 June 2020 and any objection before 9 June 2020 was within time (apparently then treating the email of 2 June 2020 as an objection).

20 The lawyers for Summit responded by email on 12 June 2020 in the following terms:

> Our client served the LAAN in question on 16 April 2020, with an access date of 5 June 2020 required. Your client contacted our client on 2 June 2020 seeking to object to the LAAN. This date, 2 June 2020, was within 5 business days of the required access period and accordingly, the objection was not valid.
>
> …
>
> The time for normal objections and following of the TIO process has now passed and we do not intend to engage in negotiations regarding access, as we are not required to do so.
>
> The delay to the start date was an absolutely courtesy to your client to allow it to make the appropriate arrangements. As previously advised, our client intends to commence installation of the Facilities from 9.00am on Tuesday, 16 June 2020. Our client will require access from 9.00am to 6.00pm each day of 16-18 June 2020 inclusive.

21 At this point, it is plain that Summit was maintaining that the time for objection was to be determined by reference to the earliest date specified in the Notice, namely 5 June 2020.

Issue 1: Did the Notice allow the required period of notice?

22 The Notice specified a range of dates within which activities were proposed. The earliest of those dates was 5 June 2020.

23 In order to be able to secure a right to enter to carry out the proposed installation activities, Summit was obliged to comply with the terms of the Code. Relevantly for present purposes, the Code specified what was required in relation to the notice to be served before 'engaging in a low-impact facility activity'. It stated in cl 4.23(4) that the notice must be given 'at least 10 business days before the carrier begins to engage in the activity'.

24 The Code also provided that the notice must contain 'a statement explaining the arrangements under this Chapter for making objections to the activity': cl 4.26(1)(b). It required any objection to include reasons for the objection: cl 4.29(2). It then stated in cl 4.30 that the reasons for the objection may relate only to all or any of the following matters:

> The reasons for the objection may relate only to all or any of the following matters:
>
> (a) using the objector's land to engage in the activity;
>
> (b) the location of a facility on the objector's land;
>
> (c) the date when the carrier proposes to start the activity, engage in it or stop it;
>
> (d) the likely effect of the activity on the objector's land;
>
> (e) the carrier's proposals to minimise detriment and inconvenience, and to do as little damage as practicable, to the objector's land.

25 Therefore, the provisions of the Code as to the making of an objection assumed that the owner of the relevant land or premises would be made aware of when the proposed activity might be undertaken so as to be able to consider whether the date was a reason for objecting and also so as to know when the objection was required to be notified. They also required the notice to inform the owner of the arrangements for making objections. They provided that the objection must be given to the carrier 'at least 5 business days before the carrier proposes to engage in the low-impact facility activity': cl 4.31.

26 In the present case, as has been noted, the Notice stated that the proposed activities may commence as early as 5 June 2020 and the Notice was deemed to be served on 25 May 2020. A period of 10 business days from 25 May 2020 did not expire until 9 June 2020. Therefore, the Notice contemplated that the proposed activities may commence on dates that were well before the required notice period of 10 business days if that period is to be calculated by reference to the dates in the Notice.

27 Notwithstanding the position that was adopted by its lawyers in the correspondence exchanged before the present proceedings were commenced, Summit now submits that because it informed the Owners on 9 June 2020 that it did not propose to commence the activities until 16 June 2020, it is the date of 16 June that is to be used to determine whether the 10 business days' notice requirement has been met. It says that the obligation was to give at least 10 business days' notice before it actually began the specified activities and it did so by serving the Notice and, after serving the Notice, not seeking to commence the proposed activities until 16 June 2020.

28 The Owners submit that the Notice contemplated activities being undertaken on 5, 6, 7 or 8 June 2020 and that activities undertaken on those dates could not have been undertaken lawfully because they would not have conformed to the requirement that the notice be given '10 business days before the carrier begins to engage in the activity'. Further, the Owners say that it was not possible to specify separately (that is by some means other than the Notice itself) when the work would commence. Rather, so it was submitted, in the context of the Code provisions as to objections, the requirement that the notice be given at least 10 business days before the carrier begins to engage in the activity means that the proposed dates specified in the Notice were required to be at least 10 business days after the date the Notice was given. Otherwise, so it was submitted, there was likely to be confusion and uncertainty concerning the right to object because the time within which to object could not be determined from the

terms of the Notice, a matter not made clear in the Notice. Therefore, a party receiving a notice in the form used by Summit might think that the time for objecting had passed by the end of May (five days before 5 June 2020) when actually the party had until five days before 16 June 2020 in which to object. Also, there would be confusion if an informal separate communication as to when the proposed activities described in the Notice would actually commence could establish the date for objection rather than the content of the Notice itself.

