Submission 046
Received 11/11/11

IT'S HOW WE CONNECT

11 November 2011

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Dear Ms Morris

INQUIRY INTO THE TELECOMMUNICATIONS AMENDMENT (ENHANCED COMMUNITY CONSULTATION) BILL 2011

Telstra is pleased to be able to provide the attached submission to assist the Committee in its inquiry into the above legislation. We would be pleased to further discuss the submission should the Committee so wish.

Yours sincerely

James Shaw
Director Government Relations

HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON INFRASTRUCTURE AND COMMUNICATIONS

INQUIRY INTO THE *TELECOMMUNICATIONS AMENDMENT (ENHANCED COMMUNITY CONSULTATION) BILL 2011*

SUBMISSIONS OF TELSTRA CORPORATION LIMITED

11 November 2011

1. INTRODUCTION

On 19 September 2011, the *Telecommunications Amendment (Enhanced Community Consultation) Bill 2011* (**the Bill**) was introduced into the Federal Parliament with the aim of amending Schedule 3 to the *Telecommunications Act 1997* (Cth) (**Telecommunications Act**). Schedule 3 sets out carriers' powers and immunities in connection with access to land.

On 17 October 2011, the House of Representatives Standing Committee on Infrastructure and Communications (**Standing Committee**) extended an invitation to Telstra Corporation Limited (**Telstra**) to present submissions to the inquiry on the Bill.

Telstra would like to thank the Standing Committee for this opportunity, and for consideration of Telstra's views.

This submission sets out Telstra's concerns regarding the Bill and the likely implications if it was to become law. **Annexure 1** is Schedule 3 of the Telecommunications Act marked up to show the amendments proposed in the Bill, with commentary from Telstra.

2. GENERAL COMMENTS

When introducing the Telecommunications Act to parliament in 1997, the Minister explained with respect to Schedule 3:

> . . . from 1 July 1997 government policy strikes the right balance between encouraging investment in infrastructure to meet the growing demand for new telecommunications services and facilitating further competition while also addressing the legitimate concerns of local communities about the effect of the roll-out of telecommunications infrastructure in their local environment.[1]

The Bill has the potential to substantially disrupt the telecommunications land access regime that has been in place since 1997. As a consequence, if the Bill was to become law, the provision of basic telecommunications services to the Australian community would be significantly impeded.

3. SUMMARY OF TELSTRA'S KEY CONCERNS

(a) **The Bill's consultation model is unworkable:** The Bill proposes a consultation model whereby carriers are required to give 30 days' notice of any maintenance or low-impact installation activity to all owners and occupiers of land within 500 metres of the location of the activity. Telstra undertakes approximately 200,000 maintenance or low-impact installation activities every year in reliance on the Telecommunications Act. Under the Bill the number of individual notices required to be provided for each activity would be increased by tens, hundreds or even

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[1] Warwick Smith (then Minister for Sport, Territories and Local Government and Minister Assisting the Prime Minister for the Sydney 2000 Games), second reading speech for the *Telecommunications Bill 1996*, 5 December 1996.

thousands in urban areas. Telstra estimates that it would be required to prepare an additional 8 million Telecommunications Act notices annually. These notification requirements, together with a tripling of the length of the current notice period, would result in very significant delays in network maintenance and development, and massively increased costs. Telstra submits that the changes proposed will provide community stakeholders with marginal benefits that in no way justify the massive increase in costs and service disruptions that will result if the proposal became law.

(b) **Excessive costs arising from the Bill's consultation model**: Based on current experience, Telstra estimates that each individually addressed Telecommunications Act notice will cost not less than $250 to prepare and distribute. An additional 8 million notices a year would result in a cost to Telstra of $2 billion annually. This figure does not include the costs of dealing with higher numbers of follow up inquiries and objections, which would also be many millions of dollars annually. The costs to Telstra of the consultation model proposed by the Bill are huge, and as noted above, do not achieve any meaningful community benefit.

(c) **The Bill's consultation model gives the same rights to distant neighbours as affected land owners:** When Telstra gives notice under the Telecommunications Act, it is advising land owners and occupiers that Telstra is intending to access and, in some cases occupy, their land, under the authority of the Telecommunications Act. While Telstra is not required to seek the consent of the relevant land owners and occupiers, the Telecommunications Act confers on them rights of objection and compensation for financial loss and damage. It is not appropriate for the Telecommunications Act to confer these same rights of objection and compensation on land owners and occupiers whose property rights are not directly affected. Clause 17 of Schedule 3 of the Telecommunications Act is not the mechanism through which enhanced community consultation should be delivered.

(d) **Carrier obligations under industry code ignored:** Since 2002, a separate and additional community consultation regime has applied specifically to the deployment of mobile network infrastructure not requiring planning approval under State or Territory law, including activities done in reliance on the Telecommunications Act. The *Industry Code: Deployment of Mobile Network Infrastructure* (ACIF C564:2004) (**Mobile Infrastructure Industry Code**), which was developed jointly by industry, Commonwealth and local governments, and community stakeholder groups, through the Communications Alliance Ltd, is presently undergoing its second five year review. The Mobile Infrastructure Industry Code imposes obligations on carriers to consult with neighbours, community groups and occupiers of nearby "sensitive sites". The Mobile Infrastructure Industry Code goes a long way to providing the community consultation sought by Mr Wilkie. However, this does not appear to have been taken into account in the development of the Bill.

(e) **Reduction of the permissible tower extension height will have a significant impact on carriers for negligible community benefit:** The ability to extend existing towers once, by up to five metres, in industrial and rural areas (without the need to seek planning approval under State law) allows Telstra to maximise its use of existing structures while reducing impact on the community from the installation of additional facilities. As a one metre extension does not offer any functional benefit, the Bill effectively proscribes tower extensions.

(f) **The system does not need radical reform:** The current telecommunications land access regime has been in place since 1997, with the Mobile Infrastructure Industry Code introduced in 2002. Telstra submits that the existing regime is sufficiently flexible to allow for the appropriate balance between the provision of

telecommunications infrastructure for the benefit of community, and protection of community interests over time. The numbers of unresolved objections requiring referral to the Telecommunications Industry Ombudsman (**TIO**), and complaints to the Australian Communications and Media Authority (**ACMA**) as to compliance with the Mobile Infrastructure Industry Code, are low. However, the current community consultation requirements are not static, and have been enhanced in the third iteration of the Mobile Infrastructure Industry Code. The Bill would create an unworkable consultation model, and be of significant detriment to both Telstra and the community at large.

4. THE BILL'S CONSULTATION MODEL IS UNWORKABLE

4.1 Notification of land owners and occupiers within 500 metres

The Bill's objective is to address "enhanced community consultation". It seeks to do this, primarily, by a requirement that carriers give 30 days' notice of maintenance or low-impact installation activities to owners and occupiers of land within 500 metres of where the activity is to occur. Telstra notifies approximately 44,000 maintenance or low-impact installation activities each year. It undertakes about 156,000 additional land access activities in reliance on the Telecommunications Act, for which, because of notice waiver arrangements with land owners (such as local councils and Roads Departments) it does not provide notification. The Bill would require Telstra to notify owners and occupiers of land within 500 metres of the location of each of the 200,000 land access activities for which it relies on the Telecommunications Act annually

Assuming, conservatively, that there are 40 owners and occupiers within a 500 metre radius of each activity Telstra undertakes in reliance on the Telecommunications Act, under the Bill, Telstra would be required to provide in the order of 8 million additional Telecommunications Act notices annually.

A notification obligation of this breadth will cause considerable inconvenience to the community. Householders would be inundated with irrelevant Telecommunications Act notices as each owner and occupier within 500 metres of, for example, a cable haul or installation of a new antenna on an existing facility, is notified. The cost to Telstra of having to notify so many land owners and occupiers would be massive.

4.2 Scope of the activities subject to the requirement

The Bill would impose the 500 metre notification requirements on all maintenance activities and all low-impact facility installations. As noted above, Telstra undertakes approximately 200,000 such activities each year. The range of activities caught by the notification requirements in the Bill is huge. Some typical activities are listed below:

Installation of low-impact facilities (Division 3)		**Maintenance activity (Division 4)**	
(a)	Installing underground cabling	(a)	Hauling cable through existing conduits
(b)	Installing cable markers along a newly installed cable route	(b)	Replacing cracked man hole covers
(c)	Installing a fence around existing telecommunications facilities	(c)	Repairing cabling
(d)	Installing a payphone	(d)	Upgrading old technology antennas

Installation of low-impact facilities (Division 3)		Maintenance activity (Division 4)	
(e)	Installing antennas on a mount on a roof top	(e)	Reinforcing a lattice tower damaged by corrosion
(f)	Extending an existing tower by five metres (once only in rural or industrial areas)	(f)	Lifecycle replacement of antennas, batteries and feeder cabling
(g)	Installing solar panels	(g)	Like for like (height and displacement) "swap-outs" of towers and monopoles to increase structural capacity

Telstra submits that there would be no benefit to any sector of the community from the onerous notification arrangements proposed by the Bill. Telstra acknowledges that community consultation plays an important role with respect to some of the activities set out above. However, Telstra does not believe that additional community consultation is necessary, or even sought by communities in respect of most of its activities.

4.3 A telecommunications land access and activity notice is not the mechanism to improve consultation

Telstra is concerned that the notification requirements proposed by the Bill do not take into account the legal effect of a notice of intention to access land under the Telecommunications Act. A Telecommunications Act notice gives carriers a legal right to enter and occupy the land specified in the notice. One consequence of this is that the notice must accurately identify the land owner and occupier. Telstra is required to undertake title searches and other measures to verify ownership and occupancy as part of the preparation of each notice. Undertaking this careful work for the 8 million additional notices that are likely to be required if the Bill is to become law will incur costs disproportionate to the benefit to the notice recipients.

Because a notice invokes the authority of the Telecommunications Act to affect the rights of landowners and occupiers, the Telecommunications Act (through the Telecommunications Code of Practice), sets up a process through which unresolved objections to Telstra's access may be adjudicated by the TIO. It also creates a right of compensation for financial loss and damage in affected land owners and occupiers.

Telstra submits that formal rights of objection and compensation should not be available to owners and occupiers of other land potentially quite distant from the land to be accessed. There is a real potential that such rights could be abused with the intent of causing Telstra additional cost and delay under the objection and TIO referral process. Telstra agrees that it is desirable for near neighbours to have notice of the installation of certain facilities. However, Telstra submits that the Telecommunications Act notification provisions are not the appropriate mechanism to achieve this. In relation to mobile network infrastructure there is already an effective process of community consultation through the Mobile Network Infrastructure Code, as discussed below.

4.4 Increased notice period

The Bill seeks to increase the period for giving of notice under the Telecommunications Act from 10 days to 30 days. For some projects, a 30 day notification period would be possible. However, for most minor repairs and network enhancements, the imposition of a lengthy notification period would materially obstruct Telstra's ability to respond to customer demand and carry out standard network maintenance. As indicated above, Telstra notifies 44,000 maintenance and low-impact activities annually. Scheduling these around weather,

project readiness, and staff and equipment availability is a considerable logistical challenge. However, Telstra is able to maintain, and even improve, its level of responsiveness because it is able to organise workflows with reasonable flexibility. An increased notification period will substantially impede this ability.

4.5 Practical examples of the impact of the Bill

The following examples show how a particular proposal is dealt with under the current regime, and identifies the impacts if the same project was to be regulated in the manner proposed in the Bill.

