

TIO Submission to the Department of Communications and Arts’ consultation on possible amendments to telecommunications carrier powers and immunities

1. A practically workable process for land access objections

- 1.1 The Telecommunications Industry Ombudsman (**TIO**) supports proposed amendments to the *Code* that would reference the deadline for making an objection from when the carrier’s notice is received by the land owner (or occupier)¹.
- 1.2 The TIO welcomes a uniform approach to determining the deadline across objections to land entry whether the carrier’s proposed activity relates to inspection – installation – maintenance. This simplifies the process and achieves consistency.
- 1.3 The TIO recommends removing the fast-track process for inspections to achieve greater simplification (**Recommendation 1**).
- 1.4 The TIO recommends extending the timeframes for the carrier to issue the notice and for the land owner (or occupier) to object. More realistic timeframes are 20 and 10 business days respectively (**Recommendation 2**).
- 1.5 The TIO recommends the *Code* be strengthened at clauses 2.36, 4.37 and 6.36 by requiring the carrier to lodge the dispute with the TIO within a specified time period after receiving the objector’s request to access the TIO (**Recommendation 3**).
- 1.6 The TIO recommends the *Code* be strengthened to clarify the circumstances when a carrier may cancel a notice without prejudice to the objector and notify the objector of the cancellation within a specified timeframe (**Recommendation 4**).
- 1.7 The TIO recommends the *Code* be updated to provide greater certainty to land owners and occupiers by confirming when a carrier’s right to undertake the permitted activity expires (**Recommendation 5**).

The current objection process

Schedule 3 of the *Telecommunications Act 1997* (**Act**) and the *Telecommunications Code of Practice 1997* (**Code**) establish a process for land owners (or occupiers) to object to a carrier’s intended entry onto their land to inspect the land, or to install or maintain a ‘low impact facility’ on receipt of the carrier’s written notice. The process allows for carrier referral of unresolved disputes about land access objections to the Telecommunications Industry Ombudsman (**TIO**).

By way of high level summary, the objection process currently involves four key stages and applies strict timeframes for compliance:

- the carrier commences the process by issuing the land owner (or occupier) with a notice of intended activity at least 10 business days before engaging in the activity, whether to inspect – install – maintain;
- the landowner (or occupier) objects to the carrier’s notice before the activity starts;
- if an objection is received, the carrier must not engage in the activity and must make reasonable efforts to consult with the objector and negotiate agreement within 20 business days after receipt of the objection;
- if the matter remains unresolved, the carrier must notify the landowner (or occupier) that the consultation period has ended, and on their request, refer the land access dispute to the TIO.

¹ *Telecommunications Code of Practice 1997*, proposed amendments to clauses 2.31(1), 4.32 and 6.31

Determining when the objection period starts (Response to Qu 18.1)

The TIO supports proposed amendments to the *Code* that would reference the deadline for making an objection from when the carrier's notice is received by the land owner (or occupier)². This reflects modern legislative drafting. It is an easier reference point for an objector to determine whether they are 'out of time', than having to count back from the carrier's proposed date of activity.

The clock should not start ticking from the date the carrier 'issued' the notice as proposed by question 18.1 of the Consultation Paper. This is because a '*from receipt of notice*' requirement will treat all objectors equally in terms of giving them the same amount of time to object (regardless of which delivery method the carrier selects) compared with a '*from the date of issue*' requirement.

The TIO welcomes a uniform approach to determining the deadline across objections to land entry whether the carrier's proposed activity relates to inspection – installation – maintenance. This simplifies the process and achieves consistency.

The TIO notes the fast-track process will remain available to carriers for inspection activities when the carrier determines there are no adverse impacts to streetscape, landscape, the environment, etc³.

The TIO encourages the Department to consider whether the fast-track process remains relevant, especially if the types of structures proposed by the reforms are more likely than not to impact streetscape, landscape and environment.

In the TIO's experience, alternative timeframes for inspection activities create complexity and can cause confusion. On occasion, the TIO has handled land access objections where the fast-track process has been misapplied by the carrier to the particular circumstances of the case. There may be instances when a misapplied fast-track process has resulted in a land owner (or occupier) losing their right to make an objection (and, if necessary, request referral of their objection to the TIO), due to being outside the much shorter one business day timeframe within which to object.

