

21 August 2018

Ms Christine McDonald
Committee Secretary
Senate Standing Committee on Environment and Communications
PO Box 6100
Parliament House
Canberra ACT 2600

Sent by email to: ec.sen@aph.gov.au

Dear Christine,

Senate Standing Committee Inquiry into the *Telecommunications Legislation Amendment Bill 2018 – temporary facilities*

Thank you for the opportunity to comment on exposure draft *Telecommunications Legislation Amendment Bill 2018 (Bill)*.

My office has been in close consultation with the Department about the proposals to update carrier powers and immunities. This has involved providing written comment,¹ and meeting and liaising with Departmental officials to enhance understanding of the Telecommunications Industry Ombudsman's jurisdiction for land access objections and to provide insights into the types of objections landowners and occupiers have in relation to low-impact facilities.

On 22 June 2018, my office updated its *Guidelines on the Installation and Maintenance of Low-Impact Facilities* to reflect reforms that commenced on 2 March 2018.²

Comments on Schedule 2 of the Bill

My comments are focused on Schedule 2 of the Bill, as disputes involving Schedule 1 would not be considered by the Telecommunications Industry Ombudsman.

I have set out my comments in more detail in the attached submission to this letter. Both this letter and the attached may be made publicly available.

Schedule 2 of the Bill seeks to implement reforms announced by the Minister in March 2018 by introducing certain types of portable temporary facilities as low-impact facilities under Sch 3, *Telecommunications Act 1997*.

It is envisaged these temporary facilities will enable service continuity when an existing low-impact facility is being maintained or replaced; and ensure service coverage during sporting, cultural and music events (e.g. on Melbourne Cup Day and New Year's Eve).³

I understand the reforms are modelled on certain exemptions from planning regimes in NSW and Victoria.⁴ If enacted, the reforms would provide a national regime by extending federal carrier powers and immunities for inspect – install – maintain activities for portable temporary facilities. The national regime would then override the NSW and Victorian regimes and go much further than those state regimes.⁵

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My comments cover:

- The Bill's introduction of semi-permanent facilities without clearly defined regulatory parameters
- Contemplating new or modified carrier conditions to safeguard landowners and occupiers given the unique nature of portable temporary facilities
- Considering how to ascertain whether the location of the temporary facility is '*practicable to achieve the purpose*'
- Clarifications that would be helpful to assist my office in handling objections about temporary facilities, if the reforms proceed
- Other reforms are necessary for the Bill to have effect, including conferral of jurisdiction and powers on my office

If you have any questions regarding this letter and the attached submission, please feel free to contact me, or my Senior Policy Advisor, Ai-Lin Lee

Yours sincerely,

Judi Jones
Ombudsman
Telecommunications Industry Ombudsman

¹ Telecommunications Industry Ombudsman, *Submission to the Department of Communications and Arts' consultation on possible amendments to telecommunications carrier powers and immunities* (September 2017). See: https://www.tio.com.au/data/assets/pdf_file/0004/249025/TIO-Submission-DoCA-Land-access-carriers-20170721.pdf

² Telecommunications Industry Ombudsman, *Guidelines on the Installation and Maintenance of Low-Impact Facilities* (22 June 2018). See: https://www.tio.com.au/data/assets/pdf_file/0019/170623/Land-Access-Guidelines-2018-Revision.pdf

³ Department of Communications and the Arts, Consultation Paper *Possible amendments to telecommunications carrier powers and immunities* (June 2017), proposal 22 (pages 25 – 27). See: <https://www.communications.gov.au/have-your-say/consultation-possible-amendments-telecommunications-carrier-powers-and-immunities>

⁴ As above for note 3

⁵ *Telecommunications Act 1997*, clause 37 in Sch 3

Telecommunications Industry Ombudsman submission to the *Senate Standing Committee Inquiry into the Telecommunications Legislation Amendment Bill 2018 (temporary facilities)*

This submission covers:

1. The Telecommunications Industry Ombudsman's role in determining land access objections
2. The Telecommunications Industry Ombudsman's comments on Schedule 2 of the Bill

1. The Telecommunications Industry Ombudsman's role in determining land access objections

The comments in this submission are informed by the work of the Telecommunications Industry Ombudsman in determining land access objections.