Example 1

Proposed installation of one low-impact antenna and mount on an existing roof mounted facility located in a residential zone

Current scheme

At the time of the installation of the original facility, Telstra negotiated a lease with the property owner who waived his entitlement to receive notice of future works in the leased area under clause 17(5) of Schedule 3 to the Telecommunications Act. Under the draft Mobile Phone Base Station Deployment Code (and current Code), Telstra is required to give notice to the Council (by letter) and the public (by advertising in a local newspaper) providing not less than 10 days for submissions. Assuming there are no submissions, Telstra may immediately undertake the works. Telstra has a work plan in place and the installation is carried out the day after the notification period ends, in eight hours.

In total the work is carried out 11 business days after notification, at a total cost of $10,000 including notification, design, equipment and installation. The notification costs are approximately $800.

If the Bill becomes law

Under the Bill, Telstra would be required to give 30 days' notice to all land owners and occupiers of land within 500 metres of the proposed installation. This 500 metre radius encompasses a number of medium and high density residential dwellings. Telstra would be required to identify and give notice to the land owner and occupier of each dwelling and business. This would require a total of 5,000 notices to be given, at a cost of $1,250,000.

29 days after giving notice, Telstra receives 100 objections relating to impact on the objectors' land. Telstra is required by the Telecommunications Code of Practice to make reasonable efforts to consult with each objector within five business days of receiving the objection and to seek resolution by agreement with each objector within 20 business days. The total cost of responding to these individual objections is approximately $100,000.

Telstra is able to resolve 95 of the objections, but is unable to resolve five objections. 25 days after receiving the objections, Telstra informs those five objectors of its intention to carry out the activity as notified, as it would be economically and technically unfeasible to change the activity.

Nine days after receiving Telstra's response, two objectors require Telstra to refer their objection to the TIO. The TIO reviews the objections and five months after referral, informs Telstra that it may carry out the activity as intended. The cost to Telstra in managing these two referrals is $20,000. Telstra's civil contractor is unavailable to carry out the installation until 20 days later.

In total, the installation is carried out seven months after giving notice, at a cost of $1.37m plus the civil costs of $9,200.

Telstra estimates it will undertake about 1,000 similar projects each year over the next three years. It is a reasonable assumption that 0.05% of these, being 50 projects, would result in the level of objection used in the example. This is an additional cost of $6.85 million for one small aspect of Telstra's annual works.

Example 2

Proposed replacement of defective low-impact cabling in an inner city suburb

Current scheme

Telstra has entered into an agreement with the local council regarding maintenance of existing infrastructure. Although these activities are undertaken in reliance on the Telecommunications Act, the council has agreed to waive the requirement to receive a notice under the Telecommunications Act of these activities. Telstra has numerous agreements of this nature with local governments throughout Australia.

Telstra is able to proceed with the cable replacement without reference to the council. The timing for the repair works is determined by the urgency of the need for repair and the work schedule of the maintenance crew. The work is therefore able to be done efficiently at a cost of less than $30,000 with no notification costs.

If the Bill becomes law

Under the Bill, Telstra is required to give 30 days' notice to all owners and occupiers of land within 500 metres of the maintenance works. The area is predominantly characterised by low density residential houses. It is necessary to serve 1,500 Telecommunications Act notices.

No objections are received. This may be attributed to the fact that there is no forecast interruption to services and the works relate to underground equipment. Telstra is able to complete the works 40 days after notification. The cost of notification is $375,000 but significantly, the works are delayed by more than a month, in which time fault levels increased leading to some loss of services. The longer notification time prevents Telstra's responding to the fault quickly and leads to a reduced level of customer satisfaction.

Telstra expects that examples of this type may be repeated up to 40,000 times per year. Assuming that on average only 250 notices are issued, the increased cost to Telstra is in the order of $2.5 billion per annum. Even if the formal Telecommunications Act notices were substituted for informal letter box drop notices, the additional costs would be in the region of $10 million per annum.

Clearly these costs are not sustainable. They significantly exceed the cost of the civil works themselves, and the ability of Telstra to fund the works. Moreover, they do not provide any meaningful benefit to community stakeholders.

5. NO REGARD TO THE INDUSTRY CODE – DEPLOYMENT OF MOBILE NETWORK INFRASTRUCTURE (ACIF C564: 2004)

Since 2002, a separate and additional community consultation regime has applied specifically to the deployment of mobile network infrastructure where it does not require planning approval under State or Territory law. The Mobile Infrastructure Industry Code is registered by the ACMA and has force under the Telecommunications Act as an "industry code".

The Mobile Infrastructure Industry Code was originally developed jointly by industry, Commonwealth and local government, and community stakeholder groups through the Australian Communications Industry Forum in 2002. It was a response to community concerns regarding the level of consultation in relation to the deployment of mobile communications infrastructure. It sought to fill in the gap left by the Telecommunications Act notification requirements. That is, it required carriers to notify and consult in relation to proposals for the installation of mobile communications infrastructure more broadly than just the owners and occupiers of the affected land, which is the extent of the notification required under the Telecommunications Act.

The Communications Alliance Ltd is now responsible for the Mobile Infrastructure Industry Code, and is presently managing the Code's second five year review. Public comment on the new "Mobile Base Station Deployment Code (DRC564:2011)" (**2012 Code**) closed in early September 2011. The 2012 Code is intended to come into effect in mid-2012.

Features of the current Mobile Infrastructure Industry Code which will be carried forward into the 2012 Code include the following:

(a) for new projects that do not require planning approval under State or Territory laws:

  (i) carriers must first prepare a consultation plan which requires the carrier to consider, for each relevant installation, potentially interested or affected. stakeholders, including neighbours, schools, kindergartens, hospitals and local parliamentarians. This group becomes the focus of carrier consultation. The consultation plan must be provided to the local council for comment;

  (ii) carriers are required to advise identified stakeholders of the proposed installation in writing and invite comments. It is not necessary, however, for carriers to check land title details etc in all cases. Notification by letter drop is acceptable; and

  (iii) carriers must include a report on the predicted electromagnetic emission levels from the facility (adopting the calculation model prescribed by the Australian Radiation Protection and Nuclear Safety Agency) in the notification materials; and

(b) for a new installations on an existing site that does not require development consent, carriers must update the report on the predicted electromagnetic emission levels from the facility, notify the local council and publish a notice in a local newspaper.

The 2012 Code will also require carriers to make information regarding each proposal for a new base station site available on a website.

The community groups involved in the development of the 2012 Code did not seek broader notification than that provided for in the Mobile Infrastructure Industry Code. Rather the focus was on the depth and detail of the information carriers are required to provide. The geographically broad community consultation sought in the Bill is not a priority for the community groups with whom Telstra engages on a regular basis.

Telstra has found that the development of the Mobile Infrastructure Industry Code and the 2012 Code has allowed it to stay in touch with community attitudes and modify its processes to address these, where reasonably possible. The Mobile Infrastructure Industry Code goes a long way to providing the enhanced community consultation sought by the Bill.

6. REDUCED HEIGHT OF PERMISSIBLE LOW-IMPACT TOWER EXTENSIONS

The Bill proposes that tower extensions be limited to one metre. The *Telecommunications (Low-impact Facilities) Determination 1997* (Cth) permits the extension of an existing tower by five metres, once only, in industrial and rural areas (but not in residential and commercial areas and areas of environmental significance). Any further tower extensions require planning approval under State or Territory laws. The effect of the Bill would be to limit any tower extension permitted under the *Telecommunications (Low-impact Facilities) Determination 1997* to one metre.

Permitting a one-off extension of five metres allows Telstra to better use existing towers in industrial and rural areas. It thereby reduces the need to build new structures. In fact, the ability to extend towers by five metres significantly contributes to Telstra's ability to provide improved coverage, capacity and call quality in a timely and cost effective manner.

Further, because existing towers are typically between 20 metres to 30 metres in height, an extension of five metres has little visual impact from ground level. An extension of this nature does not generally attract adverse community comment.

An extension of one metre only, as proposed in the Bill, would simply be too small to have any functional utility. It would not provide the necessary aperture space to accommodate any additional antennas nor allow sufficient distance from existing antennas to avoid radio frequency interference. Moreover, an extension of one metre would not offer any coverage area expansion. The reduction proposed in the Bill is little different from removing the tower extensions from Telecommunications Act altogether.

7. FACILITY INSTALLATION PERMITS

7.1 Facility installation permits are infrequently used

Telstra has never sought a facility installation permit and is not aware of other carriers doing so.

7.2 No facility installation permit within 100 metres of a "community sensitive site"

The Bill proposes to amend the criteria for issue of a facility installation permit to prevent the installation of a telecommunications facility within 100 metres of a "community sensitive site". This term is undefined.

Telstra submits that it is inappropriate to seek to limit the ACMA's discretion in issuing a facility installation permit by the imposition of this 100 metre requirement. A facility installation permit would only be sought in extreme circumstances, and if the reasons a location is sought are sufficient to justify a facility installation permit on other grounds, they may also be sufficiently compelling to permit the installation of a facility more proximate to a community sensitive site than 100 metres.

Further, because a facility installation permit can apply to any type of telecommunications facility, it is quite possible that the facility the subject of the facility installation permit may have no impact at all on a community sensitive site. For example, a cable installation that is not a low-impact facility (because it is an area of environmental significance, for example) is likely to have no impact at all on a school 95 metres away. The imposition of arbitrary buffer zones is likely to impose sub-optimal decision making constraints on a body that has considerable expertise in the area.

8. BUSINESS IMPACTS MAY BE A RELEVANT CONSIDERATION

At two points in the Bill it is proposed that the ACMA have no regard to certain business or financial interests of the carriers, including Telstra:

- The Bill includes amendments to clause 27 in relation to the grant of a facility installation permit. Clause 27(4) directs the ACMA have regard to, amongst many other things, the "economic importance of the facilities in the context of the telecommunications network to which the facilities relate". The Bill seeks to insert a new clause, 27(4A), which would preclude the ACMA from having regard to the "revenue, profit or market share or any financial interest of a carrier" when forming view as to this matter.

- The Bill includes an amendment to clause 48, which specifies that the ACMA may inform members of the public about the kinds and location of designated overhead lines, telecommunications transmission towers and underground facilities. The Telecommunications Act, as drafted, requires the ACMA to have regard to the legitimate business interests of carriers in making this information available. The Bill seeks to limit the scope of this obligation through the insertion of the words "other than matters relating to competition between carriers".

Carriers' financial interests and consideration of inter-carrier competition are factors that are relevant to some of the decisions the ACMA is to make under Schedule 3. In no instance are these matters determinative. The ACMA has a wide discretion and must have regard to a range of matters when making the decisions required under clause 27(1(b)) and clause 48(2) of Schedule 3. However, when making decisions that affect Telstra's business, Telstra submits that it is appropriate and necessary for the ACMA to be able to do so with an understanding of the business context of its decision making.

9. LAND ACCESS OBLIGATIONS ON CARRIERS MORE ONEROUS THAN UTILITIES PROVIDERS REGULATED UNDER STATE LAW

The telecommunications industry is heavily regulated at both State and Federal level. The Federal telecommunications land access regime provides for significant community consultation prior to the installation or maintenance of telecommunications facilities. Land access for other utilities is simpler, it seems, because they are solely regulated at State level (leaving aside the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth), which applies infrequently). Electricity, water and gas providers generally enjoy many statutory exemptions from State and Territory based planning laws and are not subject to additional layers of Commonwealth regulation. For day to day activities, electricity, water and gas providers have a less onerous notification/public consultation process to follow than Telstra does under the Telecommunications Act and associated instruments.