The TIO recommends removing the fast-track process for inspections to achieve greater simplification (**Recommendation 1**).

Whether 5 business days to object is sufficient time (Response to Qu 18.2)

The TIO disagrees that '5 business days' from receipt of a carrier's notice is sufficient time within which an objector can reasonably make an objection, especially if reforms to expand the definition of 'low impact facility' proceed.

Our comments on an expanded definition of 'low-impact facility' are discussed further at Part 2 of this Submission.

The timeframe for making an objection should be extended from 5 to *10 business days* from receipt of the carrier's notice. To ensure this new timeframe is workable within the broader context of the regime, the timeframe for giving a carrier's notice should also be extended from 10 to *at least 20 business days before the carrier begins to engage in the activity*⁴.

A longer timeframe is recommended because the regime requires strict compliance with each stage of the objection process for the dispute to be capable of being referred to the TIO⁵. The TIO typically responds to enquiries about land access notices, and in the process assists the objector to ascertain they are too late to object, and therefore unable to access the TIO. This may be avoided if both the notice and objection timeframe becomes more realistic.

² As above, note 1

³ *Telecommunications Act 1997*, Sch 3, clause 17(4A); *Telecommunications Code of Practice 1997*, clauses 2.23(4)(b) and 2.31(2)

⁴ *Telecommunications Act 1997*, Sch 3, clause 17(4); *Telecommunications Code of Practice 1997*, clauses 2.23(4)(a), 4.24(4), 6.23(4)

⁵ **Note:** In a small number of cases, the carrier might agree to the TIO having jurisdiction over the dispute, even though the timeframe within which to achieve a resolution through consultation may not have been strictly adhered to.

The TIO recommends extending the timeframes for the carrier to issue the notice and for the land owner (or occupier) to object. More realistic timeframes are 20 and 10 business days respectively (**Recommendation 2**).

Other Code changes needed for a workable objection process (Response to Qu 20.2)

The TIO recommends several other refinements to the *Code* to strengthen the objection process.

These relate to:

- ensuring carriers refer disputes to the TIO on the objector's request in a timely manner;
- clarifying circumstances when carriers may cancel a notice and notify the objector of the cancellation; and
- confirming that a carrier must recommence the process and issue a new notice if they significantly delay or fail to undertake the permitted activity.

Referral of disputes to the TIO in a timely manner on the objector's request

The regime assumes carriers have sufficient incentive to refer a land access dispute to the TIO once they receive an objector's request so the carrier can undertake their intended activity.

The TIO sets out in its Guideline, our expectation that carriers make a timely referral to the TIO within 20 business of receiving the objector's request⁶.

The TIO is aware of at least one instance where a carrier delayed referring the dispute to the TIO for up to 12 months after it received the objector's request. This prolonged the process for the objector, who experienced uncertainty and hiatus in the handling of their land access objection.

The TIO recommends the *Code* be strengthened at clauses 2.36, 4.37 and 6.36 by requiring the carrier to lodge the dispute with the TIO within a specified time period after receiving the objector's request to access the TIO (**Recommendation 3**).

Clarifying circumstances when carriers may cancel notices

When handling land access objections, the TIO has found that a carrier's inability to cancel a notice under the *Code* can cause confusion.

In the TIO's experience, a carrier may wish to cancel a notice in two possible circumstances:

- for technical reasons (e.g. after considering the objector's concerns, the carrier seeks to revise its proposed technical approach to undertaking the proposed activity, so the carrier issues a new notice);
- the carrier no longer seeks to proceed with the proposed activity.

A carrier's inability to cancel a notice can be confusing for an objector, especially if they receive more than one notice from the carrier regarding the same activity, or if is uncertain as to whether a notice remains 'active' or 'on foot' even though the carrier has told the objector they no longer intend to proceed with the activity.

If a notice is able to be cancelled, a carrier should be required to notify the objector of the cancellation within a specified timeframe.

The TIO recommends the *Code* be strengthened to clarify the circumstances when a carrier may cancel a notice without prejudice to the objector and notify the objector of the cancellation within a specified timeframe (**Recommendation 4**).