29 Summit submits that the terms of the Code are clear as to the requirements for a valid notice of proposed activities. They are set out in cl 4.23 as follows:

> (2) The notice must specify the purpose for which the carrier intends to engage in the activity.
>
> (3) The notice must also contain a statement to the effect that, if a person suffers financial loss or damage in relation to property because of anything done by the carrier in engaging in the activity, compensation may be payable under clause 42 of Schedule 3 to the Act.
>
> …
>
> (4) The notice must be given at least 10 business days before the carrier begins to engage in the activity.

30 Summit submits that there is no requirement that the notice itself state when the carrier proposes to begin to engage in the activity. Rather, the notice must be given 10 days before the point in time when the carrier begins to engage in the activity. On this submission, it is the date of commencement of the activities the subject of the notice that assumes significance, not any proposed dates that may be specified in the notice.

Relevant principles

31 The principles to be applied when construing legislative provisions are well established. As stated by Kiefel CJ, Nettle and Gordon JJ in *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; (2017) 262 CLR 362 at [14]:

> The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.
>
> (footnotes omitted)

Legislative context

32 The Code takes effect pursuant to the terms of Schedule 3 of the *Telecommunications Act* which confers statutory authority for carriers (as defined) to enter onto land or premises to inspect for suitability for its purposes and to undertake installation, amongst other things, of a 'low-impact facility' and to maintain any such facility. It also provides that the Minister may by legislative instrument determine that a specified facility is a low-impact facility. The Minister has done so by the terms of the *Telecommunications (Low-impact Facilities) Determination 2018* (**Determination**). It will be necessary to consider the terms of the Determination when addressing the second issue concerning the validity of the Notice. At this point it is sufficient to note that it was common ground that it is the regulatory provisions as to the notice to be given where the proposed activities concern low-impact facilities that are relevant.

33 By cl 15 of Schedule 3 to the *Telecommunications Act*, the Minister may make a Code of Practice setting out conditions to be complied with by carriers when undertaking activities covered by particular provisions of the Schedule. The Code is such an instrument. A carrier must comply with any such Code of Practice.

34 Then, cl 17 of Schedule 3 specifies certain general obligations in respect of the giving of a notice by a carrier before carrying out an activity under the authority conferred by Schedule 3. Relevantly for present purposes, cl 17 states:

> (1) Before engaging in an activity under Division 2, 3 or 4 in relation to any land, a carrier must give written notice of its intention to do so to:
>
> (a) the owner of the land; and
>
> (b) if the land is occupied by a person other than the owner - the occupier.
>
> (2) The notice must specify the purpose for which the carrier intends to engage in the activity.
>
> (3) The notice under subclause (1) must contain a statement to the effect that, if a person suffers financial loss or damage in relation to property because of anything done by a carrier in engaging in the activity, compensation may be payable under clause 42.
>
> (4) The notice must be given at least 10 business days before the carrier begins to engage in the activity.

35 It is to be noted that cl 17 of Schedule 3 does not require, in terms, the carrier to specify when the activities will be undertaken. It requires only that at least 10 business days' advance notice must be given to the owner or occupier as the case may be of the land where the carrier intends

to engage in the activity (hereafter, **owner**). Implicitly, the carrier must also specify the proposed activity (or alternatively the requirement to state the purpose of engaging in the activity carries with it a need to specify the activity). A notice that some unspecified activity was to be undertaken would serve little purpose. More fundamentally, it would not enable the recipient to consider whether the activity was indeed a low-impact activity of a kind that might be undertaken in accordance with the statutory right of entry conferred by Schedule 3.

36 It is also to be noted that Schedule 3 does not provide for a right to object. It deals only with prior notice of activities. However, as has been noted already, the Code provides for the making of an objection to an activity where a notice is given. It requires information about the arrangements for making the objection to be included in the notice: cl 4.26. Further it states that if the Telecommunications Industry Ombudsman (**Ombudsman**) has issued a document as to how the arrangements for making objections must be explained, the carrier must comply with that document: cl 4.26(2). As has already been observed, any objection by an owner must give reasons and those reasons must be confined to matters listed in the Code: cl 4.30 (as quoted above). It is the Code that provides for when the objection must be given. As has been noted, it requires the objection to be given 'at least 5 business days before the carrier proposes to engage in the low-impact facility activity': cl 4.31.