Telstra submits that the consultation requirements imposed on the telecommunications industry should not be amended as proposed by the Bill. The land access regime it presently operates under is already more stringent than that which applies to other utilities providers regulated under State and Territory law.

10. THE CURRENT LAND ACCESS SYSTEM PROVIDES THE APPROPRIATE BALANCE

Telstra rolls out infrastructure in response to customer demand – a demand which is increasing. People expect improved network coverage and improved service levels that provide the data speed and reliability they desire. Streamlined land access powers have made it possible for telecommunications networks to be rolled out at a reasonable cost and in reasonable time frames while minimising impacts on local communities to the greatest extent possible.

For the network to continue to expand, carriers must be able to continue to rely on an effective and efficient telecommunications land access regime. Telstra is aware that issues with local communities can arise in relation to specific projects from time to time. In the revised Mobile Infrastructure Industry Code, Telstra has voluntarily taken on additional obligations of disclosure and consultation, so as to better respond to community expectations.

While there has been some dispute from time to time, the system largely works well in the vast majority of situations. This is demonstrated by the low level of formal complaints:

(a) Over the past three years, there have been an average of seven unresolved objections in relation to Telstra's land access required to be referred to the TIO from a total of 44,000 Telecommunications Act notices issued annually;[2]

(b) In the past financial year, three complaints were made to the ACMA regarding Telstra's compliance with the Mobile Infrastructure Industry Code in respect of two low-impact facility installation proposals.[3] Industry wide, there were 13 complaints in relation to five low-impact activity proposals.[4]

To limit the land access scheme in the manner suggested in the Bill would alter the balance between legitimate concerns of local communities and the conditions for sound investment in telecommunications infrastructure, to the detriment of carriers, the community and the economy generally.

FINAL COMMENTS

If the Bill was to become law, the provision of basic telecommunications services to the Australian community would be significantly impeded.

Accordingly, in formulating the report on the Bill, Telstra requests that the Standing Committee have regard to the issues raised in this submission. Further, given that apparently minor changes to Schedule 3 to the Telecommunications Act can significantly impact the workability of the scheme, Telstra requests the opportunity to make further submissions in relation to any additional or different amendments recommended by the Standing Committee.

Telstra would be pleased for the opportunity to further discuss these concerns with the Standing Committee.

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2 This information is based on Telstra's own records.

3 This information is based on Telstra's own records.

4 Australian Communications and Media Authority, Annual Report 2010-2011, p 85.

ANNEXURE 1

Submission 046
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INQUIRY INTO THE *TELECOMMUNICATIONS AMENDMENT (ENHANCED COMMUNITY CONSULTATION) BILL 2011*

SUBMISSIONS OF TELSTRA CORPORATION LIMITED

ANNEXURE 1

Telecommunications Act 1997 (Cth) - Schedule 3 marked-up to show amendments proposed in the *Telecommunications Amendment (Enhanced Community Consultation) Bill 2011* with additional comments by Telstra Corporation Limited

KEY:

Proposed amendments~~ommissions~~

Comments

DEFINITIONS:

In this annotated Schedule 3, the following abbreviated terms are used:

ACMA means the Australian Communications and Media Authority.

Bill means *Telecommunications Amendment (Enhanced Community Consultation) Bill 2011.*

Code of Practice means *Telecommunications Code of Practice 1997* (Cth).

Low Impact Determination means *Telecommunications (Low-impact Facilities) Determination 1997* (Cth).

Mobile Infrastructure Industry Code means the Deployment of Mobile Network Infrastructure (ACIF C564: 2004) developed by the industry group, Communications Alliance Limited.

Mobile Phone Base Station Deployment Code means the Mobile Phone Base Station Deployment Code (DR2564:2011), the proposed replacement for the Mobile Infrastructure Industry Code.

Schedule 3 means Schedule 3 to the *Telecommunications Act 1997* (Cth).

Telecommunications Act means the *Telecommunications Act 1997* (Cth).

Schedule 3—Carriers' powers and immunities

Note: See section 484.

Part 1—General provisions

Division 1—Simplified outline and definitions

1 Simplified outline

The following is a simplified outline of this Part:

- A carrier may enter on land and exercise any of the following powers:
    - (a) the power to inspect the land to determine whether the land is suitable for the carrier's purposes;
    - (b) the power to install a facility on the land;
    - (c) the power to maintain a facility that is situated on the land.
- The power to install a facility may only be exercised if:
    - (a) the carrier holds a facility installation permit; or
    - (b) the facility is a low-impact facility; or
    - (c) the facility is a temporary facility for use by, or on behalf of, a defence organisation for defence purposes; or
    - (d) the installation is carried out before 1 July 2000 for the sole purpose of connecting a building to a network that was in existence on 30 June 1997.
- A facility installation permit will only be issued in relation to a facility if:
    - (a) the carrier has made reasonable efforts to negotiate in good faith with the relevant proprietors and administrative authorities; and
    - (b) in a case where the facility is a designated overhead line—each relevant administrative authority has approved the installation of the line; and
    - (c) the telecommunications network to which the facility relates is or will be of national significance; and
    - (d) the facility is an important part of the telecommunications network to which the facility relates; and
    - (e) either the greater part of the infrastructure of the telecommunications network to which the facility relates has already been installed or relevant administrative authorities are reasonably likely to approve the installation of the greater part of the infrastructure of the telecommunications network to which the facility relates; and

(f) the advantages that are likely to be derived from the operation of the facility in the context of the telecommunications network to which the facility relates outweigh any form of degradation of the environment that is likely to result from the installation of the facility.

- In exercising powers under this Part, a carrier must comply with certain conditions, including:

  (a) doing as little damage as practicable;

  (b) acting in accordance with good engineering practice;

  (c) complying with recognised industry standards;

  (d) complying with conditions specified in the regulations;

  (e) complying with conditions specified in a Ministerial Code of Practice;

  (f) complying with conditions specified in a facility installation permit;

  (g) giving notice to the owners of land.

2 Definitions

In this Part:

Aboriginal person means a person of the Aboriginal race of Australia.

business day means a day that is not a Saturday, a Sunday or a public holiday in the place concerned.

defence organisation means:

(a) the Department of Defence; or

(b) the Australian Defence Force; or

(c) an organisation of a foreign country, so far as the organisation:

(i) has functions corresponding to functions of, or of a part of, the Department of Defence or the Australian Defence Force; and

(ii) is authorised by the Commonwealth to operate or train in Australia or an external Territory; or

(d) a part of such an organisation or body.

designated overhead line has the meaning given by clause 3.

ecological community has the same meaning as in the *Environment Protection and Biodiversity Conservation Act 1999*.

ecosystem means a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit.

enter on land includes enter on a public place.

environment has the same meaning as in the *Environment Protection and Biodiversity Conservation Act 1999*.

Environment Secretary means the Secretary to the Department responsible for the administration of the *Environment Protection and Biodiversity Conservation Act 1999*.

facility installation permit means a permit issued under clause 25.

installation, in relation to a facility, includes:

(a) the construction of the facility on, over or under any land; and

(b) the attachment of the facility to any building or other structure; and

(c) any activity that is ancillary or incidental to the installation of the facility (for this purpose, ***installation*** includes an activity covered by paragraph (a) or (b)).

international agreement means:

(a) a convention to which Australia is a party; or

(b) an agreement or arrangement between Australia and a foreign country;

and includes, for example, an agreement, arrangement or understanding between a Minister and an official or authority of a foreign country.

land includes submerged land (but does not include submerged land that is beneath Australian waters within the meaning of Schedule 3A).

listed international agreement means an international agreement specified in the regulations.

public inquiry, in relation to a facility installation permit, means a public inquiry under Part 25 about whether the permit should be issued and, if so, the conditions (if any) that should be specified in the permit.

public place includes a place to which members of the public have ready access.

public utility means a body that provides to the public:

(a) reticulated products or services, such as electricity, gas, water, sewerage or drainage; or

(b) carriage services (other than carriage services supplied by a carriage service provider); or

(c) transport services; or

(d) a product or service of a kind that is similar to a product or service covered by paragraph (a), (b) or (c).

threatened ecological community means an ecological community that is included in the list of threatened ecological communities kept under Division 1 of Part 13 of the *Environment Protection and Biodiversity Conservation Act 1999.*

threatened species means a species that is included in one of the following categories of the list of threatened species kept under Division 1 of Part 13 of the *Environment Protection and Biodiversity Conservation Act 1999*:

(a) extinct in the wild;

(b) critically endangered;

(c) endangered;

(d) vulnerable.

Torres Strait Islander means a descendant of an indigenous inhabitant of the Torres Strait Islands.

3 Designated overhead line

A reference in this Part to a ***designated overhead line*** is a reference to a line:

(a) that is suspended above the surface of:

(i) land (other than submerged land); or

(ii) a river, lake, tidal inlet, bay, estuary, harbour or other body of water; and

(b) the maximum external cross-section of any part of which exceeds:

(i) 13 mm; or

(ii) if another distance is specified in the regulations—that other distance.

4 Extension to a tower to be treated as the installation of a facility

(1) For the purposes of the application of this Part to the installation of facilities, if:

(a) a tower is a facility; and

(b) the tower is, or is to be, extended;

then:

(c) the carrying out of the extension is to be treated as the carrying out of the installation of the facility; and

(d) the extension is to be treated as a facility in its own right.

(2) To avoid doubt, a reference in this clause to a ***tower*** does not include a reference to an antenna.

(3) In this clause:

tower means a tower, pole or mast

Division 2—Inspection of land

5 Inspection of land

(1) A carrier may, for the purposes of determining whether any land is suitable for its purposes:

(a) enter on, and inspect, the land; and

(b) do anything on the land that is necessary or desirable for that purpose, including, for example:

(i) making surveys, taking levels, sinking bores, taking samples, digging pits and examining the soil; and

(ii) felling and lopping trees and clearing and removing other vegetation and undergrowth; and

(iii) closing, diverting or narrowing a road or bridge; and

(iv) installing a facility in, over or under a road or bridge; and

(v) altering the position of a water, sewerage or gas main or pipe; and

(vi) altering the position of an electricity cable or wire.

(2) A carrier may, for the purpose of surveying or obtaining information in relation to any land that, in the carrier's opinion, is or may be suitable for its purposes:

(a) enter on any land; and

(b) do anything on the entered land that is necessary or desirable for that purpose, including, for example:

(i) making surveys and taking levels; and

(ii) felling and lopping trees and clearing and removing other vegetation and undergrowth; and

(iii) closing, diverting or narrowing a road or bridge; and

(iv) installing a facility in, over or under a road or bridge; and

(v) altering the position of a water, sewerage or gas main or pipe; and

(vi) altering the position of an electricity cable or wire.

(3) A reference in this Part to engaging in activities under this Division includes a reference to exercising powers under this Division.

Division 3—Installation of facilities

6 Installation of facilities

(1) A carrier may, for purposes connected with the supply of a carriage service, carry out the installation of a facility if:

(a) the carrier is authorised to do so by a facility installation permit; or

(b) the facility is a low-impact facility (as defined by subclause (3)); or

(c) the facility is a temporary facility for use by, or on behalf of, a defence organisation for defence purposes; or

(d) all of the following conditions are satisfied in relation to the installation concerned:

(i) the installation occurs before 1 July 2000;

(ii) the installation is carried out for the sole purpose of connecting a building, structure, caravan or mobile home to a line that forms part of a telecommunications network;

(iii) the whole or a part of the network was in existence at the end of 30 June 1997.