⁶ *TIO Guidelines on the Installation and Maintenance of Low Impact Facilities (10 April 2015)*, 20: see http://www.tio.com.au/_data/assets/pdf_file/0008/168227/Guidelines-on-the-installation-and-maintenance-of-low-impact-facilities-APRIL-2015.pdf

Loss of carrier entitlement to undertake the activity if undue delay

The regime assumes carriers have sufficient incentive to begin and complete their intended activity in a timely manner (see clauses 2.32, 4.33 and 6.32 of the *Code*).

The TIO is aware of instances when carriers have significantly delayed or failed to undertake the permitted activity.

The TIO recommends the *Code* be updated to provide greater certainty to land owners and occupiers by confirming when a carrier's right to undertake the permitted activity expires (**Recommendation 5**).

This would clarify when a carrier must recommence the process by issuing the land owner (or occupier) with a new notice.

2. Expanded definition of 'low-impact facility'

- 2.1 The TIO recommends the Department consider replacing the term 'low-impact facility' with a more accurate descriptor (**Recommendation 6**).
- 2.2 The TIO recommends that the definition of 'tower' in the *Act* should not be changed (**Recommendation 7**).
- 2.3 If the proposal to modify the definition of 'tower' proceeds, the TIO recommends that at a minimum: the current definition of 'tower' in the *Act* should continue to apply in residential areas; objectors should be entitled to receive a proprietorial payment, as discussed at Part 3 of this Submission; and the carrier should not be able to extend the pole any further whether under the *Act* or *Determination*⁷ (**Recommendation 8**).
- 2.4 In the interests of the environment and amenity, the TIO recommends that the carrier be required to remove decommissioned towers, antenna and other redundant structures that are a 'facility' within a specified timeframe (**Recommendation 9**).
- 2.5 The TIO recommends that the installation of bigger, taller and more expansive telecommunications structures be confined to commercial, industrial and rural areas (**Recommendation 10**).
- 2.6 The way in which each listed 'facility' is described in the *Determination*, should be with sufficient particularity so a carrier, objector and the TIO can easily ascertain the types of structures a carrier may legitimately install and maintain under the regime. Ambiguity in legislative drafting can lead to different interpretations, which can cause uncertainty, generate disputes and restrict the TIO's ability to effectively handle the objection, especially if the TIO has insufficient information with which to be able to make a cogent decision or give a direction.
- 2.7 The TIO recommends that the definition of 'co-located facilities' in the Schedule of the *Determination* should remain unchanged for residential areas (**Recommendation 11**).

More accurate descriptor instead of 'low-impact facility'

Expanding the definition of 'low-impact facility' in the *Act* and *Telecommunications (Low-impact Facilities) Determination 1997* (**Determination**)⁸, to allow for bigger, taller and more expansive telecommunications structures to come within the regime is transformative.

The TIO recommends the Department consider replacing the term 'low-impact facility' with a more accurate descriptor (**Recommendation 6**).

The TIO typically hears objectors' concerns that the types of facilities carriers are currently allowed to install and maintain under the regime are not 'low-impact' and should not be misleadingly described as such.

Certain types of poles to be facilities (Response to Qu 21.1 to 21.4)

The TIO recommends that the definition of 'tower' in the *Act* should not be changed (**Recommendation 7**).

The current definition prohibits the installation of poles that are taller than 5 metres high⁹.

The proposal to modify the *Act* to permit the installation of poles up to 12 metres high and up to 500 millimetres in diameter, goes too far. It would in the TIO's view, bring the installation of 'high impact facilities' within the regime. Disputes about unresolved objections to 'high impact facilities' are more appropriately addressed in court.

⁷ Currently, extension of a 'pole' is permitted: *Telecommunications Act 1997*, Schedule 3, clause 4; *Telecommunications (Low-impact Facilities) Determination 1997*, Schedule, Part 1, item 9

⁸ *Telecommunications Act 1997*, Schedule 3, clause 6; *Telecommunications (Low-impact Facilities) Determination 1997*, clause 3.1 and the Schedule

⁹ *Telecommunications Act 1997*, Schedule 3, clauses 4 and 6

If the proposal to modify the definition of ‘tower’ proceeds, the TIO recommends that at a minimum:

- the current definition of ‘tower’ in the *Act* should continue to apply in residential areas;
- objectors should be entitled to receive a proprietary payment, as discussed at Part 3 of this Submission; and
- the carrier should not be able to extend the pole any further whether under the *Act* or *Determination*¹⁰ (**Recommendation 8**).

