



Australian Government

Department of Communications and the Arts

Telecommunications Legislation Amendment Bill 2018

Department of Communications and the Arts submission to the
Environment and Communications Legislation Committee



Introduction

The Department of Communications and the Arts (DoCA) welcomes the opportunity to make a submission to the Environment and Communications Legislation Committee in relation to the Telecommunications Legislation Amendment Bill 2018 (the TLAB).

Overall, DoCA considers that the TLAB is a balanced package of measures that will provide access to NBN Co Limited towers for emergency services, and will allow the deployment of temporary telecommunications facilities, subject to a series of strong safeguards.

Based on commentary during the debate in the Senate, DoCA has focused on Schedule 2 to the TLAB, and has used this opportunity to contextualise the amendments in the broader operation of Schedule 3 to the *Telecommunications Act 1997* (the Tel Act). DoCA has also sought to respond to specific questions that the Committee has posed.

Deployment of temporary telecommunications facilities

Telecommunications companies (carriers) deploying infrastructure on occasion need to deploy temporary facilities to maintain services. This can occur in a range of circumstances, such as:

- In an emergency situation, to provide services to emergency service organisations or the public,
- In periods of high demand such as where there is an event or a peak holiday period, and
- Where an existing facility is undergoing maintenance, so that services can be maintained.

Examples of temporary telecommunications facilities currently in use include cells on wheels (COWs), satellite cells on wheels (SatCOWs) and mobile exchanges on wheels (MEOWs). Figure 1 shows examples of these facilities. COWs and SatCOWs typically include radiocommunications antenna masts, which are types of towers according to the Tel Act.

Figure 1: COW (Left), SatCOW (Middle), MEOW (Right)



What regulatory arrangements currently apply?

Under Schedule 3 to the Tel Act, carriers have some powers to inspect land, and to install and maintain facilities. Carriers also have some immunities to a subset of state and territory laws but are subject to a series of safeguards (that, for example, require notification and provide a land owner/occupier an opportunity to object to the proposed activity). These laws are known as ‘carrier powers and immunities’.



These laws are limited in a number of ways. In particular, the Tel Act allows for certain facilities to be specified as ‘low-impact’,¹ which in turn allows them to be deployed using carrier powers and immunities. At present, the Tel Act does not permit towers other than replacement towers or towers no more than five metres high attached to a building to be installed using carrier powers and immunities.²

Consequently, where a carrier seeks to install a temporary tower it must comply with state and territory planning laws which vary across jurisdictions. This can increase the costs to carriers (costs which may ultimately be passed on to consumers) and reduce the timeliness of the deployment of temporary facilities. Further, the inability to provide temporary facilities can mean there is insufficient capacity for customers to connect to mobile networks during maintenance and replacement of existing facilities, at events (like sporting events and music festivals), and during peak holiday periods.

Reduced connectivity during emergencies is clearly problematic, as it can put lives and property at greater risk. Reduced connectivity during events or peak holiday periods is also problematic as it can reduce the ability of the community to use telecommunications for their enjoyment during these periods, but more importantly, can make it difficult for the community to access critical services during periods of high demand. Likewise, if carriers are not able to deploy temporary facilities during maintenance, services are necessarily reduced during scheduled and also unscheduled maintenance.

Rationale for temporary facilities amendments

In recognition of the needs of the community for access to telecommunications during emergencies, events, peak holiday periods and for maintenance, Schedule 2 to the TLAB seeks to streamline the deployment of temporary facilities, whilst maintaining appropriate safeguards.

In technical terms, Schedule 2 would allow the Minister to amend the *Telecommunications (Low-impact Facilities) Determination 2018* (the Determination) to specify that temporary telecommunications facilities, including temporary towers, are ‘low-impact’ facilities. This would allow carriers to then deploy temporary facilities using their powers and immunities.

The proposed changes to allow for the deployment of temporary facilities would benefit the community through improved access to services. Telecommunications carriers will benefit by being able to deploy temporary facilities more efficiently and in a nationally uniform way, ensuring that even in an emergency or times of strong demand, consumers will be able to access a service.

In New South Wales (NSW), many permanent and temporary towers are already installed without development approval under the *State Environment Planning Policy (Infrastructure) 2007*. In Victoria, the *Code of Practice for Telecommunications Facilities* allows for the installation of some temporary telecommunications towers without requiring development approval. DoCA notes that the amendments proposed in the TLAB would allow a single, Australia wide process to be in place for the deployment of these kinds of facilities.

Safeguards

There are two kinds of safeguards that are relevant to the TLAB. There are new safeguards that the TLAB introduces, and existing safeguards already included in Schedule 3 to the Tel Act and the *Telecommunications Code of Practice 2018* (Code of Practice).