Note: If the installation of a facility is not authorised by this clause, the installation may require the approval of an administrative authority under a law of a State or Territory.

(2) If subclause (1) authorises a carrier to carry out a particular activity, the carrier may, for purposes in connection with the carrying out of that activity:

(a) enter on, and occupy, any land; and

(b) on, over or under the land, do anything necessary or desirable for those purposes, including, for example:

(i) constructing, erecting and placing any plant, machinery, equipment and goods; and

(ii) felling and lopping trees and clearing and removing other vegetation and undergrowth; and

(iii) making cuttings and excavations; and

(iv) restoring the surface of the land and, for that purpose, removing and disposing of soil, vegetation and other material; and

(v) erecting temporary workshops, sheds and other buildings; and

(vi) levelling the surface of the land and making roads.

(3) The Minister may, by written instrument, determine that a specified facility is a low-impact facility for the purposes of this clause. The determination has effect accordingly.

Note: For specification by class, see subsection 46(2) of the *Acts Interpretation Act 1901*.

(4) A designated overhead line must not be specified in an instrument under subclause (3).

(4A) A submarine cable (within the meaning of Schedule 3A) must not be specified in an instrument under subclause (3).

(5) A tower must not be specified in an instrument under subclause (3) ~~unless:~~

~~(a) the tower is attached to a building; and~~

~~(b) the height of the tower does not exceed 5 metres.~~

(6) To avoid doubt, a reference in subclause (5) to a *tower* does not include a reference to an antenna.

(7) An extension to a tower must not be specified in an instrument under subclause (3) unless:

(a) the height of the extension does not exceed ~~5 metres~~ 1metre; and

(b) there have been no previous extensions to the tower.

For this purpose, tower has the same meaning as in clause 4.

Comment 1: In relation to clause 6(7), the Bill proposes that tower extensions be limited to one metre. An extension of one metre only would simply be too small to have any functional utility. It would not provide the necessary aperture space to accommodate any additional antennas nor allow sufficient distance from existing antennas to avoid radio frequency interference. Further, an extension of only one metre would not offer any coverage area expansion. Accordingly, limiting a tower extension to one metre is little different from omitting clause 6(7) completely.

Consistent with clause 6(7) in its current form, the Low Impact Determination permits the extension of an existing tower by five metres, once only, in industrial and rural areas (but not in residential and commercial areas and areas of environmental significance). Any further tower extensions require planning approval under State or Territory law. Permitting one-off extensions of five metres allows carriers to better utilise existing towers in industrial and rural areas, and thereby reduces the need to build new structures. In fact, the ability to extend towers by five metres significantly contributes to Telstra's ability to provide improved coverage, capacity and call quality in a timely and cost effective manner. Further, because existing towers are typically between 20 metres to 30 metres in height, an extension of five metres has little visual impact from ground level. The ability to extend an existing tower enhances carriers' ability to use existing infrastructure efficiently. Therefore, losing this ability will have an adverse impact on both carriers and the community. Telstra submits that there should be no change to clause 6(7).

Note: No comment is made with respect to the proposed amendment to clause 6(5), because the Low Impact Determination does not make provision for new towers of any height.

(8) Paragraphs (1)(a), (c) and (d) do not, by implication, limit subclause (3).

(9) A reference in this Part to engaging in activities under this Division includes a reference to exercising powers under this Division.

(10) A determination under subclause (3) is a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*.

Division 4—Maintenance of facilities

7 Maintenance of facilities

(1) A carrier may, at any time, maintain a facility.

(2) A carrier may do anything necessary or desirable for the purpose of exercising powers under subclause (1), including (but not limited to):

(a) entering on, and occupying, land; and

(b) removing, or erecting a gate in, any fence.

(3) A reference in this clause to the ***maintenance*** of a facility (the ***original facility***) includes a reference to:

(a) the alteration, removal or repair of the original facility; and

(b) the provisioning of the original facility with material or with information (whether in electronic form or otherwise); and

(c) ensuring the proper functioning of the original facility; and

(d) the replacement of the whole or a part of the original facility in its original location, where the conditions specified in subclause (5) are satisfied; and

(e) the installation of an additional facility in the same location as the original facility, where the conditions specified in subclause (6) are satisfied; and

(f) in a case where any tree, undergrowth or vegetation obstructs, or is likely to obstruct, the operation of the original facility—the cutting down or lopping of the tree, or the clearing or removal of the undergrowth or vegetation, as the case requires.

(4) A reference in this clause to the ***maintenance*** of a facility does not include a reference to the extension of a tower. For this purpose, *tower* has the same meaning as in clause 4.

(5) For the purposes of paragraph (3)(d), the following conditions are specified:

(a) the levels of noise that are likely to result from the operation of the replacement facility are less than or equal to the levels of noise that resulted from the operation of the original facility;

(b) in a case where the original facility is a tower:

(i) the height of the replacement facility does not exceed the height of the original facility; and

(ii) the volume of the replacement facility does not exceed the volume of the original facility;

(c) in a case where the facility is not a tower:

(i) the volume of the replacement facility does not exceed the volume of the original facility; or

(ii) the replacement facility is located inside a fully-enclosed building, the original facility was located inside the building and the building is not modified externally as a result of the replacement of the original facility; or

(iii) the replacement facility is located inside a duct, pit, hole, tunnel or underground conduit;

(d) such other conditions (if any) as are specified in the regulations.

(6) For the purposes of paragraph (3)(e), the following conditions are specified:

(a) the combined levels of noise that are likely to result from the operation of the additional facility and the original facility are less than or equal to the levels of noise that resulted from the operation of the original facility;

(b) either:

(i) the additional facility is located inside a fully-enclosed building, the original facility is located inside the building and the building is not modified externally as a result of the installation of the additional facility; or

(ii) the additional facility is located inside a duct, pit, hole, tunnel or underground conduit;

(c) such other conditions (if any) as are specified in the regulations.

(7) For the purposes of paragraphs (5)(a), (b) and (c) and (6)(a), (b) and (c), trivial variations are to be disregarded.

(8) For the purposes of subclauses (5) and (6):

(a) the measurement of the height of a tower is ~~not~~ to include any antenna, aerial, dish or other attachment extending from the top of the tower; and

Comment 2: The Bill proposes to amend clause 7(8) to prescribe that, in the context of the replacement of an existing tower with a new tower, the height of the "tower" is to include any antenna, aerial, etc. In Telstra's view, amending the definition of tower for the limited purposes proposed will result in little community benefit. More generally, however, Telstra submits that it is inappropriate to regard the telecommunications equipment mounted on a tower as part of the tower structure.

The antennas, aerials etc mounted on a tower need to be maintained, replaced and upgraded with greater frequency than the tower structure itself. As technology changes, the shape, size and configuration of telecommunications equipment may also change. The current regime imposes constraints on the size of replacement equipment that can be installed as a maintenance activity (see clause 7(5)(a),(c) and (6)(a)) and the size of equipment that can be installed as a low-impact facility. Telstra submits this is the appropriate means of limiting the size of equipment mounted on a tower. The inclusion of structurally and operationally distinct telecommunications equipment in the definition of tower, is likely to lead to confusion in the application of the regulatory scheme. Further, it runs the risk that minor increases in height resulting from the replacement of old technology with upgraded equipment would need to be assessed for compliance with the relevant town planning scheme, and may be subject to the requirement to obtain planning approval under State or Territory laws. This has both cost and service delivery implications. It is also, in Telstra's view, an unnecessary measure. Minor height increases to an existing tower rarely cause community concern because they have limited impact on visual amenity.

(b) the volume of a facility is the apparent volume of the materials that:

(i) constitute the facility; and

(ii) are visible from a point outside the facility; and

(c) a structure that makes a facility inside the structure unable to be seen from any point outside the structure is to be treated as if it were a fully-enclosed building.

(9) A reference in this Part to engaging in activities under this Division includes a reference to exercising powers under this Division.

(10) In this clause (other than subclause (4)):

tower means a tower**,** pole or mast.

Division 5—Conditions relating to the carrying out of authorised activities

8 Carrier to do as little damage as practicable

In engaging in an activity under Division 2, 3 or 4, a carrier must take all reasonable steps to ensure that the carrier causes as little detriment and inconvenience, and does as little damage, as is practicable.

9 Carrier to restore land

(1) If a carrier engages in an activity under Division 2, 3 or 4 in relation to any land, 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 activity began.

(2) The carrier must take all reasonable steps to ensure that the restoration begins within 10 business days after the completion of the first-mentioned activity.

(3) The rule in subclause (2) does not apply if the carrier agrees with:

(a) the owner of the land; and

(b) if the land is occupied by a person other than the owner—the occupier;

to commence restoration at a time after the end of that period of 10 business days.

10 Management of activities

A carrier must, in connection with carrying out an activity covered by Division 2, 3 or 4, take all reasonable steps:

(a) to act in accordance with good engineering practice; and

(b) to protect the safety of persons and property; and

(c) to ensure that the activity interferes as little as practicable with:

(i) the operations of a public utility; and

(ii) public roads and paths; and

(iii) the movement of traffic; and

(iv) the use of land; and

(d) to protect the environment.

11 Agreements with public utilities

(1) A carrier must make reasonable efforts to enter into an agreement with a public utility that makes provision for the manner in which the carrier will engage in an activity that is:

(a) covered by Division 2, 3 or 4; and

(b) likely to affect the operations of the utility.

(2) A carrier must comply with an agreement in force under subclause (1).

12 Compliance with industry standards

If a carrier engages in an activity covered by Division 2, 3 or 4, the carrier must do so in accordance with any standard that:

(a) relates to the activity; and

(b) is recognised by the ACMA as a standard for use in that industry; and

(c) is likely to reduce a risk to the safety of the public if the carrier complies with the standard.

13 Compliance with international agreements

If a carrier engages in an activity covered by Division 2, 3 or 4, the carrier must do so in a manner that is consistent with Australia's obligations under a listed international agreement that is relevant to the activity.

14 Conditions specified in the regulations

If a carrier engages, or proposes to engage, in an activity covered by Division 2, 3 or 4, the carrier must comply with any conditions that are specified in the regulations.

15 Conditions specified in a Ministerial Code of Practice

(1) The Minister may, by written instrument, make a Code of Practice setting out conditions that are to be complied with by carriers in relation to any or all of the activities covered by Division 2, 3 or 4 (other than activities covered by a facility installation permit) or by Part 3 of Schedule 3A.

(2) A carrier must comply with the Code of Practice. imposition

(3) The following are examples of conditions that may be set out in the Code of Practice:
  (a) a condition requiring carriers to undertake assessments, or further assessments, of the environmental impact of the activity concerned;
  (b) a condition requiring carriers to consult a particular person or body in relation to the activity concerned;
  (c) a condition requiring carriers to obtain the approval of a particular person or body in relation to the activity concerned.

(4) This clause does not, by implication, limit a power conferred by or under this Act to make an instrument.

(5) This clause does not, by implication, limit the matters that may be dealt with by codes or standards referred to in Part 6.

(6) Subclauses (4) and (5) do not, by implication, limit subsection 33(3B) of the *Acts Interpretation Act 1901*.

(7) An instrument under subclause (1) is a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*.

16 Conditions to which a facility installation permit is subject

If:
  (a) a carrier engages, or proposes to engage, in an activity covered by Division 3; and
  (b) that activity is or will be authorised by a facility installation permit; and
  (c) the facility installation permit is subject to one or more conditions;

the carrier must comply with those conditions.