Replacement mobile towers (Response to Qu 23.1 and 23.2)

In the interests of the environment and amenity, the TIO recommends that the carrier be required to remove decommissioned towers, antenna and other redundant structures that are a ‘facility’ within a specified timeframe (**Recommendation 9**).

Applying a test of 20 metres from the original tower is open to different interpretations.

If the *Act* and *Code* are amended to permit the installation of replacement mobile towers within a certain proximity of the original tower (e.g. within 20 metres radius of the original tower’s centre point), the carrier should be required to remove the decommissioned tower within a specified timeframe.

This would ensure the environment is free of ‘visual and actual debris’.

Failure by the carrier to decommission the tower within the specified timeframe, should lead to a pathway for the land owner (or occupier) to object and a dispute about the objection referred to the TIO for resolution.

Allowing this to occur as a maintenance activity assumes the land owner (or occupier) is the same person for both the site on which existing and replacement mobile tower will be located.

Confining the expanded definition to commercial, industrial and rural areas

If the reforms proceed and the installation of bigger, taller, more expansive structures are permitted in residential areas, the TIO anticipates it will see an increase in the number of land access disputes being referred to the TIO for resolution.

The TIO recommends that the installation of bigger, taller and more expansive telecommunications structures be confined to commercial, industrial and rural areas (**Recommendation 10**).

This is because these structures are likely to have significant adverse impacts on the visual amenity of streetscapes and landscapes in residential areas.

This means the following types of structures should *not* be a permitted ‘facility’ in residential areas:

No	Type of structure
1	(Response to Qu 5.2) Panel, yagi or other like antennas protruding beyond 3 meters from a structure.
2	(Response to Qu 6.1) Omnidirectional antennas. <u>Exception:</u> However, small omnidirectional antennas (not more than 20cm long) may be permitted in residential areas. These types of antennas are typically used to improve mobile coverage and are already covered by the <i>Determination</i> ¹¹ .
3	(Response to Qu 13.1) Trenches greater than 100 metres long.

The TIO’s preferred drafting changes to the *Determination* to reflect recommendation 10 are summarised at Attachment A.

¹⁰ As above, note 7

¹¹ *Telecommunications (Low-impact Facilities) Determination 1997*, Schedule, Part 1, item 2

Removing ambiguity

The *Determination* provides an exhaustive list of structures that are a prescribed 'facility' under the regime¹². If a structure does not fall within a description on the list, the structure is not brought within the regime and must go through the full regulatory approval process for environment and planning.

The way in which each listed 'facility' is described in the *Determination*, should be with sufficient particularity so a carrier, objector and the TIO can easily ascertain what types of structures a carrier may legitimately install and maintain under the regime.

Ambiguity in legislative drafting can lead to different interpretations and cause uncertainty, generate disputes and restrict the TIO's ability to effectively handle the objection, especially if the TIO has insufficient information with which to be able to make a cogent decision or give a direction.

The TIO identifies the following areas as requiring greater clarification in the *Determination*:

