

Chapter 2

Background

Current regulatory framework

2.1 The primary Commonwealth legislation regulating the telecommunications industry is the *Telecommunications Act 1997* (the Act). The broad objects of the Act are to provide a regulatory framework that promotes the long-term interests of end-users of carriage services and to promote the efficiency and international competitiveness of the Australian telecommunications industry.¹

2.2 The Act is also intended to ensure that standard telephone services, payphones and other carriage services of social importance are:

- reasonably accessible to all Australians wherever they reside or carry on business;
- supplied as efficiently and economically as possible; and
- supplied at performance standards that reasonably meet the social needs of the Australian community.²

2.3 In addition to ensuring the provision of services, the Act is intended to provide appropriate community safeguards in relation to telecommunications activities and to regulate adequately participants in sections of the Australian telecommunications industry.³

2.4 The Act further specifies that telecommunications be regulated in a manner that:

Promotes the greatest practicable use of industry self-regulation and does not impose undue financial and administrative burdens on participants in the Australian telecommunications industry.⁴

Carriers' powers and immunities

2.5 In order for carriers to comply with and carry out the objectives of the Act, they are required to install and maintain telecommunications infrastructure.⁵

1 *Telecommunications Act 1997*, Part 1, ss. 3(1).

2 *Telecommunications Act 1997*, Part 1, ss. 3(2).

3 *Telecommunications Act 1997*, Part 1, para. 3(2)(h).

4 *Telecommunications Act 1997*, Part 1, ss. 4(a)–(b).

2.6 To this end, Schedule 3 of the Act provides telecommunication carriers with powers and immunities to inspect land to determine whether it is suitable for the carriers' purposes, install a facility on that land, and to maintain a facility that is situated on that land.⁶

2.7 The power for a carrier to install a facility may only be exercised if the carrier holds an installation permit and the facility is a low impact facility, temporary facility, or is used by a defence organisation for defence purposes.⁷ The installation of any other type of facility is regulated by state and territory planning laws.

2.8 In exercising these powers a carrier must comply with certain conditions, including:

- doing as little damage as practicable;
- acting in accordance with good engineering practice;
- complying with recognised industry standards;
- complying with conditions specified in a facility installation permit;
- complying with conditions specified in regulations and the Ministerial Code of Practice; and
- giving notice to the owner of the land.⁸

2.9 Schedule 3 also provides immunity to carriers from some state and territory laws, including planning laws, when carrying out activities to install or maintain facilities.⁹

Inspection of land and installation of facilities

2.10 The Act provides the telecommunications carrier with the power to inspect any land to determine whether it is suitable for its purposes.¹⁰ Carriers may enter and inspect land and do anything on the land that is necessary for its purposes, including:

- making surveys, taking levels, sinking bores, taking samples, digging pits and examining soil;

5 A carrier is defined in the *Telecommunications Act 1997* as a holder of a carrier licence. A carrier licence is provided by the ACMA to applicants that are a constitutional corporation, an eligible partnership, or a public body. The applicant must also meet additional criteria set out in Division 3 of the Act.

6 The powers to enter, inspect, occupy and do anything else on, over or under the land also extend to employees of the carrier and persons acting for the carrier under contract. See Schedule 3, clause 43 of the Act.

7 *Telecommunications Act 1997*, Schedule 3, s. 6.

8 *Telecommunications Act 1997*, Schedule 3, s. 8–20.

9 *Telecommunications Act 1997*, Schedule 3, s. 36–39.

10 *Telecommunications Act 1997*, Schedule 3, ss. 5(1).

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- felling and lopping trees and clearing other vegetation;
 - closing, diverting or narrowing a bridge or road;
 - altering the position of an electricity cable or water, sewerage or gas main or pipe.¹¹

2.11 Following a carrier's inspection of the land they may, for purposes connected with the supply of a carriage service, carry out the installation of a facility if:

- the carrier is authorised to do so by a facility installation permit; or
- the facility is a low impact facility; or
- the facility is a temporary facility for use by a defence organisation for defence purposes; or
- the installation is carried out for the sole purpose of connecting a building or structure to a line that forms part of a telecommunications network.¹²

2.12 If, after meeting these criteria, a carrier is authorised to carry out an installation, the carrier may enter on, and occupy, any land for the purposes of erecting a facility. The carrier may also do anything necessary or desirable to install the facility including:

- constructing, erecting and placing any plant, machinery or equipment;
- felling and lopping trees and clearing and removing vegetation;
- making cuttings and evacuations;
- restoring the surface of the land;
- erecting temporary workshops, sheds and other buildings; and
- levelling the surface of the land and making roads.¹³

Notification

2.13 Before engaging in any activity authorised under the Act on any land, a carrier must give written notice of its intention to do so to:

- the owner of the land; and
- if the land is occupied by a person other than the owner—the occupier.¹⁴

2.14 The notice must specify the purpose for which the carrier intends to engage in the activity. It must also contain a statement to the effect that, if a person suffers

11 *Telecommunications Act 1997*, Schedule 3, s. 5.

