

## **EXPLANATORY STATEMENT**

Issued by the authority of the Minister for  
Communications, Information Technology and the Arts

*Telecommunications Act 1997*

### **Telecommunications Code of Practice 1997 (Amendment No. 1 of 2002)**

Divisions 2, 3 and 4 of Part 1 of Schedule 3 to the *Telecommunications Act 1997* (the Act) provides authority for telecommunications carriers to inspect land, maintain facilities or install any declared 'low-impact facilities' or temporary defence facilities. Other installation of facilities is regulated under State or Territory law and, in the case of environmentally sensitive projects, also by the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

Division 5 of Part 1 of Schedule 3 sets out the conditions under which these activities may be conducted. Clause 15 in this Division provides that the Minister for Communications, Information Technology and the Arts 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 in Division 2, 3 or 4 (other than activities covered by a facility installation permit). Subclause 15(2) of Schedule 3 to the Act requires that a carrier comply with the Code of Practice.

The Telecommunications Code of Practice 1997 (the Code) was made on 29 June 1997 and came into effect on 1 July 1997.

The purpose of the *Telecommunications Code of Practice 1997 (Amendment No. 1 of 2002)* (the amending instrument) is to clarify the circumstances in which telecommunications carriers must refer objections from land owners or occupiers to the Telecommunications Industry Ombudsman under the Code.

#### **NOTES ON AMENDMENTS**

##### **Clause 1 – Name of Determination**

Clause 1 of the amending instrument provides that the name of the instrument is the *Telecommunications Code of Practice 1997 (Amendment No. 1 of 2002)*.

##### **Clause 2 – Commencement**

Clause 2 of the amending instrument provides that it comes into effect on notification in the *Commonwealth of Australia Gazette*.

##### **Clause 3 – Amendment of the Telecommunications Code of Practice 1997**

Clause 3 of the amending instrument provides that Schedule 1 to the instrument amends the Code.

## **Schedule 1 – Amendment of the Telecommunications Code of Practice 1997**

### **Item 1 – Substitution of section 2.35**

Division 5 of Part 5 of Chapter 2 of the Code deals with the circumstances in which a land owner or occupier may make an objection to the Telecommunications Industry Ombudsman (TIO) about a carrier's proposed land entry activities.

Section 2.35 of the Code provides that Division 5 applies if:

- (a) the objection is not resolved by agreement between the carrier and objector; and
- (b) the objector is not satisfied with the carrier's response to the objection; and
- (c) the objection comes, in whole or part, within the TIO's jurisdiction.

Some carriers have argued that paragraph 2.35(c) imposes a threshold test and that the obligation by a carrier to refer an objection to the TIO does not arise until the carrier is satisfied on objective grounds that that threshold test is satisfied. This interpretation is not in accordance with the spirit of the Code and potentially places an objector at a serious disadvantage. The better view is that a carrier is bound to refer an objection to the TIO and that it is a matter for the TIO, in the first instance, to determine whether the objection is within the TIO's jurisdiction.

To put this matter beyond doubt and to ensure that section 2.35 does not allow a carrier to restrict the referral of objections to the TIO on the basis of jurisdiction, item 1 of Schedule 1 to the amending instrument removes paragraph (c) from section 2.35. The issue of the TIO's jurisdiction and whether consideration of an objection should be refused, is a matter for the TIO to decide in the first instance after the initial referral of an objection.

A related amendment is made by item 2.

### **Item 2 – Substitution of section 2.37**

Section 2.37 of the Code provides that if the TIO gives a direction to a carrier about the way in which the carrier should engage in a land entry activity, the carrier must comply with the direction.

Item 2 of Schedule 1 to the amending instrument makes this requirement subject to a new subsection 2.37(2) which provides that section 2.37 applies only if the objection which is the subject of the direction comes, in whole or in part, within the jurisdiction of the TIO.

This amendment is related to the amendment made by item 1. It emphasises that the issue of the TIO's jurisdiction in the context of making a direction to a carrier in connection with an objection about the carrier's proposed land entry activity is a matter for the TIO in the first instance.