It is worth noting that the TLAB includes detailed conditions to ensure that there is appropriate scrutiny by the Parliament which can provide confidence to communities that the installation of towers, even on

¹ See sub-clause 6(3) of Schedule 3 to the Tel Act.

² See sub-clauses 6(5) and 7(3)(d) of Schedule 3 to the Tel Act.



a temporary basis, is carefully controlled. The Determination will need to be amended to specify the types of temporary towers that may be installed. This instrument is disallowable and subject to scrutiny by the Senate Standing Committee on Regulations and Ordinances. In addition, while the Tel Act would set out baseline conditions, the Determination could include additional conditions if the Minister decides it is necessary.

New safeguards being introduced in the TLAB

The TLAB includes strict conditions regarding circumstances when towers can be installed, maximum tower height, removal timeframes and land restoration. The conditions are based on the NSW and Victorian planning schemes, which many public submissions supported as appropriate models to be adopted nationally.

The amendments would allow carriers to meet consumer demand when used to:

- Provide additional capacity during one or more events (such as a concert, festival or sporting event),
- Provide additional capacity during a peak holiday period,
- Minimise service disruption during the maintenance or replacement of an existing facility, and
- Provide services to an emergency services organisation so that it can deal with an emergency or natural disaster.

Other uses would not be permitted. In addition, a temporary tower would be limited to no more than 30 metres in height (measured from the ground to the top of the tower), except when it is being installed:

- As a result of maintenance or replacement of another facility in a rural area, in which case it could be the higher of 30 metres or the height of the tower being maintained or replaced, or
- To provide capacity to an emergency services organisation so that it can deal with an emergency or natural disaster, in which case there is no height restriction.

For temporary facilities installed to provide services at an event or events, there is a 183 day annual limit included as a safeguard to ensure that a temporary facility cannot become a permanent installation. For example, a carrier could install a temporary facility for a football game at the MCG to boost services and the carrier would have 28 days to remove the facility after the event. However, during the 28 day period, another game could be held and the clock would restart. While this may be acceptable for a limited time, where a sporting facility or event venue requires boosted services on a regular basis, the 183 day limit will encourage carriers to submit a development application so that the local council can consult with the community and decide whether a permanent facility be installed.

A temporary facility installed to provide services during a peak holiday period would not be permitted to be installed for more than 90 days in a calendar year. The 90 calendar days' timeframe should provide an adequate amount of time for the required seasonal coverage while balancing the interests of the local community. For example, a temporary tower could be installed on public land at a ski resort during NSW winter school holidays to provide additional coverage during this busy period, but not be allowed to remain for more than 90 days as a low-impact facility. Should a carrier wish for the tower to be permanent or in place for longer than 90 days, it would need to comply with NSW planning requirements.

Except for a temporary facility installed to provide services during peak holiday demand, the facility would be required to be removed 28 days after the need for it ends, and in all instances carriers are required to take all reasonable steps to commence restoration of the land within 10 days of the temporary facility being removed.



Existing protections that would apply to temporary facilities

Carrier powers and immunities are set out in Schedule 3 to the Tel Act. Schedule 3 provides carriers with powers to enter land (including public areas of buildings) for inspection, and to install and maintain certain types of facilities. It also provides certain immunities, including from some state and territory laws when carrying out those activities, such as those laws relating to land use, and the planning, design, siting, construction, alteration or removal of a structure.³

Carriers are required to notify an affected land owner/occupier of their intended activities, and give them the opportunity to object. If an acceptable arrangement cannot be reached, land owners/occupier have the right to have an objection referred to the Telecommunications Industry Ombudsman, who may issue directions that the carrier must follow. The notification and objection process would apply to temporary facilities, noting that there are some exemptions, such as during an emergency.

Beyond notification requirements and objection opportunities, Schedule 3 sets out a series of safeguards⁴ to ensure that carrier powers are used appropriately. For instance, carriers must act in accordance with good engineering practice, and manage the activity in a way that protects the safety of persons and property, and the environment. Additional safeguards are also specified in subordinate instruments.⁵

Table 1 sets out a summary of Schedule 3 and Code of Practice conditions. These conditions would apply to temporary facilities installed under Schedule 3, just as they do for other low-impact facilities.

Table 1 – Summary of Schedule 3 and Code of Practice conditions imposed on carriers

Carriers are required to:	
<ul style="list-style-type: none"> • Do as little damage as practicable, • Restore the land, • Act in accordance with good engineering practice, • Comply with recognised industry standards, • Make reasonable efforts to reach agreements with public utilities, • Protect the safety of persons and property, and the environment, • Ensure the activity interferes as little as practicable with the operations of a public utility, roads and paths, movement of traffic and the use of land, 	<ul style="list-style-type: none"> • Notify road authorities, • Notify the land owner or occupier, • Maintain records for overhead cable, underground facilities and towers, • Adopt best practice design to minimise the degradation of the environment and visual amenity, • Minimise noise, and • Take reasonable steps to co-locate facilities and cooperate with other carriers and public utilities undertaking similar activities.

