

# EXPLANATORY STATEMENT

*Telecommunications Act 1997*

*Acts Interpretation Act 1901*

## ***Telecommunications (Low-impact Facilities) Determination 2018***

Issued by the Authority of the Minister for Communications

### Authority

Part 1 of Schedule 3 to the *Telecommunications Act 1997* (the Act) provides authority for carriers to inspect land, maintain facilities, connect subscribers to an existing network or install low-impact facilities or temporary defence facilities. Other installation of facilities are regulated under State or Territory law.

Subclause 6(3) of Schedule 3 to the Act allows the Minister to determine that specified facilities are low-impact facilities for the purpose of clause 6 of Schedule 3 to the Act. This specification power includes the power to determine particular classes of facilities to be low-impact facilities. The fact that a particular type of facility may also be a temporary defence facility or a subscriber connection authorised by the Act does not prevent it also being determined to be a low-impact facility.

The *Telecommunications (Low-Impact Facilities) Determination 2018* (the Determination) essentially remakes in substance, the conditions set out in the *Telecommunications (Low-impact Facilities) Determination 1997* (1997 Determination), with some minor modifications. The 1997 Determination was due to sunset on 1 April 2019 in accordance with the *Legislation Act 2003*. The Determination also repeals the 1997 Determination in reliance on subclause 6(3) of Schedule 3 to the Act and subsection 33(3) of the *Acts Interpretation Act 1901*, which relevantly provides that where an Act confers a power to make, grant or issue any instrument of a legislative character, the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal any such instrument. Details of the differences between the Determination and the 1997 Determination are set out below.

The Determination is a legislative instrument for the purposes of the *Legislation Act 2003*.

### *Relationship to the Telecommunications Code of Practice 2018*

Clause 15 of Schedule 3 to the Act provides that 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 in Division 2, 3 or 4 (other than activities covered by a facility installation permit) of Schedule 3 to the Act. Subclause 15(2) of Schedule 3 to the Act requires that a carrier comply with the Code of Practice.

The list of low-impact telecommunications facilities contained in the Determination is regulated under the *Telecommunications Code of Practice 2018* (the Code).

### Purpose and operation

Telecommunications services play an important and expanding role in how people, businesses and governments go about their daily lives. To help provide Australians with better telecommunications services more quickly and cost-effectively, telecommunications carriers have powers and immunities under Schedule 3 to the Act.

Carrier powers and immunities give telecommunications carriers the ability to enter land and install and maintain some types of telecommunications network facilities. They are critical to the efficient construction and maintenance of telecommunications networks, which are a vital component of

Australia's critical infrastructure, and immensely important to Australians' everyday lives. They minimise the regulatory burden on carriers so that they can quickly and cost-effectively meet the community's need for access to affordable, fast and reliable telecommunications services.

Most aspects of carrier powers and immunities have been in place since 1997.

Schedule 3 to the Act provides carriers with powers to enter land for inspection, and to install and maintain certain types of facilities. It also provides certain immunities, including from a range of state and territory laws when carrying out those activities, such as those laws relating to land use, planning, design, construction, siting, tenancy, environmental assessments and protection.

The Determination contains a list of low-impact telecommunications facilities that can be installed under carrier powers and immunities. The low-impact list does not include telecommunications towers, as the installation of these facilities is governed by State and Territory laws.

The Determination has three Parts and one Schedule:

- Part 1 is introductory, containing matters such as commencement, definitions and principal designated use (for the purposes of clarifying the zoning category).
- Part 2 identifies the areas in which a facility may be installed, by reference to zoning arrangements under State and Territory planning laws.
- Part 3 and the Schedule identify the circumstances under which named facilities are to be taken to be low-impact.

### Consultation

On 9 June 2017, the Australian Government released a public consultation paper on possible changes to Schedule 3 to the Act, the 1997 Determination and the *Telecommunications Code of Practice 1997* (1997 Code). Organisations and members of the public were invited to make submissions about the possible changes. While submissions were required within six weeks of the release of the consultation paper, submissions received after that period were accepted and considered by the Government.

Over 100 submissions were received by the Government, with 81 submissions made public on the Department of Communications and the Arts' website on 18 September 2017. Confidential submissions were not published. A number of submissions focussed on the impact of existing powers and immunities on their land and activities rather than on the specific proposals put forward in the consultation paper. These submissions proposed additional changes to carrier powers and immunities under Schedule 3 to the Act.

The Department of Communications and the Arts met with representatives from key stakeholder groups from August 2017 to November 2017 to discuss the possible changes to the regime. Stakeholders generally accepted limited changes being made to the 1997 Determination and the 1997 Code, noting additional changes would be subject to further consultation.

