THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

TELECOMMUNICATIONS LEGISLATION AMENDMENT BILL 2018

REPLACEMENT EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Communications and the Arts,
Senator the Honourable Mitch Fifield)
TELECOMMUNICATIONS LEGISLATION AMENDMENT BILL 2018

OUTLINE

Overview

The Telecommunications Legislation Amendment Bill 2018 (the Bill) comprises the following measures:

- a new tower and site access regime to allow eligible persons such as emergency service organisations (ESOs) to gain access to towers and related sites owned or operated by NBN corporations.

- changes to the carrier powers and immunities framework to enable temporary telecommunications towers to be specified as low-impact facilities in certain circumstances, along with several minor technical changes to the regime. These changes were outlined in a consultation paper titled, Possible amendments to telecommunications carrier powers and immunities – Consultation Paper (June 2017).

This Replacement Explanatory Memorandum responds to matters raised by the Senate Environment and Communications Legislation Committee report ‘Inquiry into the Telecommunications Legislation Amendment Bill 2018’ released on 10 September 2018.

NBN tower access regime

Schedule 1 to the Bill would amend the National Broadband Network Companies Act 2011 (the NBN Act) to require NBN corporations, such as NBN Co Limited (NBN Co), to provide ESOs (referred to in the Bill as ‘eligible persons’) with access in certain circumstances to towers and associated sites and facilities. Eligible persons are defined to include police, fire, ambulance and State or Territory emergency services. They can currently gain access to carriers’ towers for the purposes of internal communications, which improves their operational efficiency. In recent times, several police services have requested access to towers owned or operated by NBN corporations, however NBN Co has been unable to provide this access because of line of business restrictions in the NBN Act.

The purpose of Schedule 1 to the Bill is to allow NBN corporations to provide access, in certain circumstances, to ESOs so that those organisations can extend their radio network coverage more efficiently than would be the case if they had to seek access from other tower providers or build their own towers. Under the proposed tower access regime, NBN corporations would be required to give access to the tower and related sites, and (if requested) to supply non-communications goods or services that are incidental to the giving of site or tower access. Schedule 1 to the Bill amends the existing line of business restrictions applying to NBN corporations so that such access can be supplied to eligible persons without breaching those restrictions. Access in general would include enabling a person to install, maintain, operate or remove equipment.

An NBN corporation would be required to publish standard offers on its website detailing the terms and conditions of supply, including price. The requirements to publish standard offers ensures that there is transparency of the terms and conditions under which access may be sought. NBN corporations would have to provide access on the terms and conditions set out
in published offers and would generally not be able to discriminate between eligible persons
in supplying access on the terms and conditions in the standard offers.

The non-discrimination and transparency principles reflected in Schedule 1 to the Bill are
consistent with existing obligations on NBN corporations under the Competition and
Consumer Act 2010 (CCA) and the NBN Act.

If there is another tower in the vicinity of the tower owned or operated by the NBN
corporation, the NBN corporation would need to be reasonably satisfied that it would not be
reasonable for an eligible person to access that other tower before providing tower access. It
is anticipated that an eligible person would need to provide sufficient evidence to the NBN
corporation to enable it to be reasonably satisfied.

None of the proposed measures in Schedule 1 to the Bill conflict with, or otherwise amend
any of the obligations applying to relevant persons, such as NBN corporations under the
Telecommunication (Interception and Access) Act 1979 (the TIA Act). The Bill also does not
increase any interception or security powers, and is to be read concurrently with
infrastructure security legislation and relevant instruments, including the
Telecommunications Sector Security Reforms (TSSR) and the TIA Act.

**Temporary telecommunications facilities**

The carrier powers and immunities framework under Schedule 3 to the Tel Act minimises the regulatory burden on carriers so that they can quickly and
cost-effectively meet the community’s need for affordable, fast and reliable telecommunication services. They provide certain immunities, including from some State
and Territory laws when carrying out those activities, such as laws relating to land use,
planning, design, construction, siting, tenancy, environmental assessments and protection.