12 *Telecommunications Act 1997*, Schedule 3, ss. 6(1).

13 *Telecommunications Act 1997*, Schedule 3, para. 6(2)(a)–(b).

14 *Telecommunications Act 1997*, Schedule 3, s. 17.

financial loss or damage in relation to property because of anything done by a carrier in engaging in the activity, compensation may be payable.¹⁵

2.15 The notice must be given at least 10 business days before the carrier begins to engage in the activity.¹⁶ The notice need only be given 2 business days before a carrier begins work if the activity:

- is not inconsistent with Australia's obligations under a listed international agreement;
- could not have an effect on a threatened species or plant community;
- will not have an adverse effect on a streetscape or other landscape; and
- will not have an impact on a World Heritage property, Ramsar wetland, or a listed heritage property.¹⁷

2.16 The requirement for carriers to notify owners or occupiers of land does not apply if the activities associated with inspecting the land, installing facilities or maintaining facilities need to be carried out without delay in order to:

- protect the integrity of a telecommunications network or facility; or
- the health or safety of persons; or
- the environment; or
- property; or
- the maintenance of an adequate service level.

2.17 Carriers are also not required to give notice in relation to the installation, proposed installation or maintenance of a temporary defence facility if the carrier considers that compliance is impracticable in the circumstances.¹⁸

2.18 Further, carriers do not have to give notice to engage in the inspection of land that is a public place provided there is no impact to threatened species, adverse impact on a streetscape or other landscape, or will not have an impact on a listed heritage property.¹⁹

2.19 If a carrier is unable, after diligent inquiry, to find out who owns particular land, the carrier may serve a notice by publishing a copy in a newspaper circulating in the district or attaching a copy of the notice to a conspicuous part of the land.²⁰

15 *Telecommunications Act 1997*, Schedule 3, ss. 17(3).

16 *Telecommunications Act 1997*, Schedule 3, ss. 17(4A).

17 *Telecommunications Act 1997*, Schedule 3, ss. 17(4A).

18 *Telecommunications Act 1997*, Schedule 3, ss. 17(6A).

19 *Telecommunications Act 1997*, Schedule 3, ss. 17(7).

20 *Telecommunications Act 1997*, Schedule 3, ss. 54(1).

2.20 If a carrier is unable, after diligent inquiry, to find out who occupies particular land, the carrier may treat the land as unoccupied.²¹

Low-impact facilities

2.21 Licensed carriers are authorised under the Act to install a limited range of facilities without seeking state, territory or local government approval. The most common of these are known as low-impact facilities.

2.22 The minister has the power under the Act to determine that a specified facility is a low-impact facility.²² Infrastructure classified as low-impact facilities are contained in the Telecommunications (Low-impact Facilities) Determination 1997 (the determination).

2.23 Low-impact facilities include small radiocommunications antennae and dishes that are erected on existing towers or buildings that are designed to be unobtrusive.²³ Other types of low-impact facilities include underground and above ground housing, underground cables, public payphones and temporary emergency facilities. The full list of low-impact facilities are contained in Appendix 3.

2.24 The determination defines where low-impact facilities may be installed based on the zoning of the site as commercial, industrial, residential or rural under state or territory laws.²⁴ For example, a facility that is deemed to be low-impact in a rural or industrial area may not be low-impact in a residential area.

2.25 Low-impact facilities are also prohibited from being installed in areas of environmental significance.²⁵

2.26 Under the Act, certain facilities cannot be designated as low-impact facilities, including:

- designated overhead lines;
- a tower that is not attached to a building;
- a tower attached to a building more than 5 metres high;
- an extension to a tower that has previously been extended; and
- an extension to a tower, if the extension is more than 5 metres high.²⁶

21 *Telecommunications Act 1997*, Schedule 3, ss.54(2).