The Minister decided to remake the 1997 Determination and the 1997 Code to ensure that they do not sunset on 1 April 2019 and to incorporate nine of the possible changes set out in the consultation paper. The Determination incorporates seven of the changes.

### Summary of changes in the Determination

Apart from the changes noted below, the Determination is not otherwise changed from the 1997 Determination. Some of the changes expand the list of low-impact facilities and the circumstances in which some facilities are to be taken to be low-impact, which will allow carriers to construct and

maintain their networks more efficiently and at a lower cost. Some of the changes clarify some existing provisions and update outdated references.

#### *Section 1.5 of the Determination*

The Determination includes a new note to the definition of co-located facilities in Section 1.5. The note clarifies that a facility is not a co-located facility unless it is installed on or within an original facility or a public utility structure. The note provides greater certainty for carriers, landowners and decision makers as to when the co-location rules set out in Part 7 of the Schedule to the Determination apply.

#### *Section 3.1 of the Determination*

Section 3.1 of the Determination clarifies that a shroud installed over a low-impact facility is an ancillary facility in the Determination. Radio shrouds can improve the visual amenity of an area by screening low-impact facilities such as mobile phone antennas.

#### *Schedule, Part 1, Item 5 of the Determination*

The Determination now allows omnidirectional radiocommunications antennas to be low impact facilities in residential, commercial, industrial and rural areas. Under the 1997 Determination, omnidirectional antennas installed in either industrial and rural areas were considered to be low-impact facilities. Applying the item to residential and commercial areas is intended to enable greater use of slimline omnidirectional antennas as an alternative to bulkier panel or yagi antennas.

#### *Schedule, Part 1, Items 8 and 9 of the Determination*

These items now allow for two types of radiocommunication facilities to be low-impact facilities.

Item 8 allows a radiocommunications facility to be installed as a low-impact facility if it has a separate antenna not more than 1.2 metres long and a cabinet not more than 1 cubic metre in volume.

Item 9 introduces a new facility that makes it clear that other radiocommunications equipment, such as wireless transmitters, can be installed as low-impact facilities when attached to an existing structure and if the transmitter unit is no bigger than 0.03 cubic metres, with an external antenna not more than 1.2 metres long.

For these two items, the Determination adopts the less specific language of “radiocommunications facility” for these classes of low-impact facilities and allows for antennas not longer than 1.2 metres rather than 1 metre. The 1997 Determination used the more specific term of “micro-cell”, which is used by industry to refer to a type of base station with a particular coverage area, to describe the class of facilities. These two items specify the facilities by the size of their components, as this is more relevant than their coverage area.

#### *Schedule, Part 3, Item 7 of the Determination*

The Determination now allows solar panels with a base area not more than 12.5 square metres in rural areas to be installed as low-impact facilities when used to power telecommunications facilities. Under the 1997 Determination, solar panels were specified as low-impact facilities if they had a base area not more than 7.5 square metres in rural areas. The increase in size of the solar panels will allow for some newer generation telecommunications equipment to be used in areas where other electricity sources are not available.

### *Schedule, Part 4, Item 1 of the Determination*

The Determination now allows 200 metres of trench to be open at any time for the installation of conduit or cable in residential areas. The 1997 Determination allowed up to 100 metres of trench to be open at any time in residential areas to minimise disturbance of residential streets. Allowing 200 metres of trench to be open in residential areas will mean that carriers will be able to lay more conduit or cable each day, reducing the days they need to work in an area and reducing disruption to the community.

### *Other changes*

The Determination also includes minor updates, including current titles of references to legislation and standards. The updates include changes to environmental legislation made since 1997 and to the outdated references to the Australian Communications Authority, but do not substantively change the arrangements that were set out in the 1997 Determination.

### Regulatory Impact

The Determination largely continues the previous arrangements with some changes.

The Office of Best Practice Regulation (OBPR) has advised that a Regulation Impact Statement is not required for the Determination as it will not have a more than minor regulatory impact (OBPR references 20695 and 23118). OBPR has recognised that the remade Determination results in a reduced regulatory burden on telecommunications carriers and no further action is required to remake the Determination under the Government's regulatory impact analysis requirements.

### Statement of Compatibility with Human Rights

A statement of compatibility with human rights for the purposes of Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* is set out in Attachment B.

**Notes on the *Telecommunications (Low-impact Facilities) Determination 2018***

Detailed notes on the *Telecommunications (Low-impact Facilities) Determination 2018*

**PART 1 - PRELIMINARY**

This Part deals with the title, commencement, and interpretation of the Determination.

**Section 1.1 Name**

This provides that the Determination may be referred to as the *Telecommunications (Low-impact Facilities) Determination 2018*.

**Section 1.2 Commencement**

The Determination commences on the day after it is registered on the Federal Register of Legislation.