17 Notice to owners of land—general

(1) Before engaging in an activity under Division 2, 3 or 4 in relation to any land, a carrier must give written notice of its intention to do so to:
  (a) the owner of the land; and
  (b) if the land is occupied by a person other than the owner—the occupier; and

(c) in relation to an activity under Division 3 or 4—the owner and occupier of any land within 500 metres of the facility or proposed facility concerned.

Note: the heading to clause 17 is altered by omitting "owner" and substituting owners"

Comment 3: The Bill requires all maintenance activities and all low-impact facility installations to be notified to owners and occupiers within a 500 metre radius. The requirement is not linked to specific classes of infrastructure. It applies to all types of facility and all types of installation and maintenance activities.

In a medium density suburb, Telstra estimates that there are approximately 1500 households and businesses within a 500 metres of a particular point. The number of additional households and businesses increases considerably in inner city and city areas. Telstra estimates that, if this proposal were to become law, it would have to provide upwards of 8 million additional notices under the Telecommunications Act annually. The costs of administering the dispatch of the additional notices (leaving aside the costs of dealing with inquiries and objections from recipients of the notices), is likely to be in excess of $2 billion per annum.

A notification obligation of such breadth has considerable community detriment. Householders would be inundated with Telecommunications Act notices provided to each owner and occupier of land within 500 metres of the 200,000 maintenance and low-impact facility installations Telstra undertakes each year in reliance on the Telecommunications Act. It would be a massive burden for carriers and a nuisance for many householders. It is difficult to see any benefit to anyone if this proposal is implemented.

Further, Telstra is concerned that this proposal does not take into account the legal effect of a notice of intention to access land under the Telecommunications Act. A Telecommunications Act notice gives carriers a legal right to enter and occupy the land specified in the notice. A notice invokes the authority of the Telecommunications Act to affect the rights of landowners and occupiers, and because of this the Telecommunications Act, through the Telecommunications Code of Practice, sets up a process through which objections to the access may be adjudicated by the Telecommunications Industry Ombudsman and creates a right of compensation for financial loss and damage to affected land owners and occupiers. Telstra submits that formal rights of objection and compensation should not be available to owners and occupiers potentially quite distant from the land upon which it is proposed to install or maintain a telecommunications facility. Telstra agrees that it is desirable for near neighbours to have notice of the installation of certain facilities. However, Telstra submits that the Telecommunications Act land access notice provisions are not the appropriate mechanism to achieve this. In relation to mobile network infrastructure, there is already an effective process of community consultation through the Mobile Infrastructure Industry Code.

This proposal would significantly impact Telstra's ability to maintain and develop its network on a timely basis. This would be frustrating for Telstra, but equally so for the households and businesses that require fast and reliable telecommunications services.

(2) The notice must specify the purpose for which the carrier intends to engage in the activity.

(3) The notice under subclause (1) must contain a statement to the effect that, if a person suffers financial loss or damage in relation to property because of anything done by a carrier in engaging in the activity, compensation may be payable under clause 42.

(4) The notice must be given at least ~~10~~ 30 business days before the carrier begins to engage in the activity.

Comment 4: The increased notification period in the Bill applies to all maintenance and all low-impact facility installation activities. This is a huge range of activities ranging from minor repairs to the installation of a new phone box or roof-mounted antenna.

For some projects, a 30 day notification period would be possible. However, for most projects the imposition of a lengthy notification period would materially obstruct Telstra's ability to respond to customer demand and carry out standard network maintenance. Telstra carries out over 200,000 maintenance and low-impact facility activities each year in reliance on the Telecommunications Act powers. Scheduling projects around weather, project readiness, and staff and equipment availability is a considerable logistical challenge. However, Telstra is able to maintain, and even improve, its level of responsiveness because it is able to organise workflows with reasonable flexibility. An increased notification period coupled with the expanded notification obligation will substantially impede this ability.

(4A) Despite subclause (4), the notice need be given only 2 business days before the carrier begins to engage in an activity authorised by Division 2 (which deals with inspection) that:

(a) is not inconsistent with Australia's obligations under a listed international agreement; and

(b) could not have an effect described in one or more of subparagraphs 27(7)(a)(ii) to (xii) (inclusive) of this Schedule; and

(c) will not have an adverse effect on a streetscape or other landscape; and

(d) will not have an impact on a place, area or thing described in paragraph 27(7)(c) or (d) of this Schedule.

(5) A person may waive the person's right to be given a notice under subclause (1).

(6) Subclause (1) does not apply if:

(a) the carrier intends to engage in activities under Division 2 (which deals with inspection of land), 3 (which deals with installation of facilities) or 4 (which deals with maintenance); and

(b) those activities need to be carried out without delay in order to protect:

(i) the integrity of a telecommunications network or a facility; or

(ii) the health or safety of persons; or

(iii) the environment; or

(iv) property; or

(v) the maintenance of an adequate level of service.

(6A) Subclause (1) does not apply if:

(a) the carrier intends to engage in an activity under Division 2, 3 or 4 in relation to the installation, proposed installation or maintenance of a temporary defence facility; and

(b) the carrier considers that compliance with subclause (1) is impracticable in the circumstances.

(6B) For the purposes of this clause, a ***temporary defence facility*** is a facility of the kind that is mentioned in paragraph 6(1)(c) of this Schedule.

(7) Subclause (1) does not apply if the carrier intends to engage in an activity under Division 2 (which deals with inspection) in relation to land that is a public place and the activity:

(a) is not inconsistent with Australia's obligations under a listed international agreement; and

(b) could not have an effect described in one or more of subparagraphs 27(7)(a)(ii) to (xii) (inclusive) of this Schedule; and

(c) will not have an adverse effect on a streetscape or other landscape; and

(d) will not have an impact on a place, area or thing described in paragraph 27(7)(c) or (d) of this Schedule.

18 Notice to owner of land—lopping of trees etc.

(1) At least 10 business days before engaging in any of the following activities under Division 2, 3 or 4:

(a) cutting down or lopping a tree on private land;

(b) clearing or removing undergrowth or vegetation on private land;

a carrier must give:

(c) the owner of the land; and

(d) if the land is occupied by a person other than the owner—the occupier;

a written notice requesting that the tree be cut down or lopped, or that the undergrowth or vegetation be cleared, as the case may be, in the manner, and within the period, specified in the notice.

(2) The carrier may only engage in those activities if the request is not complied with.

(3) A person may waive the person's right to be given a notice under subclause (1).

(3A) Subclauses (1) and (2) do not apply if:

(a) the carrier intends to engage in an activity under Division 2, 3 or 4 in relation to the installation, proposed installation or maintenance of a temporary defence facility; and

(b) the carrier considers that compliance with subclause (1) is impracticable in the circumstances.

(3B) For the purposes of this clause, a ***temporary defence facility*** is a facility of the kind mentioned in paragraph 6(1)(c) of this Schedule.

(4) Subclauses (1) and (2) do not apply if:

(a) the carrier intends to engage in activities under Division 2 (which deals with inspection of land), 3 (which deals with installation of facilities) or 4 (which deals with maintenance); and

(b) those activities need to be carried out without delay in order to protect:

(i) the integrity of a telecommunications network or a facility; or

(ii) the health or safety of persons; or

(iii) the environment; or

(iv) property; or

(v) the maintenance of an adequate level of service.

19 Notice to roads authorities, utilities etc.

(1) At least 10 business days before engaging in any of the following activities under Division 3 or 4:

(a) closing, diverting or narrowing a road or bridge;

(b) installing a facility on, over or under a road or bridge;

(c) altering the position of a water, sewerage or gas main or pipe;

(d) altering the position of an electricity cable or wire;

a carrier must give written notice of its intention to do so to the person or authority responsible for the care and management of the road, bridge, main, pipe, cable or wire.

(2) A person or authority may waive the person's or authority's right to be given a notice under subclause (1).

(2A) Subclause (1) does not apply if:

(a) the carrier intends to engage in an activity under Division 2, 3 or 4 in relation to the installation, proposed installation or maintenance of a temporary defence facility; and

(b) the carrier considers that compliance with subclause (1) is impracticable in the circumstances.

(2B) For the purposes of this clause, a ***temporary defence facility*** is a facility of the kind mentioned in paragraph 6(1)(c) of this Schedule.

(3) Subclause (1) does not apply if:

(a) the carrier intends to engage in activities under Division 2 (which deals with inspection of land), 3 (which deals with installation of facilities) or 4 (which deals with maintenance); and

(b) those activities need to be carried out without delay in order to protect:

(i) the integrity of a telecommunications network or a facility; or

(ii) the health or safety of persons; or

(iii) the environment; or

(iv) property; or

(v) the maintenance of an adequate level of service.

20 Roads etc. to remain open for passage

If a carrier engages in an activity covered by Division 3, the carrier must ensure that a facility installed over a road, bridge, path or navigable water is installed in a way that will allow reasonable passage by persons, vehicles and vessels.

Division 6—Facility installation permits

21 Application for facility installation permit

(1) A carrier may apply to the ACMA for a permit authorising the carrier to carry out the installation of one or more facilities.

(2) The permit is called a ***facility installation permit***.

22 Form of application

An application must be:

(a) in writing; and

(b) in accordance with the form approved in writing by the ACMA.

23 Application to be accompanied by charge

An application for a facility installation permit must be accompanied by the charge (if any) fixed by a determination under section 60 of the *Australian Communications and Media Authority Act 2005* in relation to so much of the ACMA's expenses in connection with dealing with the application as do not relate to the conduct of a public inquiry in relation to the permit.

24 Withdrawal of application

This Division does not prevent the withdrawal of an application and the submission of a fresh application.

25 Issue of facility installation permit

(1) After considering the application, the ACMA may issue a facility installation permit authorising the applicant to carry out the installation of any or all of the facilities specified in the application.

(2) The ACMA must not issue a facility installation permit unless the ACMA has held a public inquiry in relation to the permit.

(3) The ACMA may decide to refuse to issue a facility installation permit without holding a public inquiry in relation to the permit.

Note: An example of the operation of this subclause would be a case where the application does not disclose grounds on which the ACMA could issue the permit.

(4) If the ACMA decides to refuse to issue a facility installation permit, it must give the applicant a written notice setting out the decision.

(5) Clause 23 does not prevent a charge from being fixed by a determination under section 60 of the *Australian Communications and Media Authority Act 2005* in relation to the holding of a public inquiry in relation to a permit.

26 Deemed refusal of facility installation permit

(1) If:

(a) the ACMA receives an application for a facility installation permit; and

(b) 10 business days pass and the ACMA has neither:

(i) notified the applicant in writing that the ACMA has decided to refuse to issue the permit; nor

(ii) notified the applicant in writing that the ACMA has decided to hold a public inquiry in relation to the permit;

the ACMA is taken, at the end of that period of 10 business days, to have decided to refuse to issue the permit.

(2) If:

(a) the ACMA receives an application for a facility installation permit; and

(b) 65 business days pass and the ACMA has neither:

(i) notified the applicant in writing that the ACMA has decided to refuse to issue the permit; nor

(ii) notified the applicant in writing that the ACMA has decided to issue the permit;

the ACMA is taken, at the end of that period of 65 business days, to have decided to refuse to issue the permit.

(3) The ACMA may, by written instrument, determine that subclause (2) has effect, in relation to a specified application for a facility installation permit, as if a reference in that subclause to 65 business days were a reference to such greater number of business days, not exceeding 85 business days, as is specified in the determination. The determination has effect accordingly.