22 *Telecommunications Act 1997*, Schedule 3, ss. 6(3).

23 Telecommunications (Low-impact Facilities) Determination 1997, Part 3.

24 Telecommunications (Low-impact Facilities) Determination 1997, s. 1.2.

25 Telecommunications (Low-impact Facilities) Determination 1997, s. 2.5.

26 *Telecommunications Act 1997*, schedule 3, ss. 6(4), (5), and (7).

2.27 Neither the Department of Broadband, Communications and the Digital Economy (DBCDE) nor the Australian Communications and Media Authority (ACMA) have a role in adjudicating whether or not a particular installation is a low-impact facility. Binding determinations as to whether a facility is a low-impact facility are made by courts, typically in response to proceedings commenced by state, territory or local governments.²⁷

Electromagnetic energy (EME) regulation

2.28 Carriers must also comply with legislation that limits the exposure from telecommunications facilities of electromagnetic energy (EME; also referred to as EMR, electromagnetic radiation). These requirements are specified in the *Radiocommunications Act 1992* and the following legislative instruments:

- The Radiocommunications Licence Conditions (Apparatus Licence) Determination 2003 and the Radiocommunications Licence Conditions (Temporary Community Broadcasting Licence) Determination 2003 which set out the circumstances under which a transmitter may be operated to communicate with another station and the conditions regulating human exposure to EMR emitted by a transmitter; and
- The Radiocommunications (Electromagnetic Radiation – Human Exposure) Standard 2003 which regulates the performance of particular radiocommunications transmitters, to protect the health and safety of persons exposed to electromagnetic radiation from the transmitters.²⁸

Codes of practice²⁹

2.29 In addition to the legislation described above, carriers must also comply with conditions specified in enforceable ministerial and industry codes which supplement the Act.

Telecommunications Code of Practice 1997

2.30 The Act requires the minister to create a Code of Practice setting out conditions carriers must comply with when conducting activities allowed under the

27 Australian Communications and Media Authority (ACMA), 'Telecommunications: Legislation & regulation', www.acma.gov.au/WEB/STANDARD/pc=PC_2889 (accessed 17 April 2012).

28 House of Representatives Standing Committee on Infrastructure and Communications, *Advisory report on the Telecommunications Amendment (Enhancing Community Consultation) Bill 2011*, www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=ic/telecommunications/report.htm (accessed 28 March 2012), pp 6–7.

29 Please note that some of the material contained in this chapter is drawn from the House of Representatives Standing Committee on Infrastructure and Communications' *Advisory report on the Telecommunications Amendment (Enhancing Community Consultation) Bill 2011*.

Act, including the installation of low-impact facilities.³⁰ This is known as the Ministerial Code of Practice or ministerial code.

2.31 The current version of the ministerial code is the Telecommunications Code of Practice 1997 which requires carriers to:

- ensure as little detriment, damage and inconvenience as practicable is caused;
- act in accordance with good engineering practice;
- protect the safety of persons and property;
- protect the environment;
- notify the owner and occupier of the land at least 10 business days before commencing the installation; and
- make any reasonable efforts to consult with, and resolve the objection from, any owner or occupier who makes a written objection.³¹

2.32 The code also specifies the rule under which land owners and occupiers can object to the activities of carriers, including referral of complaints to the Telecommunications Industry Ombudsman (TIO).³²

Industry codes

2.33 In addition to the ministerial code, the Act requires a carrier to comply with the recognised industry code when carrying out activities authorised under the Act.³³ The ACMA is responsible for registering codes of practice that have been developed and submitted by the industry.

2.34 The registered industry code of most relevance to the bill is the Australian Communications Industry Forum (ACIF) Code C564:2004, Deployment of Mobile Phone Network Infrastructure (the ACIF Code).³⁴ This code applies to all carriers who install infrastructure used to provide public mobile telecommunications services, and includes directions to telecommunications carriers when deciding where to place a telecommunications facility (for example a mobile phone base station). The ACIF Code also outlines requirements for community consultation, for the notification to local councils where the installation of a facility does not require development approval, and specifies the approaches that carriers must take to minimise EME exposure.

30 *Telecommunications Act 1997*, Schedule 3, s.15.