**Section 1.3 Authority**

This section provides that the Determination is made under subclause 6(3) of Schedule 3 to the *Telecommunications Act 1997* (the Act) and subsection 33(3) of the *Acts Interpretation Act 1901*.

**Section 1.4 Repeal**

This provides that the *Telecommunications (Low-impact Facilities) Determination 1997* in force immediately before the Determination commences is repealed. The 1997 Determination was due to sunset on 1 April 2019.

**Section 1.5 Definitions**

This section defines terms used in the Determination. These are principally drawn from the Act. Some key definitions are contained in section 1.6 (principal designated use), and in Part 2.

**Section 1.6 Principal Designated Use**

Principal designated use (PDU) is a key concept in the Determination. It is used in Part 2 to determine whether an area in which a facility is to be installed is to be treated as a residential, commercial, industrial or rural area. In turn, the status of an area in some cases helps determine whether a facility mentioned in the schedule is low-impact.

The section sets out a procedure which is intended to have the effect of determining one PDU for any given area. A deterministic procedure is necessary because State and Territory planning laws may vary widely in the way they describe permitted land uses and the effects of those uses. Some laws, for example, use the term zoning while others do not. Some laws allow multiple uses of land, even where one use predominates.

Subsection (1) deals with the most straightforward case - where a planning law describes only one sole, or on its face, principal use.

Subsection (2) deals with the next easiest case - where a planning law allows for several uses, but it is possible by examining the law in context to see that one of the uses is somehow preferred over the others. One example would be an area which was located within a wider area which was clearly

being targeted (within the broader context of the planning law) primarily for commercial use, but nevertheless allowed for residential uses.

Subsection (3) deals with the situation where it is not possible to glean from the planning law any preferred use among multiple uses of the land - i.e. all of the potential uses are treated completely equally. In that case, the subsection sets out a hierarchy by which the PDU is to be determined. In descending order, these are:

- residential,
- commercial,
- industrial.

Note: If a use cannot be classified as residential, commercial or industrial, then sections 2.3(2) and 2.4(2) of the Determination will apply.

Subsection (4) deals with the important issue of timing of PDU. This may be relevant if the description of land uses changes under a planning law while a carrier is in the process of installing a low-impact facility. The provision makes it clear that the time when PDU is to be determined is the time at which a carrier proposes to issue the first notice to the owner or occupier of land in the area under Chapter 4 of the *Telecommunications Code of Practice 2018*.

## **PART 2 - AREAS**

In the Schedule, the location of a facility in a particular kind of area can in some cases determine whether or not it is to be regarded as a low-impact facility. This Part sets out the rules for determining the status of such areas.

In effect, the Part establishes a hierarchy of such areas which, in descending order of sensitivity are:

- residential,
- commercial,
- industrial,
- rural.

The Part relies on the concept of PDU set out in section 1.6. The safety net provided by subsections 2.3(2) and 2.4(2) mean that any area must be capable of falling into one of these four categories.

There is, however, a further category which can cut across any of these four categories. If a facility is in an area which is an area of environmental significance under section 2.5, then because of subsection 3.1(2), a facility can never be regarded as of low-impact, irrespective of its status under sections 2.1 to 2.4.

### **Section 2.1 Commercial area**

This section provides that an area is a commercial area if its PDU is for commercial purposes.

### **Section 2.2 Industrial area**

This section provides that an area is an industrial area if its PDU is for industrial purposes.

### **Section 2.3 Residential area**

Subsection (1) provides that an area is a residential area if its PDU is for residential purposes.

Subsection (2) provides that an area which is part of a built-up area is a residential area if it cannot otherwise be described as a commercial, industrial or rural area. “Built-up area” is a commonly understood planning term.

### **Section 2.4 Rural area**

Subsection (1) provides that an area is a rural area if its PDU is for rural purposes.

Subsection (2) provides that an area which is not part of a built-up area is a rural area if it cannot otherwise be described as a commercial, industrial or residential area. “Built-up area” is a commonly understood planning term.

### **Section 2.5 Area of environmental significance**

This section sets out an exhaustive list of the areas which are to be taken as being areas of environmental significance for the purposes of the Determination. These are:

- A declared World Heritage Property within the meaning of the *Environment Protection and Biodiversity Conservation Act 1999*.
- A place that Australia is required to protect by the terms of a listed international agreement.
- An area designated, under a law of the Commonwealth, a State or a Territory, as a reserve for nature conservation purposes; and its principal purpose is for nature conservation.
- An area that, under a law of the Commonwealth, or a State or Territory, is protected from significant environmental disturbance.
- An area entered in the Register of the National Estate or the Interim List for that Register.
- A place, building or thing, under a law of the Commonwealth, a State or a Territory, entered in a register relating to heritage conservation.
- An area, under a law of the Commonwealth, a State or a Territory, entered in a register or is otherwise identified, as being of significance to Aboriginal persons or Torres Strait Islanders, in accordance with their traditions.