**Item 3 – Substitution of section 4.36**

Division 5 of Part 5 of Chapter 4 of the Code deals with the circumstances in which a land owner or occupier may make an objection to the Telecommunications Industry Ombudsman (TIO) about a carrier's proposed low-impact facility activities.

Section 4.36 of the Code provides that Division 5 applies if:

- (a) the objection is not resolved by agreement between the carrier and objector; and
- (b) the objector is not satisfied with the carrier's response to the objection; and
- (c) the objection comes, in whole or part, within the TIO's jurisdiction.

Some carriers have argued that paragraph 4.36(c) imposes a threshold test and that the obligation by a carrier to refer an objection to the TIO does not arise until the carrier is satisfied on objective grounds that that threshold test is satisfied. This interpretation is not in accordance with the spirit of the Code and potentially places an objector at a serious disadvantage. The better view is that a carrier is bound to refer an objection to the TIO and that it is a matter for the TIO, in the first instance, to determine whether the objection is within the TIO's jurisdiction.

To put this matter beyond doubt and to ensure that section 4.36 does not allow a carrier to restrict the referral of objections to the TIO on the basis of jurisdiction, item 3 of Schedule 1 to the amending instrument removes paragraph (c) from section 4.36. The issue of the TIO's jurisdiction and whether consideration of an objection should be refused, is a matter for the TIO to decide in the first instance after the initial referral of an objection.

A related amendment is made by item 4.

**Item 4 – Substitution of section 4.38**

Section 4.38 of the Code provides that if the TIO gives a direction to a carrier about the way in which the carrier should engage in a low-impact facility activity, the carrier must comply with the direction.

Item 4 of Schedule 1 to the amending instrument makes this requirement subject to a new subsection 4.38(2) which provides that section 4.38 applies only if the objection which is the subject of the direction comes, in whole or in part, within the jurisdiction of the TIO.

This amendment is related to the amendment made by item 3. It emphasises that the issue of the TIO's jurisdiction in the context of making a direction to a carrier in connection with an objection about the carrier's proposed low-impact facility activity is a matter for the TIO in the first instance.

### **Item 5 – Substitution of section 6.35**

Division 5 of Part 5 of Chapter 6 of the Code deals with the circumstances in which a land owner or occupier may make an objection to the Telecommunications Industry Ombudsman (TIO) about a carrier's proposed maintenance activities.

Section 6.35 of the Code provides that Division 5 applies if:

- (a) the objection is not resolved by agreement between the carrier and objector; and
- (b) the objector is not satisfied with the carrier's response to the objection; and
- (c) the objection comes, in whole or part, within the TIO's jurisdiction.

Some carriers have argued that paragraph 6.35(c) imposes a threshold test and that the obligation by a carrier to refer an objection to the TIO does not arise until the carrier is satisfied on objective grounds that that threshold test is satisfied. This interpretation is not in accordance with the spirit of the Code and potentially places an objector at a serious disadvantage. The better view is that a carrier is bound to refer an objection to the TIO and that it is a matter for the TIO, in the first instance, to determine whether the objection is within the TIO's jurisdiction.

To put this matter beyond doubt and to ensure that section 6.35 does not allow a carrier to restrict the referral of objections to the TIO on the basis of jurisdiction, item 5 of Schedule 1 to the amending instrument removes paragraph (c) from section 6.35. The issue of the TIO's jurisdiction and whether consideration of an objection should be refused, is a matter for the TIO to decide in the first instance after the initial referral of an objection.

A related amendment is made by item 6.

### **Item 6 – Substitution of section 6.37**

Section 6.37 of the Code provides that if the TIO gives a direction to a carrier about the way in which the carrier should engage in a maintenance activity, the carrier must comply with the direction.

Item 6 of Schedule 1 to the amending instrument makes this requirement subject to a new subsection 6.37(2) which provides that section 6.37 applies only if the objection which is the subject of the direction comes, in whole or in part, within the jurisdiction of the TIO.

This amendment is related to the amendment made by item 5. It emphasises that the issue of the TIO's jurisdiction in the context of making a direction to a carrier in connection with an objection about the carrier's proposed maintenance activity is a matter for the TIO in the first instance.