Telecommunications Industry Ombudsman

TIO submission to the Department of Infrastructure, Transport, Regional Development, Communications and the Arts – Consultation on Proposed Amendments to the Powers and Immunities Framework

December 2024

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1 The TIO supports the proposed amendments

Thank you for inviting the Telecommunications Industry Ombudsman (**TIO**) to contribute to the Department's consultation on proposed amendments to the *Telecommunications (Low-Impact Facilities) Determination 2018* (**LIFD**) and *Telecommunications Code of Practice 2021* (**the Code**).

Our office plays an important role in the powers and immunities framework. Under Schedule 3 of the *Telecommunications Act 1997* (**the Act**), a landowner or occupier (**collectively, Landowners**) can object to a carrier's proposed inspection, maintenance or installation of a low-impact facility. Subject to the formal requirements of the legislation, carriers must refer unresolved land access objections to our office if the Landowner requests them to do so. Carriers must then comply with any resulting directions made by our office. Over the last three financial years (FY22 to FY24 inclusive), our office has received an average of 14 land access objections per year. We also take complaints under our Terms of Reference from Landowners when they are concerned about how a carrier is accessing or proposing to access their land, whether under an agreement or under the carrier's Schedule 3 powers and immunities.

We broadly support the proposed amendments to the LIFD and the Code. The amendments take account of Australia's evolving telecommunications environment, as they will facilitate development of the infrastructure necessary to support essential telecommunications services.

As the telecommunications needs of Australians continue to evolve, there is a strong public interest in ensuring carriers can easily install and maintain the infrastructure required to support those needs. Telecommunications services are essential to Australians' everyday lives, supporting them to work, study, and connect with each other, government, and other essential services. Robust and resilient telecommunications infrastructure is particularly important in rural, regional and remote Australia, where it is critical to keeping those in isolated communities connected. It is also crucial for communities affected by natural disasters, where reliable access to telecommunications services can be vital to keeping those affected safe.

The proposed amendments continue a trend of the facilities that qualify as 'low-impact facilities' under the LIFD increasing in size over time (and therefore also in likely impact). In this context, it is especially important that the powers and immunities framework strikes the right balance between the public's interest in infrastructure being installed, and the right of Landowners to object to works that affect them.

We offer the following commentary on the proposed amendments, and on further areas where the powers and immunities framework could be improved, for the benefit of Landowners, the telecommunications industry, and the public. Our commentary is based on our experience of performing our unique role in considering land access objections under the powers and immunities framework.

2 The framework for consideration of objections should be reviewed

The land access process under Schedule 3 of the Act is important in making sure carriers can easily install infrastructure to ensure Australians remain connected. The proposed amendments to the LIFD include increased permitted dimensions for antennas, satellite dishes and other low-impact facilities. As the Department highlights in its consultation paper, these increased dimensions will facilitate the installation of infrastructure that supports more resilient and efficient networks, with higher capacity and longer reach. It will also allow carriers to better support emergency service organisations, for example by installing larger omnidirectional antennas to support point-to-multipoint communications.

We support these changes. However, we also observe that aspects of the land access objection process continue to be very onerous for Landowners. The short timeframes within which Landowners can lodge a valid objection, and the need to understand the permitted grounds for objecting under the Code, often mean that those affected by land access activity face barriers to their participation in the objection process.

We recommend the Department consult on whether the current process strikes the right balance between providing a meaningful process for consideration of objections and the need for efficient rollout of essential infrastructure.

2.1 The current objection process is very onerous for some Landowners

Under clause 17 of Schedule 3 to the Act and section 4.23 of the Code, a carrier is required to give Landowners at least 10 business days' notice of proposed land access activity. In our experience, carriers do not generally give significantly more than the required 10 business days' notice, and often give only the required 10 business days' notice. This means Landowners only have the shortest period of time permitted under the framework within which they can object.

Under section 4.31 of the Code, in order to lodge a valid objection, the Landowner must lodge their objection at least five business days before the proposed start date of the activity. This means that if a carrier gives the minimum notice required under the Act and the Code, a Landowner will have only five business days in which they can lodge a valid objection. Under section 4.30 of the Code, a Landowner's objection can relate only to one or more of the five permitted grounds of objection listed in the section.