These objections involve carriers (or operators of a telecommunications network unit) who are required to join and comply with the Telecommunications Industry Ombudsman scheme.¹ Additionally, carriers must hold a licence issued by the ACMA and as a condition of that licence, comply with the land access regime in Sch 3, *Telecommunications Act 1997 (Act)*.²

The land access regime permits carriers to lawfully enter land and carry out activities to deploy certain types of prescribed telecommunications network infrastructure without having to go through full State or Territory planning approval processes, so long as the landowner (and occupier) is given advance notice and has the opportunity to object to the proposed activity. This includes being able to request that the Telecommunications Industry Ombudsman determine an objection, if unable to be resolved directly with the carrier.

The Telecommunications Industry Ombudsman typically receives land access objections made by a diverse range of landowners and occupiers, including farmers, building owners, residential apartment owners, universities, hotels, public utilities (water, rail, road) and State and Territory or local government authorities which manage public land.

Over the last five years, the Telecommunications Industry Ombudsman has determined between 12 and 15 land access objections each financial year.

More information about how the Telecommunications Industry Ombudsman determines land access objections is set out in its *Guidelines*.³

¹ *Telecommunications (Consumer Protection and Service Standards) Act 1999*, sections 128 and 132

² *Telecommunications Act 1997*, section 61 and Schedules 1 and 3; *Telecommunications (Low-impact Facilities) Determination 2018*; *Telecommunications Code of Practice 2018*

³ Telecommunications Industry Ombudsman, *Guidelines on the Installation and Maintenance of Low-Impact Facilities* (22 June 2018). See: https://www.tio.com.au/data/assets/pdf_file/0019/170623/Land-Access-Guidelines-2018-Revision.pdf

2. The Telecommunications Industry Ombudsman's comments on Schedule 2 of the Bill

This Part covers:

- The Bill's introduction of semi-permanent facilities without clearly defined regulatory parameters
- Contemplating new or modified carrier conditions to safeguard landowners and occupiers given the unique nature of portable temporary facilities
- Considering how to ascertain whether the location of the temporary facility is '*practicable to achieve the purpose*'
- Clarifications that would be helpful to assist our scheme in handling objections about temporary facilities, if the reforms proceed
- Other reforms are necessary for the Bill to have effect, including conferral of jurisdiction and powers on our scheme

(a) The Bill's introduction of semi-permanent facilities without clearly defined regulatory parameters

It is our understanding that the Bill introduces semi-permanent facilities as a type of low-impact facility under Sch 3 of the Act. This goes well beyond what was proposed by the Department's public consultation and what is currently permitted in NSW and Victoria.⁴

In our view, a portable facility should only achieve the characteristic of *temporary* if:

- it cannot remain at the location for longer than a maximum period (say, 30 days) per annum;
- the carrier is prohibited from being able to relocate or reposition the facility by moving it a short distance to circumnavigate the 30 day period;
- the carrier is not permitted to replace the portable facility with an identical or similar portable facility after the end of the 30 day period.

The regulatory framework should not assume carrier compliance and should set well-defined limits on carrier powers and immunities so there is certainty as to what carriers are lawfully permitted to do. A regulatory framework that has clearly defined parameters can assist the regulator (the ACMA) in performing its monitoring and compliance role.

The Bill introduces facilities that can be installed:

- *and remain indefinitely while an existing Sch 3 facility is being maintained or replaced.*⁵
The Bill does not prescribe a maximum period within which a carrier must complete its maintenance or replacement work; and courts have interpreted maintenance to include the ongoing drawing of electricity to power a low-impact facility.⁶
- *and remain at a location for up to six months in a calendar year to bolster service coverage for one event and multiple events.*⁷

⁴ Department of Communications and the Arts, Consultation Paper *Possible amendments to telecommunications carrier powers and immunities* (June 2017), proposal 22 (pages 25 – 27). See: <https://www.communications.gov.au/have-your-say/consultation-possible-amendments-telecommunications-carrier-powers-and-immunities>; Department of Sustainability and Environment, *A Code of Practice for Telecommunications Facilities in Victoria* (July 2004), clauses 4 and 5.3; and *State Environmental Planning Policy (Infrastructure) 2007* (NSW), item 17 in Sch 3A