Schedule 3 to the Tel Act does not currently permit towers other than replacement towers or
towers no more than five metres in height and which are attached to a building to be installed
using carriers’ powers and immunities. Temporary towers require local government planning
approval in many Australian jurisdictions. Carriers are often required to obtain development
approval from local governments to temporarily install these facilities, which increases costs
and timeframes for deployment, and affects the business case for their use. The inability to
provide temporary facilities can mean there is insufficient capacity for customers to connect
to mobile networks during emergencies, maintenance, major events and high-demand holiday
periods.

Several of the amendments proposed by Schedule 2 to the Bill would allow towers to be
installed temporarily under certain conditions, provided they are, at the relevant time of
installation, specified in a ministerial determination as a low-impact facility.

Specifically, Schedule 2 to the Bill would amend Schedule 3 to the Tel Act to allow the
Minister to specify that a temporary telecommunications facility, including a temporary
tower, is a low-impact facility under the Telecommunications (Low-impact Facilities)
Determination 2018 (LIFD) when used to:

- maintain coverage during the maintenance of an existing facility or the construction or
  installation of a replacement facility;
- provide additional coverage during an event (such as a concert, festival or sporting
  event) or high-demand holiday period; or
- provide services to an ESO so that the ESOs can deal with an emergency or natural
disaster.
A temporary tower would be limited to no more than 30 metres in height (measured from the ground to the top of the tower), except when it is being installed to:

- minimise disruption to the supply of a carriage service that might result from the maintenance or replacement of another facility in a rural area, in which case it could be the higher of 30 metres or the height of the tower being maintained; or
- provide services to an ESO so that the ESOs can deal with an emergency or natural disaster, in which case there is no height restriction.

The proposed changes also include strict conditions to limit the period that a temporary facility can be installed to provide services during an event or a high-demand holiday period, ensure temporary facilities are removed within a set timeframe and that carriers restore the land.

In addition to the conditions proposed to apply to temporary facilities under Schedule 2 to the Bill, the existing protections that currently apply to low-impact facilities installed under Schedule 3 to the Tel Act and the *Telecommunications Code of Practice 2018* (the Code) would also apply.

Carriers are required to notify an affected land owner/occupier of their intended activities, and give them the opportunity to object. If an acceptable arrangement cannot be reached, the land owner/occupier has the right to have an objection referred to the Telecommunications Industry Ombudsman (TIO), who may issue directions that the carrier must follow. The notification and objection process would apply to temporary facilities, noting that there are some exemptions, such as during an emergency.

In addition to notification requirements and objection opportunities, Schedule 3 sets out a series of safeguards to ensure that the various powers and immunities afforded to carriers under the Schedule are used appropriately. Additional safeguards are also specified in subordinate instruments. For example, under Schedule 3 and the Code, when undertaking permitted facility installation and maintenance activities, carriers are required to:

- do as little damage as practicable;
- restore the land;
- act in accordance with good engineering practice;
- comply with recognised industry standards;
- make reasonable efforts to reach agreements with public utilities;
- protect the safety of persons and property and the environment;
- ensure the activity interferes as little as practicable with the operations of a public utility, roads and paths, movement of traffic and the use of land;
- notify road authorities;
- notify the land owner or occupier;
- maintain records for overhead cable, underground facilities and towers;
- adopt best practice design to minimise the degradation of the environment and visual amenity;
- minimise noise; and
- take reasonable steps to co-locate facilities and cooperate with other carriers and public utilities undertaking similar activities.

Facilities that are proposed to be installed in areas of environmental significance, which includes places listed on a Commonwealth, State or Territory heritage register, or are
otherwise identified as being of significance to Aboriginal persons or Torres Strait Islanders in accordance with their traditions cannot be specified as ‘low-impact facilities’ for the purposes of Schedule 3 to the Tel Act. Those proposed kinds of facility installations will generally be subject to applicable State and Territory laws.

The Australian Media and Communications Authority can investigate complaints about carrier non-compliance with the requirements under Schedule 3 to the Tel Act, LIFD and the Code.

The proposed changes would allow for the deployment of temporary facilities in certain circumstances and, subject to time and height restrictions, would benefit the community through improved access to services, including during natural disasters or peak holiday periods. Carriers would equally benefit from the proposed reform as a result of being able to deploy temporary facilities more efficiently and in a nationally uniform way.
STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

TELECOMMUNICATIONS LEGISLATION AMENDMENT BILL 2018

The Bill 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 Bill

Access to a telecommunications transmission tower owned or operated by an NBN corporation etc.