31 Telecommunications Code of Practice 1997, s. 2.3–2.13

32 Telecommunications Code of Practice 1997, s. 4.36–4.38.

33 Telecommunications Code of Practice 1997, Schedule 3, clause 12.

34 ACIF, *Industry Code ACIF C564:2004 Deployment of Mobile Phone Network Infrastructure*, 30 March 2006, [www.acma.gov.au/webwr/telcomm/industry_codes/codes/c564_2004\(1\).pdf](http://www.acma.gov.au/webwr/telcomm/industry_codes/codes/c564_2004(1).pdf) (accessed 20 April 2012).

2.35 The objectives of the ACIF Code are to:

- apply a precautionary approach to the deployment of radiocommunications infrastructure;
- provide best practice processes for demonstrating compliance with relevant exposure limits and the protection of the public;
- ensure relevant stakeholders are informed and consulted before radiocommunications infrastructure is constructed;
- specify standards for consultation, information availability and presentation;
- consider the impact on the wellbeing of the community, physical or otherwise, of radiocommunications infrastructure; and
- ensure council and community views are incorporated into the radiocommunications infrastructure site selection.

2.36 Regulations designed to minimise exposure to EME emissions from telecommunications facilities are also specified under the precautionary principle requirements of the ACIF Code. Under these requirements carriers must have regards to a number of issues including:

- the reason for the installation of the infrastructure, considering coverage, capacity and quality;
- the positioning of antennae to minimise obstruction of radio signals;
- the objective of restricting access to areas where radiofrequency (RF) exposure may exceed limits of the EME standards; and
- the objective of minimising power whilst meeting service objectives.

2.37 According to the ACIF Code, if the radiocommunications infrastructure is associated with a base station used for the supply of public mobile telecommunications services, site EME assessment must be made in accordance with the prediction methodology and report format of the Australian Radiation Protection and Nuclear Safety Agency (ARPANSA).

2.38 The ACMA may request a copy of such a site EME estimate, and the carrier must provide this estimate within two weeks. A carrier must also notify council of all proposed low RF power infrastructure under its control and also notify any occupiers of residences in close proximity of all proposed low RF power infrastructure and fixed radio links.

2.39 In addition, carriers must:

- demonstrate compliance with the ACMA EME regulations regarding maximum human exposure limits for RF fields;
- take appropriate measures to restrict general public access to RF hazard areas; and

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- ensure warning signs are in place for each RF hazard area so that they are clearly visible.

Revised industry code

2.40 The current ACIF Code is due to be replaced by the Communications Alliance Industry Code C564:2011 Mobile Phone Base Station Deployment (the industry code) on 1 July 2012.³⁵ The revised code is currently awaiting registration by the ACMA.³⁶

2.41 Briefly, the purpose of the changes to the industry code are to:

- require carriers to continue to develop the consultation plan for new proposals;
- improve transparency and visibility of the consultation process with local council and communities;
- increase the time allowed for local council and the community to comment on proposals for new infrastructure;
- incorporate new and revised methods of communicating with local councils and the community (for example via a website, letters, signage);
- provide consistency, guidelines and examples of the type of letters, plans, signs and reports which carriers will use when notifying and consulting with local council and the community;
- ensure that carriers consider and have regard to public and school holidays and that appropriate extensions of time are provided for consultation during these periods;
- provide and update the Radiofrequency EMR Health and Safety information, reports and signage in keeping with the current and relevant standards;
- update the code as a Communications Alliance publication; and
- update the code with further information on Land Access and Activity Notices (LAANs), Facilities Installation Permit, compensation and land owners' rights.³⁷

35 Communications Alliance, *Codes*, <http://commsalliance.com.au/Publications/all/codes/c564> (accessed 20 April 2012).

36 Mr John Stanton, Chief Executive Officer, Communications Alliance, *Proof Committee Hansard*, 12 April 2012, p. 14.

37 Communications Alliance, *Industry Code C564: 2011 Mobile Phone Base Station Deployment*, available: http://www.commsalliance.com.au/_data/assets/pdf_file/0018/32634/C564_2011.pdf (accessed 1 May 2012), pp i–ii.

The role of the ACMA and ARPANSA

2.42 The ACMA is the Commonwealth Government agency responsible for the regulation of broadcasting, the internet, radiocommunications and telecommunications.³⁸ As such, it is responsible for ensuring regulators comply with Schedule 3 of the Act.