These limitations of the objection process are particularly onerous for non-institutional Landowners, who are usually not familiar with the process at the time they receive a land access activity notice (LAAN). Such Landowners may reasonably wish to seek legal advice so they can properly understand their right to object, but the short timeframes can make this difficult or (in some cases) impracticable.

2.2 The Ombudsman cannot consider objections if the objector is out of time

Before considering a land access objection that has been referred to the Ombudsman, the Ombudsman must form a view as to whether the objection is within her jurisdiction under the Code. This can include determining that a matter is out of jurisdiction because a Landowner has notified the carrier of their objection late. Under the current requirements of the Code, this can include an objection sent by the Landowner as little as six business days after they first received the LAAN from the carrier.

We also see Landowners making objections that are poorly articulated, or not clearly related to one of the permitted grounds for objecting under section 4.30 of the Code. This can also occur in circumstances where the works to install the proposed low-impact facility have not yet commenced, even though they were planned to commence months beforehand under the relevant LAAN.

2.3 Government should consider extending the required LAAN notice period

It is important that the powers and immunities framework appropriately balance the interests of the pubic in the efficient installation of infrastructure with the rights of Landowners to object to activity that affects them.

As noted above, the Department's proposed amendments continue a trend of the permitted low-impact facilities increasing in size and impact over time. In some instances, the proposed increase in the allowable size of a low-impact facility is quite substantial. For example, the proposed increase in the allowable size of equipment shelters in Rural and Industrial areas would see the allowable base area of an equipment shelter increase from 5 to 52 square metres, and the allowed height double from 2.5 to 5 metres. Depending on the location of a proposed equipment shelter on a rural property (for example), this increase could represent a significant impact to the business activities of the Landowner, or the amenity of the property.

While we support the proposed amendments, we suggest it is also an appropriate time for government to reconsider the permitted timeframes for Landowners to object to land access activity. In our view, the period of notice carriers are required to give Landowners when issuing a LAAN should be extended to 15 business days. In effect, this would mean Landowners would have at least 10 business days (as opposed to the five business days that is the current minimum) within which to lodge their objection. This would give Landowners a more meaningful opportunity to object to land access activity (including seeking legal advice). In the context of the increasing size and impact of the permitted low-impact facilities over time, it would also appropriately balance the interests of carriers, Landowners, and the public.

2.4 The Code could also provide additional guidance about what the grounds of objection require

In addition to extending the notice period required for LAANs, we suggest it would also assist Landowners to understand what is required for a valid objection if section 4.30 of the Code provided additional guidance about what each of the grounds of objection require.[1]

For example, under section 4.30(b) a Landowner can object to land access activity on the basis of the location of a proposed facility on their land. It may be helpful for the Code to specify whether a Landowner needs to nominate an alternative location on their land where a facility could be located, when objecting for this reason.

3 We recommend updates to the Code's notification procedures

Section 1.6 of the Code outlines the notification procedures carriers must use when issuing notices under the powers and immunities framework. Based on our experience of dealing with these procedures, we suggest clarifications and other improvements could be made to the section 1.6 procedures in the following areas.

[1] We publish Guidelines on our Land Access Jurisdiction, which provide some guidance on our view about what types of objections are valid.

3.1 The requirements in the Code should be clear for deeming the date of notice of proposed activity given by post

We suggest the Department consider amending section 1.6(1) of the Code to clarify whether the expected delivery timeframes published on the Australia Post website (from time to time) apply to 'priority letters' when calculating the date notice is deemed to have been given to a Landowner.

Section 1.6(1) of the Code specifies that when a carrier gives notice by post sent to an address in Australia, the time when the notice is deemed to have been given to and received by the addressee is determined in accordance with the table contained in regulation 6 of the *Australian Postal Corporation (Performance Standards) Regulations 1998*. This instrument has since been repealed and replaced with the *Australian Postal Corporation (Performance Standards) Regulations 2019* (Postal Regulations). For improved clarity, we suggest the reference to these regulations in the Code should be updated to reflect the version currently in force.