Schedule 1 of the Telecommunications Legislation Amendment Bill 2018 (the Bill) would amend the National Broadband Network Companies Act 2011 (the NBN Act) to require NBN corporations, such as NBN Co Limited, to provide access in certain circumstances to towers, and associated sites and facilities, to eligible persons who are neither carriers nor service providers, such as emergency service organisations (ESO).

The purpose of Schedule 1 to the Bill is to allow NBN corporations, in certain circumstances, to provide access to ESOs so that those organisations can extend their radio network coverage more efficiently than would be the case if they had to seek access from other tower providers or build their own towers.

Currently under the NBN Act, NBN corporations can supply eligible services (such as access to towers) only to carriers and carriage service providers, consistent with their wholesale-only mandate. NBN corporations are also subject to other line of business restrictions under the NBN Act, including that NBN corporations cannot supply non-communications goods or services. If NBN corporations were to provide access to towers to entities that are not carriers or service providers, they would breach these obligations.

The Bill will establish a new access regime specific to telecommunications towers owned or operated by an NBN corporation. The Bill would enable NBN corporations to give ‘eligible persons’ access to such towers (and related sites) in certain circumstances. An NBN corporation would have a duty to provide access to its towers to an eligible person where the access is given to enable the installation, maintenance or removal of equipment on the tower and other conditions are met.

Eligible persons will include police services, ambulance services, fire services and State and Territory emergency services. It is envisaged that employees, officers of the eligible persons, and subcontractors to those organisations would, in practical terms, carry out the tower access and related installation activities on behalf of the eligible person. Such entities have requested access to towers owned or operated by NBN corporations, but NBN corporations have been unable to provide such access because of the line of business restrictions on NBN corporations in the NBN Act. The Minister would also have the power to specify, by legislative instrument, additional classes of persons who would be able to access towers owned or operated by an NBN corporation. The Minister would be able to declare limitations or restrictions on tower access for classes of persons that are determined to be eligible.

An NBN corporation would be required to publish a standard offer on its website detailing the terms and conditions of supply, including price for the tower and site access. The requirements to publish standard offers ensure that eligible persons have transparency of the terms and conditions under which access may be sought.
Temporary telecommunications facilities

Part 1 of Schedule 3 to the Telecommunications Act 1997 (the Tel 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 Tel Act allows the Minister to determine that specified facilities are low-impact facilities for the purpose of clause 6 of Schedule 3.

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 immunities from certain 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.

Schedule 2 to the Bill would amend Schedule 3 to the Tel Act to allow the Minister to specify temporary telecommunications towers to be low-impact facilities when used to:

- maintain coverage during the maintenance of an existing facility or the construction or installation of a replacement facility;
- provide additional coverage during an event (such as a concert, festival or sporting event) or high-demand holiday period; or
- provide services to an ESO so that the ESOs can deal with an emergency or natural disaster.

A temporary tower would be limited to no more than 30 metres in height (measured from the ground to the top of the tower), except when it is being installed to:

- minimise disruption to the supply of a carriage service that might result from the maintenance or replacement of another facility in a rural area, in which case it could be the higher of 30 metres or the height of the tower being maintained; or
- provide services to an ESO so that the ESOs can deal with an emergency or natural disaster, in which case there is no height restriction.

The changes would allow carriers to more efficiently provide sufficient network capacity during these times to ensure consumers are not affected by a disrupted service. The changes would include conditions to ensure that the facilities are removed within a set timeframe and that carriers restore the land. Schedule 2 to the Bill would also make several consequential changes and a substantive amendment to clause 7 of Schedule 3 to make clear the ability for carriers to temporarily install facilities such as mobile exchanges on wheels as part of Schedule 3 facility maintenance activities.

The proposed changes were outlined in a consultation paper titled, Possible amendments to telecommunications carrier powers and immunities - Consultation Paper (June 2017) relating to possible amendments to carrier powers and immunities. The paper invited submission from the public, and no applicable human rights issues were raised during the public consultation.