In response to the Committee's question regarding any unique risks posed by temporary facilities, DoCA notes that all types of facilities pose unique risks. To ensure that carriers manage these risks on a case-by-case basis, the Tel Act and Code of Practice conditions summarised in Table 1, provide broad requirements that can be applied to each installation. Conditions that are likely to be particularly applicable to temporary facilities include that a carrier must take all reasonable steps to act in accordance with good engineering practice, and to protect the safety of persons and property, and the environment. The notification and objection process also provides a mechanism whereby land owners and occupiers can raise concerns about risks as they see them.

³ See sub-clause 37(2) of Schedule 3 to the Tel Act.

⁴ See Division 5 of Schedule 3 to the Tel Act – Conditions relating to the carrying out of authorised activities.

⁵ Including, the Code of Practice and the Determination.



Compliance with Schedule 3 and the Code of Practice is a carrier licence condition and can be enforced by the Australian Communications and Media Authority (ACMA). ACMA can direct carriers to comply with some conditions and issue formal warnings. Penalties for non-compliance can be severe, including fines of up to \$10 million for each breach.⁶

When undertaking inspection, installation or maintenance activities under Schedule 3 to the Tel Act, carriers have immunity from state and territory laws⁷ about:

- Assessing the environmental effects of the activity,
- The protection of places or items of significance to Australia's natural or cultural heritage,
- Town planning,
- The planning, design, siting, construction, alteration or removal of a structure,
- The powers and functions of a local government,
- The use of land,
- Tenancy,
- The supply of fuel or power, including the supply and distribution of extra-low voltage power systems, or
- A matter specified in the regulations (currently there are none).

Schedule 3 to the Tel Act does not affect the operation of any other state or territory law, nor any of the above state and territory laws, so far as that other law is capable of operating concurrently with the Tel Act.⁸ Schedule 3 does not authorise a carrier to engage in an activity contrary to the requirements of another law of the Commonwealth.⁹

The Tel Act also makes provision for payment of compensation for financial loss or damage, or with regard to an acquisition of property.¹⁰

Carrier powers and immunities, including the proposed changes to allow for temporary towers, don't apply in areas of environmental significance.¹¹ This includes places and land that are:

- Declared world heritage properties,
- Designated as a reserve for nature conservation purposes,
- Listed on a Commonwealth, state or territory heritage register,
- Protected from significant environmental disturbance, and
- Listed on a Commonwealth, state or territory register, or otherwise identified, as being of significance to Aboriginal persons or Torres Strait Islanders, in accordance with their traditions.¹²

Mobile Phone Base Station Deployment Code

Telecommunications carriers installing low-impact facilities for mobile phone networks are also required to comply with *C564:2011 Mobile Phone Base Station Deployment Code* (the Deployment Code). It sets out additional processes and conditions that mobile carriers are to follow when they are installing facilities that do not require development approval, such as low-impact facilities. The Deployment Code

⁶ See Schedule 1 to the Tel Act, and Parts 3, 28 and 31 of the Tel Act.

⁷ See clause 37 of Schedule 3 to the Tel Act.

⁸ See clause 38 of Schedule 3 to the Tel Act.

⁹ See clause 52 of Schedule 3 to the Tel Act.

¹⁰ See clauses 42 and 62 of Schedule 3 to the Tel Act.

¹¹ See section 2.5 of the Determination.

¹² See sub-clause 37(3) of Schedule 3 to the Tel Act, in addition to section 2.5 of the Determination.



currently applies to temporary facilities installed for more than one month to cover an event and equipment installed for reoccurring annual events at a specific site.¹³

The Deployment Code ensures that local governments and communities are consulted and have a say about a proposed mobile phone base station. The Deployment Code was developed by Communications Alliance, and is registered with the ACMA. The ACMA can warn or direct sections of the industry that are covered by the Deployment Code to comply with it.¹⁴

The Deployment Code is currently under review by a working committee established by Communications Alliance. The working committee includes representatives from carriers, the ACMA, the Australian Local Government Association and the Australian Communications Consumer Action Network. Should the TLAB receive Royal Assent, DoCA has been advised that amendments to the Deployment Code will be considered by the working committee. DoCA's expectation is that draft amendments will be published for consultation.