37 If there is an objection then, under the Code, the carrier must not engage in the relevant activity unless: (a) the objection is resolved by agreement; (b) there is no request by the recipient of the notice within nine business days of the response by the carrier to the objection to refer the objection to the Ombudsman; (c) the Ombudsman deals with the objection without giving any direction to the carrier; or (d) the Ombudsman gives a direction to the carrier.

38 The carrier has an obligation to consult with the objector about the objection within five business days of receiving the objection and to make reasonable efforts to resolve the objection within 20 days: cl 2.32.

39 The reference in the *Telecommunications Act* and in the Code to the Ombudsman is to the body established under the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth) which requires all carriers to enter into an industry ombudsman scheme to be operated by Telecommunications Industry Ombudsman Limited. The scheme must provide for the Ombudsman to investigate, make determinations relating to and give directions relating to complaints. The *Telecommunications Act* contemplates the conferral of certain types of authority on the Ombudsman. In particular, if the Ombudsman consents, an industry code

developed under Part 6 of the Act may confer functions and powers on the Ombudsman. Codes developed under Part 6 are to be developed by bodies or associations that represent sections of the telecommunications industry.

40 The Code is not an industry code. It is prepared by the Minister in the exercise of the power conferred by cl 15 of Schedule 3 of the *Telecommunications Act*. Nevertheless, it appears that authority has been conferred on the Ombudsman to deal with objections by not accepting the objection or by making a direction to the carrier as to what must be done. The present case is not concerned with any aspect of the process for dealing with an objection because the parties are joined as to issues relating to the validity of the Notice. Even so, the procedure specified in the Code by which objections are to be addressed by the Ombudsman forms part of the context in which the notice provisions of the Code are to be construed.

Evident purpose

41 The evident purpose of the relevant provisions of the Code is to ensure that reasonable notice is given before low-impact activities are undertaken by a carrier on the land or premises of a third party. Also there is an evident purpose that there be a procedure for objecting to the proposed activities which is limited as to the nature of the objections that may be raised and provides for their timely resolution. The time frames are consistent with a purpose that any objection be made promptly. There is also a purpose of ensuring that the recipient of the notice is made aware of the right to object and the manner of its exercise.

42 There is a plain intention to interfere with established common law rights for the purposes of allowing the installation of low-impact facilities. The terms of the Code, which have statutory effect, reflect a balancing as between the interests of carriers and owners where activities are proposed to be undertaken by the carriers. Beyond that, it is a matter of construction of the provisions as to where the balance lies. The limits of the guidance provided by the evident purpose must be recognised where the purpose involves a balancing of interests or considerations with no further purposive guidance as to where that balance has been struck in the legislation: *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* [2012] HCA 56; (2012) 248 CLR 378 at [26]; *Minister for Employment and Workplace Relations v Gribbles Radiology Pty Ltd* [2005] HCA 9; (2005) 222 CLR 194 at [21]; and *Australian Mines and Metals Association Inc v Construction, Forestry, Maritime, Mining and Energy Union* [2018] FCAFC 223; (2018) 268 FCR 128 at [80]-[84] (Allsop CJ, Griffiths and O'Callaghan JJ).

43 However, it is important to note that the terms of Schedule 3 of the *Telecommunications Act* were enacted as part of a statute that did not include the Code. Rather, it empowered the making of a Code. In the result, the Code restated the terms of cl 17 of Schedule 3 as to the requirement for 10 business days' notice to be given in advance of any activities and also dealt with the requirements concerning objections. In those circumstances, there are difficulties in using the content of the objection provisions in the Code to construe what is meant by the requirement for advance notification of the activities which is stated in Schedule 3 of the enacting legislation and is there divorced from any context concerning objection rights.

Two distinct notice requirements

44 As has been noted, the Code deals with two distinct matters that require notice where low-impact facility activities are proposed. *First*, there must be at least 10 business days' notice of the proposed activities before undertaking them (which is requirement that is stated in Schedule 3 and then restated in the same terms in the Code). This may be described as a notification requirement.