Human rights implications

The Bill does not engage any of the applicable rights or freedoms.
Conclusion
The Bill 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.
FINANCIAL IMPACT STATEMENT

None of the measures in the Bill will have any financial impact on the Australian Government Budget.
# ABBREVIATIONS

The following abbreviations are used in this explanatory memorandum:

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>ACCC</td>
<td>Australian Competition and Consumer Commission</td>
</tr>
<tr>
<td>ACMA</td>
<td>Australian Communications and Media Authority</td>
</tr>
<tr>
<td>Bill</td>
<td>Telecommunications Legislation Amendment Bill 2018</td>
</tr>
<tr>
<td>CCA</td>
<td><em>Competition and Consumer Act 2010</em></td>
</tr>
<tr>
<td>Code</td>
<td><em>Telecommunications Code of Practice 2018</em></td>
</tr>
<tr>
<td>ESO</td>
<td>Emergency Service Organisations</td>
</tr>
<tr>
<td>LIFD</td>
<td><em>Telecommunications (Low-impact Facilities) Determination 2018</em></td>
</tr>
<tr>
<td>Minister</td>
<td>the Minister responsible for administering the Tel Act from time to time, currently the Minister for Communications and the Arts</td>
</tr>
<tr>
<td>NBN</td>
<td>National Broadband Network</td>
</tr>
<tr>
<td>NBN Co</td>
<td>NBN Co Limited</td>
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<tr>
<td>NBN Act</td>
<td><em>National Broadband Network Companies Act 2011</em></td>
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<tr>
<td>Tel Act</td>
<td><em>Telecommunications Act 1997</em></td>
</tr>
<tr>
<td>TIA Act</td>
<td><em>Telecommunications (Interception and Access) Act 1979</em></td>
</tr>
<tr>
<td>TIO</td>
<td>Telecommunications Industry Ombudsman</td>
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TSSR: Telecommunications Sector Security Reforms
NOTES ON CLAUSES

Clause 1 – Short title
Clause 1 provides that the Bill, when enacted, may be cited as the *Telecommunications Legislation Amendment Act 2018*.

Clause 2 – Commencement
Clause 2 provides for the commencement of provisions in the Bill.

Item 1 of the table at subclause 2(1) provides that the whole of the Bill would commence on the day after the Act receives the Royal Assent.

Subclause 2(2) provides that any information in column 3 of the table in Subclause 2(1) is not a part of the Bill and that information may be inserted in this column, or may be edited, in any published version of the Bill, when enacted.

Clause 3 – Schedules
Clause 3 provides that legislation that is specified in a Schedule to the Bill is amended or repealed as set out in the applicable items in that Schedule, and any other item in a Schedule has effect according to its terms. There are two Schedules to this Bill.
Schedule 1— Access to a telecommunications transmission tower owned or operated by an NBN corporation etc.

The amendments set out in Schedule 1 to the Bill would require NBN corporations, including NBN Co, to provide access to NBN telecommunications transmission towers and other related facilities, and the sites on which those towers or facilities are located, to eligible persons who are neither carriers nor service providers.

The main purpose of Schedule 1 to the Bill is to allow NBN corporations to provide access to ESOs so that those organisations can extend their radio network coverage more efficiently than would be the case if they had to seek access from other tower providers, or build their own towers. The Bill intentionally does not exhaustively list the purposes for which ESOs may be granted access to NBN telecommunications transmission towers and other related facilities. To exhaustively list, would unnecessarily constrain future access to a specific technical definitions that may be superseded or no longer applicable with the passage of time.

National Broadband Network Companies Act 2011

Item 1 - Section 5

Item 1 of Schedule 1 to the Bill would insert a new term into section 5 of the NBN Act. The new term, ‘telecommunications transmission tower’ would have the same meaning as in Part 5 of Schedule 1 to the Tel Act. Under that Part, telecommunications transmission tower means any of the following things used to supply a carriage service by means of radiocommunications:

- a tower; or
- a pole; or
- a mast; or
- a similar structure.