2.43 The ACMA described its role with respect to Schedule 3 of the Act:

ACMA is the communications regulator for the Commonwealth. It manages public resources such as the radio-frequency spectrum and telecommunications numbers. In those areas, in a lot of the activities that the ACMA conducts and where it is most visible, the ACMA issues licences or allocates numbers. We normally grant regulatory permissions to industry but sometimes to the community or individual Australians to access and use those resources. With regard to Schedule 3, the situation is different. The parliament has set up a regulatory arrangement that confers powers and immunities on carriers or their agents, and carriers and their agents have responsibility to comply with Schedule 3 and, subsequently, the low-impact facilities determination. But the ACMA is not in a position where it grants a regulatory permission to a carrier or is able to withdraw it. Those powers have been established by the parliament and augmented by the minister.

The role of the ACMA is to ensure that carriers and their agents comply with the conditions that apply to the exercise of those powers under Schedule 3. So we are not actually in a position where we give permission to or are able to withdraw permission from carriers, which is not to say that we do not have a compliance enforcement role, but we are not allocating a resource to people in the way that we do as a spectrum manager or as the numbering manager.³⁹

2.44 ARPANSA is the Commonwealth Government agency responsible 'for protecting the health and safety of people, and the environment, from the harmful effects of ionising and non-ionising radiation'.⁴⁰

2.45 With respect to mobile phone towers, ARPANSA provided the following explanation about its role:

Mobile phone base stations include radio transmitters that radiate electromagnetic energy (EME), also known as Radiofrequency EME (RF EME), into the surrounding area. The levels of these electromagnetic fields must comply with safety limits imposed by the Australian Communications

38 ACMA, *About us*, available: http://www.acma.gov.au/WEB/STANDARD/pc=ACMA_ROLE_OVIEW (accessed 1 May 2012).

39 Mr Mark Loney, Executive Manager, Operations Branch, ACMA, *Committee Hansard*, 12 April 2012, p. 41.

40 ARPANSA, *About us*, <http://www.arpansa.gov.au/AboutUs/index.cfm> (accessed 7 May 2012).

and Media Authority (ACMA) in the Radiocommunications Licence Conditions (Apparatus Licence) Determination 2003. (ACMA is a statutory authority within the Department of Broadband, Communications and the Digital Economy.) The safety limits in this document are based on the ARPANSA Radiation Protection Standard - Maximum Exposure Levels to Radiofrequency Fields - 3kHz to 300GHz.

ACMA also requires compliance with industry codes of practice including the Australian Communications Industry Forum (ACIF - now called Communications Alliance Ltd) C564:2004 Industry Code – Deployment of Mobile Phone Network Infrastructure. (This code has recently undergone review, including public consultation, but is yet to be adopted by ACMA.)

Under this code, the operators of mobile phone networks (carriers) have certain obligations when planning, installing or upgrading mobile phone base stations. These include providing information about predicted levels of EME in the vicinity of a new or upgraded facility. The Code requires this information to be prepared in accordance with the ARPANSA Prediction Methodology and presented as a report in an approved ARPANSA Environmental EME Report format. Environmental EME Reports for almost every Australian mobile phone base station, in metropolitan and regional areas, can be found in the Radio Frequency National Site Archive.

The ARPANSA and the State and Territory radiation regulatory authorities have no regulation of RF EME emissions from mobile phone base stations. Only a small part of the ARPANSA Standard is captured by the ACMA regulatory framework and the bulk of the Standard remains non mandatory.⁴¹

2.46 The Radiation Health and Safety Advisory Council provides advice to ARPANSA. In detail, the role of the council is:

- to identify emerging issues relating to radiation protection and nuclear safety and to advise the CEO [of ARPANSA] on them;
- to examine matters of major concern to the community in relation to radiation protection and nuclear safety and to advise the CEO on them;
- to advise the CEO on the adoption of recommendations, policies, codes and standards in relation to radiation protection and nuclear safety;
- to advise the CEO, at the CEO's request, on other matters relating to radiation protection and nuclear safety;
- to advise the CEO on such other matters relating to radiation protection and nuclear safety as the Council considers appropriate;

41 Australian Radiation Protection and Safety Agency (ARPANSA), *Supplementary Submission*, pp 2–3.

- to report to the CEO on matters relating to radiation protection and nuclear safety.⁴²

Key issues regarding the bill

2.47 The following chapter, Chapter 3, examines key issues raised during the course of the inquiry. These issues include:

- notification and consultation processes;
- EME emission standards; and
- potential costs and unintended consequences arising as a result of the bill.

42 *Australian Radiation Protection and Nuclear Safety Act 1998*, section 20.