(4) In determining the validity of any action taken by the ACMA under Part 25 in relation to the holding of a public inquiry in relation to in a permit, regard must be had to the

ACMA's need to act with sufficient speed to meet the time limit imposed by subclause (2).

27 Criteria for issue of facility installation permit

Criteria

(1) The ACMA must not issue a facility installation permit that authorises a carrier to carry out the installation of one or more facilities unless the ACMA is satisfied that:

(a) the telecommunications network to which the facilities relate is, or is likely to be, of national significance; and

(b) the facilities are, or are likely to be, an important part of the telecommunications network to which the facilities relate; and

(c) any of the following conditions is satisfied:

(i) the greater part of the infrastructure of the telecommunications network to which the facilities relate has already been installed;

(ii) the greater part of the infrastructure of the telecommunications network to which the facilities relate has not been installed but each administrative authority whose approval was required or would, apart from Division 3, be required, for the installation of the greater part of the infrastructure of the network has given, or is reasonably likely to give, such approval;

(iii) no part of the infrastructure of the telecommunications network to which the facilities relate has been installed, but each administrative authority whose approval was required or would, apart from Division 3, be required, for the installation of the greater part of the infrastructure of the network has given, or is reasonably likely to give, such an approval; and

(d) the advantages that are likely to be derived from the operation of the facilities in the context of the telecommunications network to which the facilities relate outweigh any form of degradation of the environment that is likely to result from the installation of the facilities; and

(e) in a case where none of the facilities consists of a designated overhead line—the conditions set out in subclause (2) are satisfied; and

(f) in a case where any of the facilities consists of a designated overhead line—all the conditions set out in subclause (2A) are satisfied; and

(g) where the facility is proposed to be located near a community sensitive site, including residential areas, childcare centres, schools, aged care centres, hospitals, playgrounds and regional icons:

(i) the community has been fully consulted, and wherever possible, has agreed to the facility; and

~~(ii) alternative less sensitive sites have been considered and~~

(ii) all alternative less sensitive sites are not feasible; and

(iii) the proposed location is not within 100 metres of the community sensitive site; and

Comment 5: Facility installation permits (**FIPs**) presently play a minor role in the telecommunications land access regime. Telstra has never made an application for a FIP in the 14 year history of the Telecommunications Act.

Telstra submits that the imposition of an arbitrary distance from a "community sensitive site" (undefined) is undesirable from a policy perspective for the following reasons:

- Given that a FIP would only be sought in extreme circumstances, it is inappropriate to limit ACMA's discretion by the imposition of this 100 metre restriction. If the reasons the site is sought are sufficient to justify a FIP on the other grounds, they may also be sufficiently compelling to permit the installation of a facility more proximate to a community sensitive site than 100 metres.
- Further, because a FIP can apply to any type of telecommunications facility, it is quite possible that the facility the subject of the FIP may have no impact at all on a "community sensitive site". For example, a cable installation that is not a low-impact facility (because it is an area of environmental significance) is likely to have no impact at all on a school 95 metres away.
- The imposition of arbitrary buffer zones is likely to impose sub-optimal decision making constraints on a body that has considerable expertise in the area.

(iv) efforts have been made to minimise electromagnetic radiation exposure to the public.

Conditions relating to facilities other than designated overhead lines

(2) For the purposes of paragraph (1)(e), the following conditions are specified:

(a) the carrier has made reasonable efforts to negotiate in good faith with:

(i) each proprietor whose approval is required, or would, apart from Division 3, be required, for carrying out the installation; and

(ii) each administrative authority whose approval is required, or would, apart from Division 3, be required, for carrying out the installation; and

(b) one of the following subparagraphs applies:

(i) at least one approval that is referred to in subparagraph (a)(i) has not been obtained within 20 business days after the beginning of the negotiations concerned;

(ii) at least one approval that is referred to in subparagraph (a)(ii) has not been obtained within 6 months after the beginning of the negotiations concerned;

(iii) at least one approval that is referred to in paragraph (a) has been refused.

Conditions relating to facilities consisting of designated overhead lines

(2A) For the purposes of paragraph (1)(f), the following conditions are specified:

(a) the carrier has made reasonable efforts to negotiate in good faith with each proprietor whose approval is required, or would, apart from Division 3, be required, for carrying out the installation; and

(b) at least one of those approvals has not been obtained within 20 business days after the beginning of the negotiations concerned; and

(c) each administrative authority whose approval is required, or would, apart from Division 3, be required, for the installation of the line has given such an approval.

Networks of national significance

(3) In determining the matter set out in paragraph (1)(a), the ACMA must have regard to the following:

(a) the geographical reach of the network;

(b) the number of customers connected, or likely to be connected, to the network;

(c) the importance of the network to the national economy;

(d) such other matters (if any) as the ACMA considers relevant.

When facilities are an important part of a network

(4) In determining the matter set out in paragraph (1)(b), the ACMA must have regard to at least one of the following:

(a) the technical importance of the facilities in the context of the telecommunications network to which the facilities relate;

(b) the economic importance of the facilities in the context of the telecommunications network to which the facilities relate;

(c) the social importance of the facilities in the context of the telecommunications network to which the facilities relate.

(4A) For the purposes of subclause (4), the ACMA must not have regard to the revenue, profit, market share or any other financial interest of the carrier.

When advantages of facilities outweigh degradation of the environment

(5) In determining the matter set out in paragraph (1)(d), the ACMA must have regard to the following:

(a) the extent to which the installation of the facilities is likely to promote the long-term interests of end-users of carriage services or of services supplied by means of carriage services;

(b) the impact of the installation, maintenance or operation of the facilities on the environment;

(c) the objective of facilitating the timely supply of efficient, modern and cost-effective carriage services to the public;

(d) any relevant technical and/or economic aspects of the installation, maintenance or operation of the facilities in the context of the telecommunications network to which the facilities relate;

(e) whether the installation of the facilities contributes to the fulfilment by the applicant of the universal service obligation;

(f) whether the installation of the facilities involves co-location with one or more other facilities;

(g) whether the installation of the facilities facilitates co-location, or future co-location, with one or more other facilities;

(h) such other matters (if any) as the ACMA considers relevant.

Long-term interests of end-users

(6) For the purposes of this clause, the question whether a particular thing promotes the long-term interests of end-users of carriage services or of services supplied by means of carriage services is to be determined in the same manner as that question is determined for the purposes of Part XIC of the *Trade Practices Act 1974*.

Environmental impact

(7) In determining the matter set out in paragraph (5)(b), the ACMA must have regard to the following:

(a) whether the installation, maintenance or operation of the facilities:

(i) is inconsistent with Australia's obligations under a listed international agreement; or

(ii) could threaten with extinction, or significantly impede the recovery of, a threatened species; or

(iii) could put a species of flora or fauna at risk of becoming a threatened species; or

(iv) could have an adverse effect on a threatened species of flora or fauna; or

(v) could damage the whole or a part of a habitat of a threatened species of flora or fauna; or

(vi) could damage the whole or a part of a place, or an ecological community, that is essential to the continuing existence of a threatened species of flora or fauna; or

(vii) could threaten with extinction, or significantly impede the recovery of, a threatened ecological community; or

(viii) could have an adverse effect on a threatened ecological community; or

(ix) could damage the whole or a part of the habitat of a threatened ecological community; or

(x) could have an adverse effect on a listed migratory species (as defined in the *Environment Protection and Biodiversity Conservation Act 1999*); or

(xi) will have or is likely to have a significant impact on the environment in a Commonwealth marine area (as defined in the *Environment Protection and Biodiversity Conservation Act 1999*); or

(xii) will have or is likely to have a significant impact on the environment on Commonwealth land (as defined in the *Environment Protection and Biodiversity Conservation Act 1999*);

(b) the visual effect of the facilities on streetscapes and other landscapes;

(c) whether the facilities are to be installed at any of the following places:

(i) a declared World Heritage property (as defined in the *Environment Protection and Biodiversity Conservation Act 1999*);

(ia) a declared Ramsar wetland (as defined in the *Environment Protection and Biodiversity Conservation Act 1999*);

(ii) a place that Australia is required to protect by the terms of a listed international agreement;

(iii) an area that, under a law of the Commonwealth, a State or a Territory, is reserved wholly or principally for nature conservation purposes (however described);

(iv) an area that, under a law of the Commonwealth, a State or a Territory, is protected from significant environmental disturbance;

(d) whether the facilities are to be installed at or near an area or thing that is:

(i) included in the National Heritage List or Commonwealth Heritage List, within the meaning of the *Environment Protection and Biodiversity Conservation Act 1999*; or

(ii) included in the Register of the National Estate, within the meaning of the *Australian Heritage Council Act 2003*; or

(iii) registered under a law of a State or Territory relating to heritage conservation; or

(iv) of particular significance to Aboriginal persons, or Torres Strait Islanders, in accordance with their traditions;

(e) such other matters (if any) as the ACMA considers relevant.

Deemed approvals by administrative authorities

(8) The ACMA may, by written instrument, determine that this clause has the effect it would have if it were assumed that a specified administrative authority had given a specified approval for the installation of one or more specified facilities. The determination has effect accordingly.

Note: For specification by class, see section 46 of the *Acts Interpretation Act 1901*.

Definitions

(9) In this clause:

administrative authority means:

(a) the holder of an office; or

(b) an authority of a State or a Territory; or

(c) a local government body;

performing administrative functions under a law of a State or a Territory.

approval means an approval or permission (however described).

negotiations includes:

(a) the submission of an application for approval; and

(b) pursuing an application for approval.

proprietor means an owner or occupier of land.

review, in relation to a refusal to give an approval, means a review on the merits (in other words, a review that is not based on the grounds that the refusal is contrary to law).

telecommunications network includes a proposed telecommunications network.

28 Special provisions relating to environmental matters

(1) Chapters 2 and 4 and Divisions 1 to 4 (inclusive) of Part 13 of the *Environment Protection and Biodiversity Conservation Act 1999* do not apply to:

(a) the performance of a function, or the exercise of a power, conferred on the ACMA by this Division; or

(b) an action (as defined in that Act) authorised by a facility installation permit.

(2) Before issuing a facility installation permit, the ACMA must consult the Environment Secretary.

(5) In this clause:

this Division includes:

(a) Part 25, to the extent that that Part relates to the holding of a public inquiry in relation to a permit; and

(b) Part 29, to the extent that that Part relates to this Division.

29 Consultation with the ACCC

Before making a decision to issue, or to refuse to issue, a facility installation permit, the ACMA must consult the ACCC.

30 Facility installation permit has effect subject to this Act

(1) A facility installation permit has effect subject to this Act.

(2) In this clause:

this Act includes the *Telecommunications (Consumer Protection and Service Standards) Act 1999* and regulations under that Act.

31 Duration of facility installation permit

(1) A facility installation permit comes into force when it is issued and remains in force until the end of the period specified in the permit.

(2) However, the ACMA may, by written notice given to the holder of a facility installation permit, extend the period specified in the permit if the ACMA is satisfied that the extension is warranted because of special circumstances.

32 Conditions of facility installation permit

(1) A facility installation permit is subject to such conditions as are specified in the permit.

(2) A condition of a facility installation permit may restrict, limit or prevent the carrying out of, an activity under Division 3. This subclause does not, by implication, limit subclause (1).