In April 2024, the Postal Regulations were amended and their definitions of 'regular letter' and 'priority letter' were removed. It is common practice for carriers to give LAANs to Landowners by priority mail. Given that the Postal Regulations definition of 'priority letter' has been removed, there is now a level of uncertainty as to what postal timeframes apply when a carrier sends a LAAN by priority mail.

The Explanatory Statement for the 2024 Postal Regulations amendments says the intention of removing the definitions for 'regular letter' and 'priority letter' was to allow Australia Post to set the appropriate terms and conditions of priority letters. Accordingly, we think it is reasonable to apply the expected delivery timeframes published on the Australia Post website for priority letters when calculating the date notice is deemed to have been given to a Landowner. However, this is not strictly an application of the legislation and we think some clarity in the legislation would assist all stakeholders. For example, the Code could provide a mechanism by which to determine the deemed delivery date of priority letters.

3.2 The Code should clearly specify when carriers can give notice via electronic communication and when notice is deemed to have been given when they do

Section 1.6 of the Code contemplates LAANs being given to Landowners by post or delivery of a physical notice to their residence. A note to section 1.6(1) refers to the *Electronic Transactions Act 1999* (E-Transactions Act) for the circumstances in which a notice may be given by means of electronic communication.

Section 9 of the E-Transactions Act says if a person is required to give information in writing, they may do so by electronic communication if, among other things, the person to whom the electronic communication is required to be given consents to the information being given by electronic communication. Section 5 of the E-Transactions Act says this consent 'includes consent that can reasonably be inferred from the conduct of the person concerned.'

In our experience, carriers often give notice both by email and by post. This sometimes creates difficulties for carriers and our office in determining the date notice is deemed to have been given to a Landowner. These difficulties arise in circumstances where it is not clear what is required for a Landowner's consent to electronic communications to be reasonably inferred from their conduct.

In modern Australia, it may be reasonable to expect that notice of land access activity should be given electronically, if this is practicable in the circumstances (and subject to an appropriate mechanism for determining consent to receive notice by email). Depending on their individual

circumstances, many Landowners may prefer email notice to postal notice. In our view, it would assist multiple stakeholders if the Code contained clear provisions for LAANs to be given via electronic communication such as email.

4 The framework should account for any engineering safety risks arising from the increased permissible dimensions of low-impact facilities

As noted above, many of the Department's proposed amendments to the Schedule of the LIFD would see antennas and satellite dishes of larger dimensions than allowed under the current LIFD qualify as low-impact facilities. The proposed increase in the size of allowed co-located facilities under Part 8 of the Schedule to the LIFD will also result in larger, heavier infrastructure being installed on power and lighting poles as low-impact facilities.

In some instances, we anticipate the increased allowable dimensions of low-impact facilities may present engineering safety challenges. For example, larger, heavier facilities will place additional strain and wind load on existing frames and towers. We acknowledge the Code requires carriers to use good engineering practices when installing low-impact facilities. Nonetheless, we encourage the Department to consider any engineering safety risks arising from the increased dimensions of some low-impact facilities when determining the final form of these amendments.

5 We support further amendments to the LIFD to clarify the application of some provisions

We welcome the Department's proposed amendments to clarify the interpretation of various provisions of the LIFD and the Code.

Clarity in the law is always desirable. In the context of the powers and immunities framework, it is important the provisions of the LIFD specifying what facilities qualify as 'low-impact facilities' are clear and easy to interpret. The question of whether a facility qualifies as a 'low-impact facility' determines both our office's jurisdiction to consider land access objections, and whether the land access powers under Schedule 3 of the Act are available to a carrier to complete works. Clarity about what facilities qualify as 'low-impact' also assists Landowners to understand a carrier's right to access their land when they receive a LAAN.

To this end, we support the Department's proposal to amend Part 3 of the Schedule to the LIFD to clarify that cabling and conduit installed in various locations on bridges qualifies as a low-impact facility.