45 *Second*, there must be notification of the arrangements specified in the Code for objecting to the activities (a requirement stated only in the Code). Those arrangements require the recipient of the notice to object at least five business days before the carrier proposes to engage in the low-impact facility activity. Further, one of the matters that may be objected to is the date on which the activities are proposed to be undertaken. Together, these may be described as an objection requirement.

Proper construction

46 The competing contentions of the parties tended to state the relevant issue as a single question of construction as to what was required to be stated in a notice (such as the Notice) concerning the timing of proposed activities. However, in my view, it is necessary to bear in mind the separate character of each of the notification requirement and the objection requirement as specified in the Code.

47 Dealing first with the objection requirement, given the nature of the right to object and the manner in which the Code specifies the time within which an objection must be made, the Code provisions concerning the making of an objection implicitly require notice to be given of the proposed activities in a manner that specifies the earliest date on which the carrier proposes to undertake the activities. In my view, such a requirement is implicit in the terms of cl 4.26(1)(b),

read in the context of the subsequent provisions in cl 4.29 to cl 4.34. In short, the Code requirements to specify in any notice the arrangements for making an objection and to allow an objection to be made up to five days before the proposed activity are requirements that cannot be met without making plain in the notice the earliest date of the proposed activities. If there is no date specified, the notice fails to inform the recipient of the time for making an objection, being a key aspect of the arrangements for making an objection.

48 The alternative would be for notice to be given explaining the procedure for objection, but then leaving for some type of separate, perhaps informal, communication as to when the activities are proposed. By that separate communication the time within which an objection may be made would then be established and an objection could be made on that basis. However, such a construction would contemplate an additional form of notification that is not indicated by the Code. Further, as submitted for the Owners, it would introduce confusion as to the date from which the period for making an objection was to run. As such, it would be inconsistent with the evident purpose of the objection notification which is to ensure that an owner receiving a notice is told of the right to object and how to exercise that right. It would compromise such a purpose if the owner was told that the objection had to be made at least five business days before the proposed activity, but then was not told when the activity was proposed.

49 Therefore, taking account of the evident purpose, the objection requirement of the Code required the Notice to state the earliest date on which the proposed activities may be undertaken.

50 As a matter of practicality, there is no reason why the notice might not also specify an end date (as was done in the present case). However, there appears to be no statutory requirement to do so. What the Code requires in terms of the objection is that the notice specify a date after which the activities are proposed to be undertaken. Then, if there is no objection, the activities may be undertaken. The notice need not specify the precise date on which the activities will be undertaken such that a fresh notice is required if there is a short delay for some reason. The Code is concerned with making the owner aware of the proposed activities well before they happen and allowing for an objection before they are undertaken.

51 It was submitted that the fact that one of the reasons that an owner may object was the date when the carrier proposes to start the activity or stop it meant that the end date had to be specified. However, a notice that specified a start date would still allow such an objection to be made. The fact that no end date was specified would mean that it was unclear when the

proposed activities would end and that could itself be a basis for objection because it would mean the carrier could stop the activity on an uncertain future date of its own choosing.

52 If no end date is specified, a point may be reached where the notice is stale and a fresh notice is required because the passage of time indicates that the carrier does not intend to act on the notice or sufficient time has passed that the notice, if acted upon, may apply to a different set of circumstances in respect of which the owner should have an opportunity to raise an objection. For those reasons, a carrier may find it prudent to specify an end date to be clear as to the window within which it is proposed to undertake the activities. However, in my view, there is no requirement for an end date to be specified.

53 The possibility that the date on which the activities may be undertaken could be later than the date specified in the notice is also consistent with those aspects of the Code that contemplate that if there is an objection then it may concern the dates on which the works may be undertaken and the requirement that the carrier make a reasonable effort to reach agreement (which might be agreement to defer the activities until a time that is more convenient for the owner). There is no provision in the Code suggesting that in such a case the activities can only proceed if there is a fresh notice.

54 Therefore, even though the notice required by Schedule 3 (as repeated in the Code) only requires notice to be given 10 days before actually engaging in the activity (without specifying when the activity will commence), the inclusion of the objection regime in the Code requires the notice to specify when the activity is proposed to commence in order to meet the obligation to include in the notice information about the arrangements for making an objection. As the Code requires any objection to be made five business days before the proposed activities, the earliest commencement date of those proposed activities must be included as part of the information about the arrangements for making an objection.