No	Determination	Matters requiring clarification
1	Part 3 – Low-impact facilities Section 3.1(4)(aa) <i>shroud</i>	(Response to Qu 3.1) Shrouds should not be described as ancillary to a facility as proposed by section 3.1(4)(aa) of the <i>Determination</i> . Shrouds should be listed as a distinct type of facility in the Schedule of the <i>Determination</i> . (Response to Qu 3.2) When describing a 'shroud', requirements regarding permitted installation, shape, size, volume, style and integration with surroundings should be specified.
2	Schedule, Part 1 – radio facilities column 1 item no. 6 <i>radiocommunications facility</i>	(Response to Qu 7.1) Requirements for mounting the antenna should be specified (e.g. for micro-cell like installations).
3	Schedule, Part 1 – radio facilities column 1 item no. 6A <i>radiocommunications facility</i>	(Response to Qu 7.1) The TIO is uncertain as to how this item is different to item 6. Further clarification should be provided to explain the distinction between modified item 6 and proposed new item 6A. If attached to a structure, requirements should be specified for: <ul style="list-style-type: none"> • colour-matching; and • mounting the antenna to the structure. The TIO notes that the use of 'each' at paragraph (b) suggests that more than one external antenna may be attached. If this is permitted, there should be a specified limit on the number of antennas that may be attached.
4	Schedule, Part 1 – radio facilities column 1 item no. 8A <i>equipment</i>	Requirements regarding size and volume should be specified so it is clear that carriers cannot build a new structure to conceal equipment that is outside the specifications of a facility.
5	Schedule, Part 3 – Above ground housing Column 1 item no. 2A <i>cabinet</i>	(Response to Qu 11.1) The requirement that the cabinet be a 'neutral colour' is open to different interpretation and introduces a new requirement. The requirement should be deleted to be consistent with the descriptions of other facilities in the Schedule.
6	Schedule, Part 4 – underground facilities (for fixed-line networks) Column 1 item 2 <i>conduit or cabling to be laid</i>	(Response to Qu 14.1) The description of 'on or under a bridge' is limiting. It should be broadened to 'in, on, over or under a bridge' as permitted by Schedule 3 of the Act ¹³ . This will facilitate conduit or cabling being able to be connected between a trench and continue where there is a bridge.

¹² As above, note 8

¹³ *Telecommunications Act 1997*, Schedule 3, clauses 5(2) and 20

Co-located facilities (Response to Qu 15.2 and 15.3)

The TIO recommends that the definition of 'co-located facilities' in the Schedule of the *Determination* should remain unchanged for residential areas (**Recommendation 11**).

Expanding the volume requirement from 25% to 50% of the original facility or original infrastructure should not proceed for residential areas (i.e. item 2, Part 7 in the Schedule of the *Determination* should remain unchanged).

The TIO is unsure whether the definition of 'public utility structure' as currently expressed in the *Determination* is sufficiently broad to be capable of capturing a 'road sign' under 'transport services',¹⁴ (see Figure 7 in the Consultation Paper). Assuming it is, the TIO notes the potential risk to public safety, especially for pedestrians and traffic, if the volume limit is increased to 50% and the road sign falls over.

¹⁴ *Telecommunications (Low-impact Facilities) Determination 1997*, clause 1.3

3. Strengthening TIO's powers

- 3.1 If the proposed reforms proceed, the TIO anticipates an increase in the number of land access objections that will be referred to the TIO.
- 3.2 The TIO recommends that the Ombudsman's powers be strengthened for the avoidance of doubt (**Recommendation 12**). This will be particularly critical in the context of a revised regime, permitting carriers to install bigger, taller and more expansive telecommunications structures.
- 3.3 The TIO recommends that the regime include an entitlement for objectors to receive a proprietary payment (perhaps according to a schedule of prescribed payments set by the Government that may be indexed over time) (**Recommendation 13**).

Increase in the number of disputes referred to the TIO

If the proposed reforms proceed, the TIO anticipates an increase in the number of land access objections that will be referred to the TIO.

There is likely to be increased complexity in the nature of the objection, given the expanded definition of 'facility' discussed above at Part 2 of this Submission.

Strengthening TIO's powers (Response to Qu 20.2)

Currently, the *Code* specifies that the carrier must comply with the TIO's direction about *the way in which the carrier should engage in an activity*¹⁵.

This has led to carriers challenging the extent of the TIO's powers to give directions to the carrier about land access matters that might otherwise be considered implicit under the regime.

It would assist the TIO to adjudicate land access objections, if the Ombudsman's powers were codified, to confirm that the Ombudsman can determine:

- whether the dispute involves a 'facility' within the meaning of the *Act* and *Determination*
- whether the parties have complied with the procedural requirements prescribed by the *Act* and the *Code* to be able to access the TIO's service (or whether any party needs to take a step to cure a defect in the procedural requirement)
- whether the land owner (or occupier) has raised valid issues of objection (as set out in the *Code*) that were not resolved by the carrier during the consultation process
- the objector's entitlement to a proprietary payment as discussed below.