Item 2 - After Subdivision B of Division 2 of Part 2

Item 2 of Schedule 1 would insert a new subdivision into Division 2 of Part 2 of the NBN Act constituting the new tower and site access regime. This new subdivision comprises ten new provisions.

Proposed section 19A - Access to a telecommunications transmission tower

Proposed subsection 19A(1) would set out the primary access obligation in respect of telecommunications transmission towers owned or operated by NBN corporations.

If an NBN corporation is requested by an ‘eligible person’ (which would be defined in proposed new section 19H) to provide access to a telecommunications transmission tower owned or operated by the NBN corporation (the first tower), then the NBN corporation must provide access to the tower to that person subject to certain conditions being met.

All of the following conditions must be met in order to enliven the new access obligation:

- the access must be for the sole purpose of enabling the eligible person to install particular equipment on the first tower or to maintain, operate or remove particular equipment installed by the eligible person on the first tower (paragraph (1)(a)); and
- in a case where the access is for equipment installation:
the NBN corporation must be satisfied that the installation of the equipment is technically feasible (paragraph (1)(b)); and

if there is another telecommunications transmission tower in the vicinity of the NBN tower which is not owned or controlled by the NBN corporation, the NBN corporation must be reasonably satisfied that it would not be reasonable for the eligible person to install the equipment on the other tower (paragraph (1)(c)). The other tower is not defined and refers to a tower in the vicinity of the first tower, that is not owned or operated by the NBN corporation.

Specific criteria are proposed for determining what is ‘technically feasible’ at proposed subsection 19A(7).

The requirement for an NBN corporation to be reasonably satisfied that it would not be reasonable for an eligible person to access another tower in the vicinity of the NBN corporation’s tower addresses potential competitive neutrality concerns. Other carriers, and independent tower providers, also provide ESOs with access to towers and NBN corporations would be competing with them. In effect, paragraph 19A(1)(c) establishes a requirement that eligible persons must approach those providers first and only seek access from an NBN corporation where access to the other provider’s tower would be unreasonable or not feasible.

In reaching a decision on whether or not an NBN corporation is reasonably satisfied that the eligible person seeking access to the NBN transmission tower does, or does not have, a reasonable option to install equipment on another tower, an NBN corporation should make an assessment based on the evidence provided to it, and this is intended to be based on information reasonably available to the NBN corporation at the time of considering the request. The assessment process should not be burdensome or time-consuming for NBN corporations or the eligible person. It is not intended that commercially sensitive information provided to eligible persons must be provided to NBN corporations in order for NBN corporations to reach a decision regarding reasonableness for these purposes.

The types of documentary or other form of evidence that NBN corporations could reasonably rely upon to assess whether it is reasonable for the eligible person to install the equipment on the other tower may include:

- a statement from the eligible person that pricing at alternative tower sites is not reasonable or that the payment would be in excess of the NBN corporation’s standard offer;
- a statement from the eligible person that there is insufficient space at alternative tower sites, or that the space is not available at an appropriate height;
- a statement that the eligible person would need to pay to extend or support the tower in order to install equipment, and that this payment would be in excess of the NBN corporation’s standard offer; or
- any existing knowledge the NBN corporation possesses of alternative tower sites in the vicinity of its towers.

The first note accompanying proposed subsection 19A(1) refers the reader to the definition of ‘eligible person’ in new section 19H.

The second note accompanying proposed subsection 19A(1) refers the reader to the definition of ‘equipment’ in new section 19G, where a broad definition is proposed to encompass the different types of equipment that persons may wish to install on NBN corporations’ towers.
The third note accompanying proposed subsection 19A(1) refers the reader to new section 19C, which provides that the Minister may make a determination to clarify that certain types of conditions may or may not be reasonable for the purposes of paragraph 19A(1)(c).

Under the NBN Act, an NBN corporation can only supply ‘eligible services’ to a carrier or a service provider (section 9). Eligible services are defined in section 152AL of the CCA and are either listed carriage services (within the meaning of the Tel Act) or services that facilitate the supply of a listed carriage service. They therefore cover a broad range of communications services, including wholesale carriage services and providing access to network elements or facilities.

NBN corporations are subject to further line of business restrictions set out in Subdivision B of Division 2 of the NBN Act. These are intended to ensure that NBN corporations remain limited to, and focused on, the wholesale provision of carriage services.