55 Further, although Schedule 3 and the Code did not require the Notice to specify when the activities would be undertaken in order to meet the notification requirement, the Code contemplated that the carrier would meet both requirements. That is to say, the proposed date for commencement of the activities that had to be specified to the meet the objection requirement also had to be a date that met the 10 business days' notification requirement. This is the consequence of a contextual construction of the Code requiring an owner to meet both requirements. The Code contemplated that an owner would receive 10 business days' notice before any activities would be undertaken. Therefore, the proposed date for commencement

of activities that established the time within which to object could not be a date that was inconsistent with that requirement.

56 For reasons already given, a construction of the Code requirements that gave significance to a date that was to be found outside the terms of the notice would be impractical. Therefore, in order for the proposed date for commencement of the activities to meet the objection requirement it had to be a date that was no earlier than 10 business days after the actual or deemed date of service of the notice.

The form of notice in this case

57 In the present case, the Notice did not purport to simply provide notice of the intention to undertake specified activities (which might then be undertaken once 10 business days had expired). Rather, the Notice specified a range of dates on which it was proposed to undertake those activities. However, as the Notice proposed activities on or after 5 June 2020 it was that date that established the five day period for objection. If there had been no end date specified, but the works were delayed, the time for objecting would not be adjusted by reason of the delay. The time for objecting is not determined by reference to when the activities are actually undertaken (that would be antithetical to the nature of an objection procedure).

58 By specifying 5 June 2020 (and the days thereafter) as dates upon which the activities might be undertaken the notice did not meet the objection requirement. The date was too early. It contemplated activities being undertaken before 10 business days after the Notice was deemed to have been given and that could not occur.

59 Therefore, the Notice failed to comply with the Code in that respect.

Issue 2: Are the proposed activities in respect of 'low-impact facilities'?

60 The Determination describes those facilities that are low-impact facilities by reference to a table. A facility of the kind described in column 2 of an item is a low-impact facility if installed in an area mentioned in column 3: cl 3.1(1). Trivial variations for a facility mentioned in column 2 are to be disregarded: cl 3.1(3). Clause 3.1(4) then provides:

> A facility that is ancillary to a facility covered by subsection (1) is also a low-impact facility only if it is:
>
> (a) necessary for the operation or proper functioning of the low-impact facility; or
>
> (b) a shroud installed over a low-impact facility, where the shroud is intended to minimise the visual amenity impact of the low-impact facility and is colour-matched to its background; or

(c) installed, or to be installed, solely to ensure the protection or safety of:

(i) the low-impact facility; or

(ii) a facility covered by paragraph (a); or

(iii) persons or property in close proximity to the low-impact facility.

61 Relevantly for present purposes the table (set out in the Schedule to the Determination (Part 1 - Radio facilities)) contains the following items:

Column 1 **Item no.**	**Column 2** **Facility**	**Column 3** **Areas**
…		
4	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	Residential Commercial Industrial Rural
…		
6	Radiocommunications dish: (a) not more than 1.2 metres in diameter; and (b) either: (i) colour-matched to its background; or (ii) in a colour agreed in writing between the carrier and the relevant local government authority; and (c) if attached to a supporting structure, the total protrusion from the structure is not more than 2 metres	Residential Commercial Industrial Rural

62 On the evidence, the sector antennas to be installed at Location A were 'other like antenna' for the purposes of Item 4 by reason that they were 'like' a panel antenna.

63 For the Owners, the proposed activities were said not to be low-impact facilities for two reasons.

64 *First*, the Notice stated that each dish antenna was to be 680 mm in diameter. There would be three antennas at Location A. In order to fall within Item 6 (as Summit contended), 'the total protrusion from the structure' was not to be more than 2 metres. In that context, it was said that as each dish protruded 680 mm, the total protrusion was over 2 metres. However, as to that contention, the evidence was to the effect that the dish antennas would be mounted

approximately 1500 mm from the base of the mast and would protrude horizontally approximately 350 mm and vertically 1,857 mm (measured from the building). Therefore, the manner in which the dishes were to be installed meant that the protrusion of the dishes was well within the limits stated in Item 6. I reject the claim that the protrusion must somehow be determined by a summation of the widest point of each dish.