## **PART 3 - LOW-IMPACT FACILITIES**

This Part sets out the rules for interpreting the Schedule. The Schedule contains a list of facilities and the circumstances under which they are to be regarded as being low-impact.

### **Section 3.1 Facilities**

Subsection (1) describes the operation of the Schedule which is a matrix with two operative columns. Column 2 contains a list of facilities. Column 3 sets out the normal circumstances in which those facilities are to be taken to be low-impact.

Subsection (2) sets out the exception to the rules in subsection (1), which is that if the facility is in an area of environmental significance, then it is not low-impact.

Subsection (3) establishes a de minimis rule for the dimensions and other measurements set out in the Schedule. It requires that trivial variations for a facility mentioned in the Schedule are to be ignored.

Subsection (4) establishes that an ancillary facility may be a low-impact facility in certain circumstances. Those circumstances are where the ancillary facility is:

- Necessary for the operation or proper functioning of the low-impact facility. For example, cabling leading from a low-impact antenna to a power source, and other associated equipment necessary for the operation of the antenna.
- A new shroud installed over a low-impact facility that is intended to minimize the visual amenity impact of the low-impact facility and is colour-matched to the background. For example, a radio shroud used to screen a new mobile base station.
- Used to protect a telecommunications facility from damage, and technicians and the general public from injury. For example, facilities such as security fences or facility supports designed to elevate a low-impact facility above potential flood levels in rural areas.

## **SCHEDULE – FACILITIES AND AREAS**

As described in subsection 3.1(1), the Schedule contains a description of facilities and the PDU areas in which they can be low-impact facilities. The areas are described in Part 2. The categories of facilities set out in the Schedule cover:

- Part 1 – Radio facilities
- Part 2 – Underground housing
- Part 3 – Above ground housing
- Part 4 – Underground facilities (for fixed-line networks)
- Part 5 – Above ground facilities (for fixed-line networks)
- Part 6 – Public payphones
- Part 7 – Emergency facilities
- Part 8 – Co-located facilities

Classes of facilities are specified in the table by type and the PDU areas in which the facility can be low-impact. Most items include descriptions, sizes and conditions.



## **Statement of Compatibility with Human Rights**

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

### ***Telecommunications (Low-Impact Facilities) Determination 2018***

The *Telecommunications (Low-Impact Facilities) Determination 2018* (the Determination) is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

#### **Overview of the Determination**

Part 1 of Schedule 3 to the *Telecommunications Act 1997* (the Act) provides authority for carriers to inspect land, maintain facilities, connect subscribers to an existing network or install any declared low-impact facilities or temporary defence facilities. Subclause 6(3) of Schedule 3 to the Act allows the Minister to determine that specified facilities are low-impact facilities for the purpose of clause 6 of Schedule 3 to the Act.

Carrier powers and immunities are critical to the efficient construction and maintenance of telecommunications networks. They minimise the regulatory burden on carriers so that they can quickly and cost-effectively meet the community's need for access to affordable, fast and reliable telecommunications services. They provide certain immunities, including from a range of state and territory laws when carrying out those activities, such as those laws relating to land use, planning, design, construction, siting, tenancy, environmental assessments and protection.

The Determination remakes the *Telecommunications (Low-Impact Facilities) Determination 1997* (1997 Determination), which was due to sunset on 1 April 2019. There are seven substantive changes in the Determination, including changes that clarify some existing provisions and update outdated references. The changes in the Determination were included in a public consultation paper of possible amendments to carrier powers and immunities. No applicable human rights issues regarding the Code or the Determination were raised during the public consultation.

The low-impact facilities specified in the Determination do not include telecommunications towers, as the installation of these facilities is governed by State and Territory laws. Installation of low-impact facilities is regulated under Chapter 4 of the *Telecommunications Code of Practice 2018*.

The Determination has three Parts and one Schedule:

- Part 1 is introductory, containing matter such commencement, definitions and principal designated use (for the purposes of clarifying the zoning category).
- Part 2 identifies the areas in which a facility may be installed, by reference to zoning arrangements under State and Territory planning laws.
- Part 3 and the Schedule identify the circumstances under which named facilities are to be taken to be low-impact.

The Determination is technical and operational in nature and does not invoke any of the human rights or freedoms as set out in the seven core international human rights treaties to which Australia is a party.

**Human rights implications**

The Determination does not engage any of the applicable rights or freedoms.

**Conclusion**

The Determination is compatible with human rights as it does not raise any applicable human rights issues.