⁵ *Telecommunications Legislation Amendment Bill 2018*, Sch 2, 2 and 4 to introduce proposed clauses 6(5)(b) – (c) and 7(3A) in Sch 3 of the Act

⁶ As above for note 5; *NBN Co Ltd v Pipe Networks Pty Limited* [2015] NSWSC 475

⁷ *Telecommunications Legislation Amendment Bill 2018*, Sch 2, 2 and 5 to introduce proposed clauses 6(5)(d) – (e) and 8B in Sch 3 of the Act

This allows a portable facility to remain on site for almost an entire football season near the MCG. We are unsure why a portable facility should be able to remain for so long after a single event. This interpretation is possible because the Bill does not clarify whether a series of games within a sporting season is not 'one event'.

- *on public land (without any geographic limitations)⁸ and remain at the location for up to three months to provide additional service coverage during public and school holiday periods.⁹*

This timeframe far exceeds the six week Summer school holiday period and the period within which schoolies go on holiday at the Gold Coast to celebrate the end of their high school education.

(b) Contemplating the unique nature of temporary facilities to safeguard landowners and occupiers

Temporary facilities are different to permanent facilities. Their unique characteristics may necessitate new or modified carrier conditions to safeguard the interests of landowners and occupiers in not having their land and property rights unduly interfered with. Our comments here relate to:

- The 25 metre increase in height
- The possibility of multiple temporary facilities in one location
- Noise issues

i. *a 25 metre increase in height is a significant increase*

An increase in height from five to 30 metres from the ground (assuming there has been no five metre extension)¹⁰ for portable temporary facilities is a significant increase in height.¹¹ We note this would increase the height for temporary facilities that may already be installed in an emergency.¹²

We reiterate our views above on achieving the characteristic of *temporary*. We believe this would more appropriately achieve the balance between enabling carriers to install portable temporary facilities and safeguarding the interests of landowners and occupiers.

ii. *limits on the number of temporary facilities on the same land for the annual period*

We anticipate multiple carriers could seek to install multiple temporary facilities at any one time at a location.

It may be worthwhile considering whether the regulatory framework might restrict the maximum number of temporary facilities that may be installed and allowed on the same land for the duration of the annual period. This could more appropriately safeguard landowners and occupiers, and also incentivise removal.

As at 1 August 2018, the ACMA reports there are 296 active carrier licences in operation.¹³ Responses to the Department's public consultation revealed that due to co-location, land

⁸ *Telecommunications Legislation Amendment Bill 2018*, Sch 2, 2 to introduce proposed clause 6(5)(f) in Sch 3 of the Act

⁹ *Telecommunications Legislation Amendment Bill 2018*, Sch 2, 5 to introduce proposed clauses 8A and 8C in Sch 3 of the Act

¹⁰ *Telecommunications Act 1997*, clauses 4 and 6(7) in Sch 3

¹¹ *Telecommunications Legislation Amendment Bill 2018*, Sch 2, 2 and 3 to introduce proposed clauses 6(5)(b) – (f) and 6(5C) in Sch 3 of the Act

¹² *Telecommunications (Low-impact Facilities) Determination 2018*, Part 7 of the Schedule

¹³ <https://www.acma.gov.au/Industry/Telco/Carriers-and-service-providers/Licensing/register-of-licensed-carriers-licensing-i-acma>

owners and occupiers experience multiple low-impact facilities installed by multiple carriers on a single site.

iii. noise created by generators

A temporary facility is likely to need to be powered by a generator. The noise from a generator could be a legitimate ground of concern for a landowner or occupier.

We note the *Act* and the *Telecommunications Code of Practice 2018 (Code)* already impose an additional condition on carriers to manage noise when engaging in inspect – install – maintain activities.¹⁴ This carrier condition could be modified to address the issue of noise created by generators, for example by considering whether ‘noise buffers’ or other noise containment measures are needed.

(c) Considering how to ascertain whether the location of the temporary facility is ‘practicable to achieve the purpose’

In the absence of further clarification in the *Telecommunications (Low-impact Facilities) Determination 2018 (Determination)* or *Code*, it will be difficult to determine whether the proposed location of a temporary facility is *practicable to achieve the purpose*.