65 It was suggested that because the mast at Location A was to have dish antennas attached, the mast could be no more than 2 metres because of the terms of Item 6 even though the mast was also to be used for antennas to which Item 4 applied. I do not accept that submission. If a mast is to be used for antennas to which Item 4 applies then if it complies with that Item then it is a low-impact facility. The fact that dish antennas are also added to the mast does not mean that the mast must comply with Item 6. This was determined to be the correct manner in which to approach co-located facilities in *Hutchison 3G Australia Pty Ltd v Director of Housing* [2004] VSCA 99 at [40]-[46].

66 *Second*, it was said that as to Location B the mast could be no more than 2 metres in height by reason of the terms of Item 6. Although it was accepted by the Owners that Item 4 allowed for a mast of that height if panel, yagi or other like antenna were attached, it was said that Item 4 did not apply because there were no such antennas to be attached at Location B. The Owners said that by reason of Item 6 the mast at Location B was not a low-impact facility because it would extend 3 metres from the building.

67 The contention advanced by the Owners is based upon reading the reference to 'structure' in the phrase 'protruding from the structure by not more than 3 metres' in Item 4(b) as referring to the building structure to which the antenna (and any supporting structure) is to be attached. The difficulty with that reading is that the Item 4(b) applies 'if the antenna is attached to a structure'. Given that an antenna must be attached to something, the possibility that it might not be attached to a structure suggests that the reference to 'structure' is to some form of structure that forms part of the installation (or an earlier installation), namely a supporting structure (such as a pole). On that basis, Item 4 is regulating the protrusion from the supporting structure, not the protrusion from the building.

68 Such a construction explains the terminology of Item 3 which states:

Column 1 Item no.	Column 2 Facility	Column 3 Areas
…		
3	Panel, yagi or other like antenna: (a) flush mounted to an existing structure; and (b) either: (i) colour-matched to its background; or (ii) in a colour agreed in writing between the carrier and the relevant local authority	Residential Commercial Industrial Rural

69 Item 3 appears to be dealing with a case where there is an 'existing structure' of some kind to which the antenna may be 'flush mounted' such that it does not create any additional protrusion. It is to be noted, in that context, that Item 4 refers to attachment to a structure (not an existing structure). The difference in terminology indicates that in the case of Item 4 the structure is to be added as part of the installation. There is similar terminology in Item 5 to that used in Item 4.

70 Item 6 then uses the different term 'supporting structure' rather than 'structure' when prescribing the extent of permitted protrusion, but otherwise follows a similar form. The additional word 'supporting' suggest that the structure to which the dish is to be attached may be as robust as is needed to support the dish.

71 Item 7 deals with a larger dish that may be attached in an industrial or rural area. It has no specified protrusion. It is also to be noted that Item 10 uses the term 'building' suggesting that if the term structure used in other items was intended to refer to a building then that term would have been used elsewhere.

72 In *Hutchinson 3G Australia* at [54], it was observed that various items in the Schedule to the Determination contemplate that there will be 'a pole which is attached to a structure'. On that basis it was determined that the pole itself forms part of the low-impact facility that is described by the Determination. In other words where an antenna cannot be affixed without a structure such as a pole, the Items in the Determination contemplate that the pole or similar structure forms part of the facility as described. The consequence is that the authority conferred by the Determination to install each of the facilities described in Schedule 3 includes the authority to install a structure such as a pole to which the described equipment will be attached. Neither party questioned the correctness of the decision in *Hutchinson 3G Australia*.

73 On that basis, the facilities described in Schedule 3 do not seek to impose limits on the height of a structure (such as a pole) that may be required when the facility is installed. Rather, the Schedule describes the low-impact facilities by identifying the type of facility, its size (diameter or length) and, in some instances, the extent to which it will protrude when mounted. However, it does not describe the size of any supporting structure. Rather it assumes that such a structure will be no more substantial than is necessary to effect the installation. Put another way, a structure which is greater in size than that which might reasonably be required to install the facility described in the Schedule would mean that the installation is not part of a low-impact facility.

74 The explanation provided by Summit for the pole being 3 metres in height at Location B was that it would facilitate the attachment of other antennas as permitted by Item 4 at a later time. In other words, it was said to be a reasonable supporting structure for such antennas, even though they were not to be then installed at Location B.