To be able to resolve and adjudicate land access objections efficiently and effectively, the TIO recommends that the Ombudsman's powers be strengthened for the avoidance of doubt (**Recommendation 12**).

This will be particularly critical in the context of a revised regime, permitting carriers to install bigger, taller and more expansive telecommunications structures. Codifying the TIO's powers will ensure the regime is sufficiently robust so the TIO can focus on resolving disputes.

An objector's entitlement to proprietary payments

In the TIO's experience, the primary reason why land owners (or occupiers) are motivated to object and progress their objection to the TIO is because they think it fundamentally unfair that a carrier can come onto their land and install telecommunications facilities.

The advent of the migration from 4G to 5G mobile, growing consumer demand for broadband data and the Internet of Things, when coupled with the proposed reforms, will bring objectors within the regime who may have otherwise been previously outside it. If outside the land access regime, these

¹⁵ *Telecommunications Code of Practice 1997*, clauses 2.37, 4.38 and 6.37

objectors might have otherwise been offered a commercial lease or rights agreement by the carrier as fair payment or entitlement for coming onto their land and installing a facility.

The TIO recommends that the regime include an entitlement for objectors to receive a proprietary payment (perhaps according to a schedule of prescribed payments set by the Government that may be indexed over time) (***Recommendation 13***).

The TIO could apply the payment when adjudicating land access objections.

4. Transitional period

The TIO seeks clarification as to when the revised regime will commence and whether there will be a transitional period.

This will assist the TIO to take the necessary steps to prepare for the start date.

The TIO anticipates it will need to update its information materials for possible revision (covering TIO's Terms of Reference, Guidelines¹⁶ and other relevant website information).

¹⁶ *TIO Guidelines on the Installation and Maintenance of Low Impact Facilities (10 April 2015)*: see http://www.tio.com.au/_data/assets/pdf_file/0008/168227/Guidelines-on-the-installation-and-maintenance-of-low-impact-facilities-APRIL-2015.pdf

Attachment A

The TIO's recommended drafting changes to the Schedule of the *Determination*.

Note: TIO's preferred drafting changes below focus on where the TIO disagrees with the proposed indicative mark-ups for consultation purposes.

Schedule – Facilities and areas		
Part 1 – Radio facilities		
Column 1 Item no.	Column 2 Facility	Column 3 Areas
2	Panel, yagi, small omnidirectional antenna (not more than 20 cm long), 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
3	Panel, yagi or other like antenna: (a) not more than 2.8 meters 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 relevant local authority	Residential
3A	Panel, yagi or other like antenna: (a) not more than 2.8 meters long; and (b) if the antenna is attached to a structure – protruding from the structure by not more than 5 metres; and (c) either: (i) colour-matched to its background; or (ii) in a colour agreed in writing between the carrier and relevant local authority	Commercial Industrial Rural
4	An omnidirectional antenna or an array of omnidirectional antennas: (a) not more than 4.5 metres long; and (b) not more than 5 meters apart; and (c) if the array is attached to a structure – protruding from the structure by not more than 2 metres	Commercial Industrial Rural
Part 4 –Underground facilities (for fixed line networks)		
1	Underground conduit or cable deployed by: (a) narrow trench not more than: (i) 450 millimetres wide; or (ii) 650 millimetres wide if intended to be used by more than one carrier; or (b) direct burial; or (c) bore or directional drill hole at least 600 millimetres below the surface; where: (d) access to business premises is not restricted between the hours of 8 am and 6pm, Monday to Friday, or such other hours agreed to by the relevant local government authority; and (e) not more than 100 metres of excavation is left open for each trench at any time and vehicle access to each property is not lost for more than 8 hours in total.	Residential
1A	Underground conduit or cable deployed by: (a) narrow trench not more than: (i) 450 millimetres wide; or (ii) 650 millimetres wide if intended to be used by more than one carrier; or (b) direct burial; or (c) bore or directional drill hole at least 600 millimetres below the surface; where: (d) access to business premises is not restricted between the hours of 8 am and 6pm, Monday to Friday, or such other hours agreed to by the relevant local government authority; and (e) not more than 200 metres of excavation is left open for each trench at any time and vehicle access to each property is not lost for more than 8 hours in total.	Commercial Industrial Rural