If the reforms proceed, they will introduce a waterfall or cascading location test for the temporary facility based on whether it is *practicable to achieve the purpose*. The waterfall or cascade flows downwards from:¹⁵

- on the land where the existing facility is located (or at the venue where the event will be held); to
- if this is not practicable to achieve the purpose, on public land; to
- if this is not practicable to achieve the purpose, in the vicinity of the other facility (or the venue where the event is being held).

For example, a private land owner, in the vicinity of a venue may find it difficult to research and point to another location when objecting to the use of their land to host a portable facility for up to six months a year. There could be added complexity if the other location may be on public land or the venue of the event.

Consideration could be given to whether the regulatory framework could provide clear indicia to be applied when determining whether it is *practicable to achieve the purpose* for the temporary facility to be at the venue of the event, or on public land instead of the private land.

(d) Clarifications that would be helpful to assist our scheme in handling objections about temporary facilities, if the reforms proceed

When handling objections about temporary facilities, clarification of the following matters would assist in dealing expeditiously with objections:

i. the meaning of installation ‘in the vicinity of the venue’ of the event and ‘in the vicinity of the other facility’¹⁶

Having some further guidance to the meaning of ‘in the vicinity of the venue’ and ‘in the vicinity of the other facility’ would assist in dealing with objections. We anticipate the plain English dictionary meaning of the word *vicinity* is likely to be highly contested and open to differences in interpretation between a carrier and an objector.

¹⁴ *Telecommunications Act 1997*, clause 15 in Sch 3; *Telecommunications Code of Practice 2018*, clauses 2.12, 4.12 and 6.12

¹⁵ Telecommunications Legislation Amendment Bill 2018, Sch 2, 2 to introduce proposed clauses 6(5)(b) – (e) in Sch 3 of the Act

¹⁶ As above for note 15

ii. the types of 'event' for which installation of a temporary facility is not permitted¹⁷

It will assist decision-making if the Bill states which types of events do not permit the installation of a temporary facility.

It is not clear, for example, whether a business convention or trade fair would be a permitted type of event for which a temporary facility may be installed. These are permitted events in NSW,¹⁸ but not necessarily in Victoria.¹⁹

iii. the public and school holidays which are covered²⁰

It will assist decision-making if the permitted public and school holidays are listed in a schedule.

(e) Other reforms are necessary for the Bill to have effect

For the Bill to have effect, we believe two other reforms are necessary on enactment. These relate to:

- The conferral of powers on entities
- The conferral of jurisdiction and powers on our scheme to handle objections

i. conferral of powers on carriers

For carriers to be conferred powers to install temporary facilities under Sch 3, the Act, the Minister would need to prescribe in the Determination each type of temporary facility that is a permitted low-impact facility.

This is confirmed by:

- section 6(1) and the opening requirements in section 6(5) remaining unchanged;
- the Determination already prescribing a temporary facility in emergencies.²¹

ii. conferral of jurisdiction and powers on our scheme to handle objections

For the Telecommunications Industry Ombudsman to be conferred jurisdiction and powers to handle objections about temporary facilities and for carriers to comply:

- the Minister would need to prescribe in the Determination each type of temporary facility that is a permitted low-impact facility; and
- the new carrier conditions (e.g. to remove, restore the land and meet the annual limits) would need to be reflected in the Code.²²

¹⁷ *Telecommunications Legislation Amendment Bill 2018*, Sch 2, clause 3 to introduce proposed section 6(5B) in Sch 3 of the Act.

¹⁸ *State Environmental Planning Policy (Infrastructure) 2007* (NSW), item 17 in Sch 3A

¹⁹ Department of Sustainability and Environment, *A Code of Practice for Telecommunications Facilities in Victoria* (July 2004), clauses 4 and 5.3

²⁰ *Telecommunications Legislation Amendment Bill 2018*, Sch 2, 1 and 2 to introduce a definition of 'high-demand holiday period' and proposed clause 6(5)(f) in Sch 3 of the Act

²¹ As above for note 12

²² *Telecommunications Act 1997*, clause 15 in Sch 3; and *Telecommunications Legislation Amendment Bill 2018*, Sch 2, 5 and 7 to introduce proposed clauses 8A, 8B, 8C and 9A in Sch 3 of the Act