75 In effect, the contention for Summit was that at the time of installing a pole as contemplated by Item 6, it could ensure that the structure was of a kind that would be appropriate for installation, at a later time, of antennas of the kind described in Item 4. In my view, if (as was held in *Hutchinson 3G Australia*) a reasonable structure to which the relevant equipment is to be attached forms part of the low-impact facility described in the Determination then it may be installed so that it can be used at a later time to attach antennas as described. If there is an objection then it may be that by agreement or by direction from the Ombudsman the pole is limited to that which is necessary for the dish referred to in Item 6 being the equipment that is being installed at the time. The Ombudsman may uphold the objection on the basis that there is not sufficient certainty as to when or if the supporting structure will be used for the type of installation that is advanced as the justification for its installation. Whether that occurs may depend upon how likely it is that there will be a further installation of equipment to be attached to the pole and when. However, given the decision in *Hutchinson 3G Australia*, it could not be said that the installation of a pole which was permitted by Item 4 was not a low-impact facility.

76 Therefore, the Notice specified low-impact facilities and complied with the Code in that respect.

Issue 3: Did any issue with the period of notice affect the validity of the Notice?

77 For reasons I have given, the Notice failed to conform to the Code because it notified a date for the proposed activities that did not conform with the requirement to provide a statement for explaining the arrangements for making an objection to the proposed activity. Those arrangements contemplated that at least 10 business days' notice would be given before commencement of those activities and that any notice of objection must be given at least five business days before the carrier proposes to engage in the activities. For the objection procedure to be explained in any notice, the earliest date on which the carrier proposed to engage in the activities had to be specified in the notice and that date must be a date at least 10 business days after notice was given.

78 The question is whether the failure to conform to the Code meant that the Notice was invalid. The requirement for a carrier to specify the date in a notice was a condition regulating the exercise of the statutory power to enter upon private premises to install the equipment. An act done in breach of such a condition is not necessarily invalid and of no effect: *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 at [91]. The question is one of statutory construction in which the issue is the extent to which the condition, in context, might be seen to impose essential preliminaries to the exercise of the power: *Forrest & Forrest Pty Ltd v Wilson* [2017] HCA 30; (2017) 262 CLR 510 at [63] (Kiefel CJ, Bell, Gageler and Keane JJ). Factors that may be important include whether the requirement is expressed as a rule rather than in more indeterminate language and the public inconvenience that may result if a failure to satisfy the condition did not lead to invalidity: at [59]-[62] (Kiefel CJ, Bell, Gageler, Keane JJ).

79 In the present case, the notice affords substantive protections where the legislative scheme authorises a substantial interference with private rights to real property. It is the mechanism by which the objection rights might be brought to the attention of the relevant parties. There would be no direct public inconvenience if the notice was invalid because the effect of invalidity would fall upon the party giving the notice and not the wider public. The requirement is expressed as a rule. In all the circumstances, failure to conform to the relevant requirement must mean that the Notice is invalid.

Issue 4: If the Notice is valid, can Summit undertake the proposed activities?

80 Given the conclusion that I have reached, Issue 4 does not arise for determination. However, as the matter was addressed I will briefly express the reasons for my view that Summit would

have been able to act on the basis of the Notice and undertake the proposed activities if the Notice had been valid.

81 For reasons I have given, it was not necessary for the Notice to specify an end date so as to establish a window within which it proposed to undertake the notified activities. It need only specify the earliest date on which it proposed to undertake those activities. In those circumstances, the end date had no statutory significance. The statutory authority to enter upon premises to undertake the activities in the Notice was not dependent upon those activities being undertaken within a period of time specified in the Notice.

82 Therefore, it would only be in circumstances where the passage of time was such that it might be said that the notice was stale that any issue would arise about Summit relying upon the Notice as the basis for entering upon premises to undertake the proposed activities. No argument of that kind was advanced by the Owners. In circumstances where the delay has been occasioned by the dispute that has been now adjudicated it is difficult to see how such an argument might be advanced. Therefore, had I been persuaded that the Notice was valid I would have granted the declaratory relief sought by Summit.

Conclusion

83 For the reasons I have given the application must be dismissed. Both parties agreed that costs should follow the event. Therefore, there should be an order that Summit do pay the Owners' costs.

I certify that the preceding eighty-three (83) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Colvin.

Associate:

Dated: 23 December 2020