(3) The following are examples of conditions to which a facility installation permit may be subject:

(a) a condition requiring the holder to undertake an assessment, or a further assessment, of the environmental impact of the installation of the facility concerned;

(b) a condition requiring the holder to consult a particular person or body in relation to the installation of the facility concerned;

(c) a condition requiring the holder to obtain the approval of a particular person or body in relation to the installation of the facility concerned.

33 Surrender of facility installation permit

The holder of a facility installation permit may, at any time, surrender the permit by written notice given to the ACMA.

34 Cancellation of facility installation permit

(1) The ACMA may, by written notice given to the holder of a facility installation permit, cancel the permit.

(2) In deciding whether to cancel the permit, the ACMA may have regard to:

(a) any contravention of Division 5; and

(b) any matter which the ACMA was entitled to have regard in deciding whether to issue a permit.

(3) Subclause (2) does not, by implication, limit the matters to which the ACMA may have regard.

35 Review of decisions by Administrative Appeals Tribunal

(1) Applications may be made to the Administrative Appeals Tribunal for review of a decision of the ACMA under clause 25 or 26 to refuse to issue a facility installation permit if the ACMA has not held a public inquiry in relation to the permit.

(2) If the ACMA:

(a) makes a decision of a kind covered by subclause (1); and

(b) gives to the person or persons whose interests are affected by the decision written notice of the making of the decision;

that notice is to include a statement to the effect that, subject to the *Administrative Appeals Tribunal Act 1975*, application may be made to the Administrative Appeals Tribunal for review of the decision.

(3) A failure to comply with subclause (2) does not affect the validity of a decision

(3A) Applications may be made to the Administrative Appeals Tribunal for review of a decision of the ACMA under clause 25 to issue a facility installation permit.

(4) In this clause:

decision has the same meaning as in the *Administrative Appeals Tribunal Act 1975*.

Division 7— Exemptions from State and Territory laws

36 Activities not generally exempt from State and Territory laws

(1) Divisions 2, 3 and 4 do not operate so as to authorise an activity to the extent that the carrying out of the activity would be inconsistent with the provisions of a law of a State or Territory.

(2) The rule set out in subclause (1) has effect subject to any exemptions that are applicable under clause 37.

37 Exemption from State and Territory laws

(1) This clause applies to an activity carried on by a carrier if the activity is authorised by Division 2, 3 or 4.

(2) The carrier may engage in the activity despite a law of a State or Territory about:

(a) the assessment of the environmental effects of engaging in the activity; or

(b) the protection of places or items of significance to Australia's natural or cultural heritage; or

(c) town planning; or

(d) the planning, design, siting, construction, alteration or removal of a structure; or

(e) the powers and functions of a local government body; or

(f) the use of land; or

(g) tenancy; or

(h) the supply of fuel or power, including the supply and distribution of extra-low voltage power systems; or

(i) a matter specified in the regulations.

(3) Paragraph (2)(b) does not apply to a law in so far as the law provides for the protection of places or items of significance to the cultural heritage of Aboriginal persons or Torres Strait Islanders.

(4) Paragraph (2)(h) does not apply to a law in so far as the law deals with the supply of electricity at a voltage that exceeds that used for ordinary commercial or domestic requirements.

38 Concurrent operation of State and Territory laws

It is the intention of the Parliament that, if clause 37 entitles a carrier to engage in activities despite particular laws of a State or Territory, nothing in this Division is to affect the operation of any other law of a State or Territory, so far as that other law is capable of operating concurrently with this Act.

39 Liability to taxation not affected

This Division does not affect the liability of a carrier to taxation under a law of a State or Territory.

Division 8—Miscellaneous

41 Guidelines

(1) In performing a function, or exercising a power, conferred on the ACMA by this Part, the ACMA must have regard to:
  (a) any guidelines in force under subclause (2); and
  (b) such other matters as the ACMA considers relevant.

(2) The ACMA may, by written instrument, formulate guidelines for the purposes of subclause (1).

42 Compensation

(1) If a person suffers financial loss or damage because of anything done by a carrier under Division 2, 3 or 4 in relation to:
  (a) any property owned by the person; or
  (b) any property in which the person has an interest;

there is payable to the person by the carrier such reasonable amount of compensation:
  (c) as is agreed between them; or
  (d) failing agreement—as is determined by a court of competent jurisdiction.

(2) Compensation payable under subclause (1) includes, without limitation, compensation in relation to:
  (a) damage of a temporary character as well as of a permanent character; and
  (b) the taking of sand, soil, stone, gravel, timber, water and other things.

(3) In this clause:

court of competent jurisdiction, in relation to property, means:
  (a) the Federal Court; or
  (b) the Supreme Court of the State or Territory in which the property is situated or was situated at the time of the relevant loss or damage; or

(c) an inferior court that has jurisdiction:

(i) for the recovery of debts up to an amount not less than the amount of compensation claimed by the person; and

(ii) in relation to the locality in which the property, or part of the property, is situated or was situated at the time of the relevant loss or damage.

inferior court means:

(a) a County Court, District Court or local Court of a State or Territory; or

(b) a court of summary jurisdiction exercising civil jurisdiction.

43 Power extends to carrier's employees etc.

If, under a provision of Division 2, 3 or 4, a carrier is empowered to:

(a) enter on land; or

(b) inspect land; or

(c) occupy land; or

(d) do anything else on, over or under land;

the provision also empowers:

(e) an employee of the carrier; or

(f) a person acting for the carrier under a contract; or

(g) an employee of a person referred to in paragraph (f);

to do that thing.

44 State and Territory laws that discriminate against carriers and users of carriage services

(1) The following provisions have effect:

(a) a law of a State or Territory has no effect to the extent to which the law discriminates, or would have the effect (whether direct or indirect) of discriminating, against a particular carrier, against a particular class of carriers, or against carriers generally;

(b) without limiting paragraph (a), a person is not entitled to a right, privilege, immunity or benefit, and must not exercise a power, under a law of a State or Territory to the extent to which the law discriminates, or would have the effect (whether direct or indirect) of discriminating, against a particular carrier, against a particular class of carriers, or against carriers generally;

(c) without limiting paragraph (a), a person is not required to comply with a law of a State or Territory to the extent to which the law discriminates, or would have the effect (whether direct or indirect) of discriminating, against a particular carrier, against a particular class of carriers, or against carriers generally.

(2) The following provisions have effect:

(a) a law of a State or Territory has no effect to the extent to which the law discriminates, or would have the effect (whether direct or indirect) of discriminating, against a particular eligible user, against a particular class of eligible users, or against eligible users generally;

(b) without limiting paragraph (a), a person is not entitled to a right, privilege, immunity or benefit, and must not exercise a power, under a law of a State or Territory to the extent to which the law discriminates, or would have the effect (whether direct or indirect) of discriminating, against a particular eligible user, against a particular class of eligible users, or against eligible users generally;

(c) without limiting paragraph (a), a person is not required to comply with a law of a State or Territory to the extent to which the law discriminates, or would have the effect (whether direct or indirect) of discriminating, against a particular eligible

user, against a particular class of eligible users, or against eligible users generally.

(3) For the purposes of this clause, if a carriage service is, or is proposed to be, supplied to a person by means of a controlled network, or a controlled facility, of a carrier, the person is an ***eligible user***.

(4) The Minister may, by written instrument, exempt a specified law of a State or Territory from subclause (1).

Note: For specification by class, see section 46 of the *Acts Interpretation Act 1901*.

(5) The Minister may, by written instrument, exempt a specified law of a State or Territory from subclause (2).

Note: For specification by class, see section 46 of the *Acts Interpretation Act 1901*.

(6) An exemption under subclause (4) or (5) may be unconditional or subject to such conditions (if any) as are specified in the exemption.

(7) An instrument under subclause (4) or (5) is a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*.

Note: The following are examples of a law of a State or Territory:

(a) a provision of a State or Territory Act;

(b) a provision of a legislative instrument made under a State or Territory Act.

45 State and Territory laws may confer powers and immunities on carriers

It is the intention of the Parliament that this Part is not to be construed as preventing a law of a State or Territory from conferring powers or immunities on carriers, so long as that law is capable of operating concurrently with this Act.

46 ACMA may limit tort liability in relation to the supply of certain carriage services

(1) The ACMA may, by written instrument, impose limits on amounts recoverable in tort in relation to acts done, or omissions made, in relation to the supply of specified carriage services.

Note: For specification by class, see subsection 46(2) of the *Acts Interpretation Act 1901*.

(2) An instrument under subclause (1) has effect accordingly.

(3) A limit imposed by an instrument under subclause (1) may be expressed to apply in relation to:

(a) the total of the amounts that can be recovered in relation to a single event; or

(b) the total of the amounts that can be recovered by a particular plaintiff in relation to a single event.

(4) An instrument under subclause (1) may impose a limit expressed as:

(a) a dollar amount; or

(b) a method of calculating an amount.

(5) Subclauses (3) and (4) do not, by implication, limit subclause (1).

(6) This clause does not apply to a cause of action under Part 5 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (which deals with the customer service guarantee).

(7) This clause does not apply to a cause of action under clause 42 (which deals with compensation for loss or damage resulting from a carrier's activities under Division 2, 3 or 4).

(8) An instrument under subclause (1) is a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*.

47 Ownership of facilities

Unless the circumstances indicate otherwise, a facility, or a part of a facility, that is supplied, installed, maintained or operated by a carrier remains the property of its owner:

(a) in any case—whether or not it has become (either in whole or in part), a fixture; and

(b) in the case of a network unit—whether or not a nominated carrier declaration is in force in relation to the network unit.

48 ACMA may inform the public about designated overhead lines, telecommunications transmission towers and underground facilities

(1) The ACMA may inform members of the public about the kinds and location of:

(a) designated overhead lines; and

(b) telecommunications transmission towers; and

(c) underground facilities.

(2) In performing the function conferred on the ACMA by subclause (1), the ACMA must have regard to the following matters:

~~(a) if:~~

~~(i) the ACMA is satisfied that a body or association represents carriers; and~~

~~(ii) the body or association has given the ACMA a written statement setting out the body's or association's views about how the ACMA should perform that function;~~

~~the views set out in the statement;~~

(b) the legitimate business interests of carriers, other than matters relating to competition between carriers;

Comment 6: It is unclear why inter-carrier competition should not be treated as a legitimate business interest of carriers.

(c) the objective of safeguarding national security;

(d) the privacy of end-users of carriage services supplied by means of the lines, towers or facilities concerned;

(e) the impact of such facilities on members of the public.

(3) Subclause (2) does not, by implication, limit the matters to which the ACMA may have regard.

(4) Clauses 40 and 41 do not apply to the function conferred on the ACMA by subclause (1).

(5) In this clause:

telecommunications transmission *tower* means:

(a) a tower; or

(b) a pole; or

(c) a mast; or

(d) a similar structure;

used to supply a carriage service by means of radiocommunications.

49 Review of options for placing facilities underground

(1) Before 1 July 1998, the Minister must cause to be conducted a review of the options for placing facilities underground.

(2) Those options are to include options for placing facilities underground as part of a co-ordinated program of placing other infrastructure underground (for example, electricity transmission and distribution infrastructure).

(3) The Minister must cause to be prepared a report of the review.

(4) The Minister must cause copies of the report to be laid before each House of the Parliament within 15 sitting days of that House after the completion of the preparation of the report.

50 Monitoring of progress in relation to placing facilities underground

The ACMA is to monitor, and report to the Minister on, progress in relation to the implementation of efforts to place facilities underground.