As the Department outlines in its consultation paper, this change will address the impact of two recent decisions by the High Court[2] and Federal Court[3] to the effect that such installations are not permitted under the powers and immunities framework. Prior to these decisions, the installation of cabling on bridges as low-impact facilities was consistent with our office's understanding of the powers and immunities framework. We agree with the Department that the impact of these decisions has been to cause significant delays in some cable deployments, and (in some instances) perverse outcomes such as the (otherwise unnecessary) trenching of riverbeds for cabling.

While we support this amendment, we note the proposed new items 11 and 12 in Part 3 of the Schedule to the LIFD refer to, among other things, cabling 'under, a bridge', and 'within existing

[2] *Optus Fixed Infrastructure Pty Limited v State of Queensland & Anor* [2023] HCATrans 86 (16 June 2023).

[3] *Optus Fixed Infrastructure Pty Ltd v Telecommunications Industry Ombudsman* [2023] FCA 928.

conduit deployed by a carrier… under… a bridge' respectively. We question whether these references to cabling installed 'under' bridges are necessary to address the impact of the court decisions outlined above. In our view, allowing cabling (within existing conduit and otherwise) that is 'attached to, on, or within' a bridge is likely sufficient. Referring to cabling 'under' bridges may cause overlap or confusion with some of the items referring to aerial cables in Part 5 of the Schedule to the LIFD.

Based on our experience considering land access objections, we have also identified several other areas of the LIFD that could be clarified to ensure the smooth and efficient operation of the powers and immunities framework. We encourage the Department to consider amending the following areas to clarify them.

5.1 New cabling in existing conduit installed underground as a low-impact facility

Item 2 of Part 4 of the Schedule to the LIFD should be amended to explicitly clarify that adding new cabling to existing conduit installed underground qualifies as a low-impact facility. This clarification would be consistent with our office's current understanding of the LIFD, but the drafting could be clearer. Item 2 of Part 4 currently refers to:

> Conduit or cabling to be laid in:
>
> (a) an existing trench, or
>
> (b) a trench created by a developer, relevant local government authority, public utility or carrier.

We suggest the drafting should be modified so it contains an explicit reference to the installation of cabling in an existing conduit underground (whether owned by the carrier or a third party). This will clarify that such installations qualify as low-impact facilities.

5.2 Radiocommunications facilities installed with cabinets – whether the cabinet and antennas need to be installed on the same structure

We note the Department has proposed to amend Item 8 of Part 1 of the Schedule to the LIFD so that a facility with an antenna of not more than 1.2 metres in length no longer needs to be installed with a cabinet. We understand this item currently allows the installation of a facility including antennas and a cabinet, whether the antennas and the cabinet are attached to the same or different structures. However, this is not made explicit in the text of the item.

We encourage the Department to clarify whether Item 8 of Part 1 of the Schedule to the LIFD requires the antennas and any associated cabinet to be installed on the same structure.

5.3 Definition of 'in-building subscriber connection equipment'

Section 1.5 of the LIFD provides a definition for 'in-building subscriber connection equipment' (IBSCE), which under Item 6 in Part 3 of the Schedule, qualifies as a low-impact facility. Broadly, the inclusion of IBSCE as low-impact facilities is intended to allow carriers to easily install the infrastructure required to supply services to end-users who live in multi-tenant buildings such as apartment blocks. It is also designed to support competition by empowering competing carriers to offer their services to end-users who live in a building with established infrastructure owned by another carrier.

In our experience, there are aspects of the section 1.5 definition for IBSCE that are potentially unclear, and raise questions about the circumstances in which a carrier is entitled to install infrastructure as IBSCE. These areas have also been a common cause of disagreement between Landowners and carriers. We encourage the Department to clarify the following aspects of the definition.

5.3.1 The IBSCE definition should make clear a carrier needs an existing customer in a building before issuing a LAAN

We sometimes receive land access objections where a carrier who does not have existing customers in a building issues a LAAN with the intention of installing infrastructure as IBSCE. In some cases, the carrier proposes to install infrastructure in the building with the apparent aim of obtaining customers in the building at a later date. In other cases, it appears that the carrier did not understand it required a customer in the building before issuing a LAAN. In our experience, Landowners generally do not understand the relevant obligation and rarely challenge whether the carrier's proposed activity meets the requirements of the LIFD.