While the development of codes and standards under the Tel Act are primarily the responsibility of the telecommunications industry, should the ACMA determine that a code is not operating to provide appropriate community safeguard or the code is not adequately regulating industry, the ACMA may make its own standard to deal with the matter.¹⁵

Consultation

In June 2017, the Australian Government sought public comment on changes to telecommunications carrier powers and immunities.

The proposed changes were outlined in a consultation paper titled, 'Possible amendments to telecommunications carrier powers and immunities' (June 2017).¹⁶ The paper invited submissions from the public. Public submissions are available on DoCA's website.

Following the six week consultation period, DoCA undertook further consultation with groups representing local governments, road authorities, rail and water utilities, commercial property owners, telecommunications carriers and the Telecommunications Industry Ombudsman. In March and April 2018, DoCA undertook further targeted consultation with the above groups on Schedule 2 to the TLAB and made some amendments based on comments received.

Of the more than 100 submissions received by DoCA in 2017, the most popular response to the temporary facility proposal was 'no comment', followed by 'support'. Less than 10 per cent of submitters objected to the proposal. Of the submissions that did not support the proposal, half did not provide reasons. Those submissions that did provide a reason, identified general concerns regarding visual amenity, safety, land owner rights and health impacts. As detailed above, the existing protections in Schedule 3 to the Tel Act, the Code of Practice and the Deployment Code provide strong protections to address these matters.

More than 75 per cent of individual councils and state local government associations that made submissions supported or did not comment on the proposal. Others provided comments, but did not make clear whether they support the proposal or not. Less than 5 per cent of councils stated that they

¹³ See section 1.1.2 and Part 2 (Definitions and abbreviations) of the Deployment Code.

¹⁴ See Division 4 of Part 6 of the Tel Act.

¹⁵ See section 125 of the Tel Act

¹⁶ Available on DoCA's website at: www.communications.gov.au/have-your-say/consultation-possible-amendments-telecommunications-carrier-powers-and-immunities



did not support the proposal. As per the information provided above, in the event that a temporary facility was deployed these local councils could object to that deployment using the existing processes.

The consultation paper also asked for suggestions about conditions that could be imposed, and pointed to the existing planning exemptions for temporary facilities in NSW and Victoria. Of those that responded to this question, almost all considered that the NSW and Victorian planning arrangements provide suitable conditions.

A comparison between proposals in the Bill, the NSW requirements set out in Item 17 of Schedule 3A to the *State Environment Planning Policy (Infrastructure) 2007*, and the Victorian requirements in section 5.3 of the *Code of Practice for Telecommunications Facilities*, is set out below in Table 2.

Conclusion

In summary, DoCA considers that the TLAB is a balanced package of measures that will allow carriers greater flexibility to deploy temporary facilities, whilst at the same time ensuring that strong safeguards are in place to ensure that the deployment of temporary facilities is in line with community expectations.



Table 2 – Summary of Commonwealth, NSW and Victorian requirements

	NSW	Victoria	Commonwealth (proposed)
Purpose	To provide service or coverage during routine and emergency maintenance, or the construction or installation of a replacement facility. To provide additional service or coverage at events such as sporting carnivals, cultural festivals, business conventions, or the like.	The temporary facility must be for: <ul style="list-style-type: none"> • routine or emergency maintenance of an existing facility, • coverage during the construction or installation of a new facility, or • additional service coverage at events such as sporting carnivals or cultural festivals. 	In an emergency situation, to provide services to emergency service organisations or the public. In periods of high demand such as an event or peak holiday period, to boost services. Where an existing facility is undergoing maintenance or being replaced, so that services can be maintained.
Location	No restriction	No restriction	Where possible, must be installed on the land of the original facility or the land on which an event/s is held, otherwise on public land or land in the vicinity.
Height	No height limit	The height must not exceed 25m above its base* or the height of the existing facility, whichever is the greater. <i>*DoCA note: the base could include a trailer or other footings, making the total height from the ground more than 25 metres.</i>	The height must not be higher than 30 metres from the ground, except: <ul style="list-style-type: none"> • For the replacement or maintenance of an existing facility in a rural area, the height of the original facility, and • No height limit for providing services to an emergency services organisation.
Removal	Within 28 days after the need for the facility has ceased. No annual limit	No time limit No annual limit	Within 28 days, except for temporary towers installed to meet peak demand in holiday periods, in which case there is an annual limit of 90 days. There is an annual limit of 183 for facilities installed to provide services at event/s.
Remediation	Not permanently alter any building or site so that, upon removal, the building or site is in a substantially different condition than it was before the establishment of the facility.	The establishment of a temporary facility must not permanently alter any building or site so that upon removal, the building or site is in a substantially different condition than it was prior to the establishment of the facility.	Within 10 business days of removing a temporary facility, the carrier must take all reasonable steps to ensure that the land is restored to a condition that is similar to its condition before the installation began.