51 Removal of certain overhead lines

(1) If:

(a) an overhead line (the ***eligible overhead line***) is attached to a pole (the ***first pole***); and

(b) the eligible overhead line, or a portion of the eligible overhead line, is suspended between the first pole and another pole (the ***second pole***); and

(c) the installation of the eligible overhead line was or is authorised by:

(i) this Act; or

(ii) section 116 of the *Telecommunications Act 1991*; or

(iii) Division 3 of Part 7 of the *Telecommunications Act 1991*; or

(iv) a repealed law of the Commonwealth; and

(d) there is also attached to the first pole one or more other overhead cables, where at least one of the other overhead cables is a non-communications cable; and

(e) each of the non-communications cables is permanently removed (either simultaneously or over a period) and is not replaced;

the owner of the eligible overhead line must, within 6 months after the completion of the last of the removals referred to in paragraph (e), permanently remove so much of the eligible overhead line as is suspended between the first pole and the second pole.

(2) If:

(a) there is a local government body for the area in which the first pole is situated; and

(b) there is no prescribed administrative authority for the State or Territory in which the first pole is situated;

the local government body may, by writing:

(c) exempt the owner of the eligible overhead line from compliance with subclause (1) in relation to the first pole; or

(d) extend the period of 6 months mentioned in subclause (1) for the purposes of the application of subclause (1) to the owner of the eligible overhead line and to the first pole.

(3) If there is a prescribed administrative authority for the State or Territory in which the first pole is situated, the prescribed administrative authority may, by writing:

(a) exempt the owner of the eligible overhead line from compliance with subclause (1) in relation to the first pole; or

(b) extend the period of 6 months mentioned in subclause (1) for the purposes of the application of subclause (1) to the owner of the eligible overhead line and to the first pole.

(4) If:

(a) there is no local government body for the area in which the first pole is situated; and

(b) there is no prescribed administrative authority for the State or Territory in which the first pole is situated;

the regulations may make provision for and in relation to:

(c) the exemption of the owner of the eligible overhead line from compliance with subclause (1) in relation to the first pole; and

(d) the extension of the period of 6 months mentioned in subclause (1) for the purposes of the application of subclause (1) to the owner of the eligible overhead line and to the first pole.

(5) Regulations made for the purposes of subclause (4) may make provision with respect to a matter by conferring a power on the ACMA.

(6) This clause does not prevent 2 or more instruments under subclause (2) or (3) from being combined in the same document.

(7) In this clause:

administrative authority means:

(a) the holder of an office; or

(b) an authority of a State or a Territory;

that performs administrative functions under a law of a State or a Territory.

line includes a disused line.

non-communications cable means an overhead cable (other than a line).

overhead cable means a wire or cable that is suspended above the surface of:

(a) land (other than submerged land); or

(b) a river, lake, tidal inlet, bay, estuary, harbour or other body of water.

overhead line means a line that is suspended above the surface of:

(a) land (other than submerged land); or

(b) a river, lake, tidal inlet, bay, estuary, harbour or other body of water.

prescribed administrative authority, in relation to a State or a Territory, means an administrative authority that:

(a) performs administrative functions under a law of the State or the Territory; and

(b) is specified in the regulations.

52 Commonwealth laws not displaced

Divisions 2, 3 and 4 do not authorise a carrier to engage in an activity contrary to the requirements of another law of the Commonwealth.

53 Subdivider to pay for necessary alterations

If:

(a) it becomes necessary, in the opinion of a carrier, because of the subdivision of any land, to remove, or alter the position of, a facility on, over or under the land; and

(b) the carrier incurs costs in connection with anything reasonably done in connection with the removal or alteration;

the person who subdivided the land is liable to pay to the carrier so much of those costs as is reasonable, and that amount may be recovered in a court of competent jurisdiction as a debt due to the carrier.

54 Service of notices

(1) If:

(a) a carrier is unable, after diligent inquiry, to find out who owns particular land; or

(b) a carrier is unable to serve a notice under this Part on the owner of land either personally or by post;

the carrier may serve a notice under this Part on the owner of the land by publishing a copy of the notice in a newspaper circulating in a district in which the land is situated and:

(c) if the land is occupied—serving a copy of the notice on the occupier; or

(d) if the land is not occupied—attaching, if practicable, a copy of the notice to a conspicuous part of the land.

(2) If a carrier is unable, after diligent inquiry, to find out:

(a) whether particular land is occupied; or

(b) who occupies particular land;

the carrier may treat the land as unoccupied land.

(3) If a carrier is unable to serve a notice under this Part on the occupier of land either personally or by post, the carrier may serve a notice under this Part on the occupier by:

(a) publishing a copy of the notice in a newspaper circulating in a district in which the land is situated; and

(b) attaching, if practicable, a copy of the notice to a conspicuous part of the land.

(4) This clause does not affect the operation of any other law of the Commonwealth, or of any law of a State or Territory, that authorises the service of a document otherwise than as provided in this clause.

55 Facilities installed before 1 January 2001 otherwise than in reliance on Commonwealth laws—environmental impact

(1) This clause applies if:

(a) a carrier, for purposes connected with the supply of a carriage service, proposes to commence to carry out the installation of a facility before 1 January 2001; and

(b) neither Division 3 of this Part, nor Part 7 of the *Telecommunications Act 1991*, will operate so as to authorise the carrying out of the installation; and

(c) any of the conditions set out in subclause (2) is satisfied.

(2) For the purposes of paragraph (1)(c), the following conditions are specified:

(a) the carrying out of the installation:

(i) is, or is likely to be, inconsistent with Australia's obligations under a listed international agreement; or

(ii) could threaten with extinction, or significantly impede the recovery of, a threatened species; or

(iii) could put a species of flora or fauna at risk of becoming a threatened species; or

(iv) could have an adverse effect on a threatened species of flora or fauna; or

(v) could damage the whole or a part of a habitat of a threatened species of flora or fauna; or

(vi) could damage the whole or a part of a place, or an ecological community, that is essential to the continuing existence of a threatened species of flora or fauna; or

(vii) could threaten with extinction, or significantly impede the recovery of, a threatened ecological community; or

(viii) could have an adverse effect on a threatened ecological community; or

(ix) could damage the whole or a part of the habitat of a threatened ecological community; or

(x) could have an adverse effect on a listed migratory species (as defined in the *Environment Protection and Biodiversity Conservation Act 1999*); or

(xi) will have or is likely to have a significant impact on the environment in a Commonwealth marine area (as defined in the *Environment Protection and Biodiversity Conservation Act 1999*); or

(xii) will have or is likely to have a significant impact on the environment on Commonwealth land (as defined in the *Environment Protection and Biodiversity Conservation Act 1999*);

(b) the installation is to be carried out at any of the following places:

(i) a declared World Heritage property (as defined in the *Environment Protection and Biodiversity Conservation Act 1999*);

(ia) a declared Ramsar wetland (as defined in the *Environment Protection and Biodiversity Conservation Act 1999*);

(ii) a place that Australia is required to protect by the terms of a listed international agreement;

(iii) an area that, under a law of the Commonwealth, is reserved wholly or principally for nature conservation purposes (however described);

(iv) an area that, under a law of the Commonwealth, is protected from significant environmental disturbance;

(c) the installation is to be carried out at or near an area or thing that is:

(i) entered in the Register of the National Estate; or

(ii) entered in the Interim List for that Register; or

(iii) of particular significance to Aboriginal persons, or Torres Strait Islanders, in accordance with their traditions.

(3) At least 25 business days before commencing to carry out the installation, the carrier must give the Environment Secretary written notice of the carrier's intention to do so.

(4) The notice must be accompanied by a written statement setting out such information about the environmental impact of:

(a) the carrying out of the installation; and

(b) the facility;

as is specified in the regulations.

(5) Within 25 business days after the notice was given, the ACMA may give the carrier a written direction requiring the carrier to do, or to refrain from doing, a specified act or thing in relation to:

(a) the carrying out of the installation; or

(b) the facility;

or both.

(6) A carrier must comply with a direction under subclause (5).

(7) A direction under subclause (5) may only be given for purposes relating to the environmental impact of:

(a) the carrying out of the installation; or

(b) the facility;

or both.

(8) The ACMA must not give a direction under subclause (5) unless the Environment Secretary has given the ACMA a recommendation under subclause (9).

(9) The Environment Secretary may give the ACMA a written recommendation to give a direction under subclause (5).

(10) In giving a direction under subclause (5), the ACMA:

(a) is not required to give a direction in the same terms as the Environment Secretary's recommendation; and

(b) may have regard to matters other than the Environment Secretary's recommendation.

(11) The ACMA must consult the Australian Heritage Commission before giving a direction under subclause (5) if the condition specified in paragraph (2)(c) is satisfied.

(12) In this clause:

environmental impact includes impact on heritage values.

Part 2—Transitional provisions

60 Existing buildings, structures and facilities—application of State and Territory laws

A law of a State or Territory that relates to:

(a) the standards applicable to:

(i) the design; or

(ii) the manner of the construction;

of a building, structure or facility; or

(b) the approval of the construction of a building, structure or facility; or

(c) the occupancy, or use, of a building, structure or facility; or

(d) the alteration or demolition of a building, structure or facility;

does not apply to a building, structure or facility that is owned or operated by a carrier to the extent that the construction, alteration or demolition of the building, structure or facility was or is authorised by:

(e) section 116 of the *Telecommunications Act 1991*; or

(f) Division 3 of Part 7 of the *Telecommunications Act 1991*; or

(g) a repealed law of the Commonwealth.

61 Existing buildings, structures and facilities—application of the common law

A rule of the common law that relates to trespass does not apply to the continued existence of a building, structure or facility that is owned or operated by a carrier to the extent that the construction or alteration of the building, structure or facility was or is authorised by:

(a) section 116 of the *Telecommunications Act 1991*; or

(b) Division 3 of Part 7 of the *Telecommunications Act 1991*; or

(c) a repealed law of the Commonwealth.

Part 3—Compensation for acquisition of property

62 Compensation for acquisition of property

(1) If:

(a) either of the following would result in an acquisition of property from a person:

(i) anything done by a carrier under, or because of, this Schedule;

(ii) the existence of rights conferred on a carrier under, or because of, this Schedule in relation to a building, structure or facility owned or operated by the carrier; and

(b) the acquisition of property would not be valid, apart from this clause, because a particular person had not been compensated;

the carrier must pay that person:

(c) a reasonable amount of compensation agreed on between the person and the carrier; or

(d) failing agreement—a reasonable amount of compensation determined by a court of competent jurisdiction.

(2) In assessing compensation payable under this clause arising out of an event, the following must be taken into account:

(a) any compensation obtained by the person as a result of an agreement between the person and the carrier otherwise than under this clause but arising out of the same event;

(b) any damages or compensation recovered by the person from the carrier, or other remedy given, in a proceeding begun otherwise than under this clause but arising out of the same event.

(3) This clause does not limit the operation of clause 42.

(4) In this clause:

acquisition of property has the same meaning as in paragraph 51(xxxi) of the Constitution.

63 Application of this Part

This Part applies in relation to:

(a) anything done by a carrier under, or because of, this Schedule after the commencement of Schedule 2 to the *Telecommunications and Other Legislation Amendment (Protection of Submarine Cables and Other Measures) Act 2005*; and

(b) the existence of rights:

(i) in relation to a building, structure or facility owned or operated by a carrier; and

(ii) that are conferred on a carrier under, or because of, this Schedule on or after the commencement of Schedule 2 to the Telecommunications and Other Legislation Amendment (Protection of Submarine Cables and Other Measures) Act 2005.