Paragraph (a) of the section 1.5 definition for IBSCE defines IBSCE as a facility installed within a building 'with the aim of managing and maintaining the supply of carriage services to a customer of a carrier'. The term 'customer' is not defined in the LIFD. In part because of this, paragraph (a) of the definition for IBSCE has historically presented a level of interpretive difficulty, as noted by the Supreme Court of Victoria Court of Appeal in the *Hutchison 3G v Director of Housing* case.[4] In that case, the Court read IBSCE to mean a facility installed for managing or maintaining the supply of carriage services 'to a customer or customers of a carrier who occupy the building or part of the building'.[5]

Following this reasoning, we view the IBSCE definition as requiring that a facility is installed with the aim of supplying carriage services to a customer who occupies the building. In our view, the powers and immunities framework generally requires a carrier to have at least one existing customer who occupies a building before issuing a LAAN to install IBSCE in that building.[6] However, this could be clearer in the text of the definition.

We encourage the Department to amend the definition of IBSCE to clarify that a carrier needs to have an existing customer in a building before issuing a LAAN.

5.3.2 Paragraph (a) of the definition should be clear about whether IBSCE may be installed for the purpose of supplying carriage services to a carriage service provider (as a customer of the carrier)

In the contemporary telecommunications market, it is common for Australia's larger telecommunications providers to have separate retail and wholesale functions. Such providers often have one or more entities supplying services to end-users, and one or more separate entities that own and manage their infrastructure. In practice, this means that the wholesale arm of a provider will often seek to install low-impact facilities for the purpose of supplying carriage services to its retail arm, so those services can be on-sold to end-users.

The drafting of the LIFD should make clear how this current industry practice applies to the definition of IBSCE.

[4] *Hutchison 3G Australia Pty Ltd v Director of Housing & Anor* [2004] VSCA 99.

[5] *Hutchison 3G Australia Pty Ltd v Director of Housing & Anor* [2004] VSCA 99, at paragraph 49.

[6] See clause 3.4 of our Guidelines on our Land Access Jurisdiction.

In the current industry context, one reading of paragraph (a) of the definition is that it may allow a wholesale carrier to install infrastructure for the purpose of supplying carriage services to a carriage service provider (CSP), for resupply by the CSP to its end-user customers in the building (provided the CSP has at least one end-user customer occupying the building at the time the carrier issues the LAAN). However, this is not explicit in the text of the definition.

The Department should amend paragraph (a) of the definition of IBSCE to make clear whether it allows a carrier to install infrastructure for the purposes of allowing a CSP to supply services to its existing end-user customers in a building.

5.4 Definition of 'area of environmental significance'

Section 2.5 of the LIFD defines the phrase 'area of environmental significance' for the purposes of the LIFD. This definition is important, as under section 3.1(2), a facility is not a low-impact facility if the area in which it is to be installed is an 'area of environmental significance'.

The section 2.5 definition contains six subsections, each of which outlines a different criterion that will, if satisfied, qualify an area as an 'area of environmental significance'. Some of the subsections are only briefly defined, and would benefit from additional defining and guidance as to how they should apply.

Several subsections cross-refer broadly to the status of an area under 'a law of the Commonwealth, a State or a Territory'. For example, subsection 2.5(4) says an area is an 'area of environmental significance' if it is an area that 'under a law of the Commonwealth, or a State or Territory, is protected from significant environmental disturbance.' However, other Commonwealth, State and Territory legislation often uses different terminology to that in the LIFD to refer to similar concepts. For example, legislation designed broadly to protect the environment may not use the language of 'significant environmental disturbance'.

Issues such as these can cause ambiguity in how section 2.5 should be interpreted. As shown in the case studies below, they also create challenges for our office when determining our jurisdiction to consider land access objections. Accordingly, multiple stakeholders would benefit from the subsections of section 2.5 being more fully defined.

Case Study A – A Landowner argued their land was of significance to Aboriginal persons or Torres Strait Islanders

Pursuant to section 2.5(6) of the LIFD, a Landowner asserted their land was an 'area of environmental significance' because it was of significance to Aboriginal persons or Torres Strait Islanders. One way to determine whether section 2.5(6) applied was to check a register under section 2.5(6)(a). However, in the circumstances, only the Landowner was permitted to access the register. The Landowner could not or would not access the register to assist us in determining our jurisdiction to consider their objection.

This is an unsettled area of law. The LIFD's Explanatory Statement does not provide guidance on section 2.5(6) and there does not appear to be any applicable case law. Therefore, difficult statutory interpretation was required for us to determine our jurisdiction to consider the Landowner's objection.

We concluded that if a cultural heritage management plan prepared under the *Aboriginal Heritage Act 2006 (Vic)* identified an Aboriginal place in the area of the carrier's proposed activity, then the area would be an 'area of environmental significance' under section 2.5(6)(b) of the LIFD. In practice,

obtaining such a cultural heritage management plan can be a very time-consuming process. This has obvious impacts for the carrier and the Landowner.

Case Study B – A Landowner argued their land was protected from 'significant environmental disturbance' under the *Fisheries Management Act 1994 (NSW)*

Under section 2.5(4) of the LIFD, a Landowner argued the area where a carrier had proposed to install a facility was an 'area of environmental significance' because it was an area protected from 'significant environmental disturbance' under a law of New South Wales. Specifically, the Landowner referred to the *Fisheries Management Act 1994 (NSW)* (**FM Act**). The Landowner argued that the proposed facility was to be installed in 'public water lands', which are 'protected areas'. Where a 'protected area' has 'protected marine vegetation' under section 204A of the FM Act, the FM Act precludes harvesting 'or other harm' to the protected vegetation.

The Landowner also referred to section 205 of the FM Act, which sets out a permit process for any person seeking to 'harm' marine vegetation in 'protected areas'.

The FM Act does not use the language of protection from 'significant environmental disturbance'. Accordingly, we needed to perform detailed statutory interpretation to determine our jurisdiction to consider the Landowner's objection. We concluded that to the extent the relevant provisions of the FM Act may identify certain areas as protected from 'significant environmental disturbance' under the LIFD, those provisions of the FM Act did not apply to carrier's proposed activities.

Therefore, we concluded the area of the carrier's proposed activity was not an 'area of environmental significance' under the LIFD.

5.5 The method of calculating 'protrusion' distances

The LIFD contains several references to facilities 'protruding' from the surface of land or from a supporting structure. When applying several items in the LIFD's Schedule, it is necessary to determine the distance a proposed facility will protrude from its supporting structure. These protrusion distances are often difficult to calculate on the basis of engineering plans and drawings.

We understand the protrusion distance is to be measured from the top of a supporting structure that a facility (such as an antenna) is attached to (for example, the rooftop of a building), to the bottom of the facility. However, there are differing views about the correct method for calculating protrusions.

We recommend the Department provide additional guidance in the LIFD about how protrusion distances should be calculated.

5.6 The provisions relating to ancillary facilities

Under section 3.1(4) of the LIFD, a facility qualifies as a low-impact facility if it is 'ancillary' to another low-impact facility, and satisfies at least one of the criteria laid out in paragraphs 3.1(4)(a)-(c). This definition is quite broad and states:

> 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.

When determining whether a proposed facility is an ancillary facility that qualifies as a low-impact facility under section 3.1(4), the relevant case law says a decision maker should consider the proposed facility in its own right.[7] However, the totality of the facilities in an area (including any proposed facility) may raise questions about whether a proposed facility is ancillary under section 3.1(4), or should be considered a separate low-impact facility.

In our view, section 3.1(4) would benefit from additional guidance to help Landowners, carriers, and our office determine whether a proposed facility is 'ancillary' to a low-impact facility, or is a separate facility that is not 'ancillary' (but may be a low-impact facility in its own right under section 3.1(1)).

[7] See, eg, *Hutchison 3G Australia Pty Ltd v Director of Housing & Anor* [2004] VSCA 99.