Under section 18 of the NBN Act, an NBN corporation must not supply a ‘non-communications service’ to another person.

A ‘non-communications service’ is defined in section 5 of the NBN Act as a service that does not include five classes of services; two of those being an ‘eligible service’ and a service that is ancillary or incidental to the supply by an NBN corporation of an eligible service.

Under section 19 of the NBN Act, an NBN corporation cannot supply a good unless the goods are for use in connection with the supply, or prospective supply, of an eligible service by the NBN corporation.

Under the existing arrangements outlined above, if an NBN corporation were to provide access to its towers and sites, and supply ancillary goods or services, to persons that are neither carriers nor service providers, it would breach these obligations. For example, if it proposed to supply tower access to such a person, generally speaking, it would be supplying an eligible service to a person who is neither a carrier nor a service provider.

In some circumstances, the supply of tower access by an NBN corporation would not necessarily be an eligible service. When a carrier supplies tower access to another carrier or service provider this would usually be a service that facilitates the supply of a carriage service, and therefore an ‘eligible service’ as defined in the CCA. If an NBN corporation supplies tower access to an ESO such as a police service, for example, that police service would not be supplying a carriage service and so the tower access service would not be an ‘eligible’ service because no carriage service is being facilitated.

In this circumstance, however, the NBN corporation would still be precluded from supplying tower access to an emergency service organisation because doing so would potentially be in breach of the proscription in section 18 of the NBN Act on supplying non-communications services.

Similarly, if NBN Co were to supply a good to an ESO it could potentially breach section 19 of the NBN Act. An example would be the supply of a good such as electricity, which may be required to allow equipment installed on a tower to operate. When an NBN corporation supplies tower access to a carrier it may also supply electricity, and in this case the supply is in connection with the supply of an eligible service and does not breach the ban on supplying non-communications goods. However, if an NBN corporation were to supply electricity to an ESO, it could breach section 19. As outlined above, the NBN corporation would not, under the NBN Act, be supplying an eligible service and therefore the supply of electricity would not be in connection with the supply of an eligible service.
Proposed subsection 19A(2) is therefore an integral provision to the reform measure because it operates to ensure that the prohibitions in sections 9, 18 and 19 of the NBN Act do not apply to an NBN corporation giving access to a tower in compliance with proposed subsection 19A(1), or the supply to the eligible person of non-communications goods or services that are part of the giving of that tower access.

Proposed subsection 19A(3) sets out reasonable limitations on the access obligations under proposed subsection 19A(1). Specifically, an NBN corporation would not need to provide access if giving such access would:

- prevent an NBN corporation from reserving sufficient space on a tower for its reasonably anticipated requirements (paragraph 19A(3)(a)); or
- prevent another person who has already installed equipment on the NBN tower from obtaining access to sufficient space on that tower to be able to meet the other person’s reasonably anticipated requirements in relation to the installation of equipment, measured at the time when the request was made (paragraph 19A(3)(b)); or
- deprive any person of a ‘protected contractual right’, defined under paragraph 19A(4)) to mean a right under a contract that was in force at the commencement of section 19A.

These limitations are consistent with those that apply to the Category B standard access obligations under subsection 152AXB(3) of the CCA. The limitations in proposed subsection 19A(3) are intended to ensure that the duty to provide access is suitably limited and recognise the commercial and physical constraints that may exist (or apply) in respect of a particular tower. Where a tower is not yet full, but the available space will be required by an NBN corporation to fulfil existing contractual obligations or reasonably anticipated requirements, then the relevant NBN corporation should not be required to grant subsequent access requests if this would derogate from the existing requirements.

Proposed subsection 19A(5) specifies a further limitation on the access right set out in proposed subsection 19A(1). It operates in conjunction with proposed subsection 19H(2), which creates a power for the Minister, by legislative instrument, to specify additional classes of eligible persons to whom NBN corporations must give tower access. In exercising this power, the Minister may declare that one or more specified limitations or restrictions are applicable to the class. If the Minister had specified a class of persons and any applicable limitations or restrictions, the duty to provide tower access under 19A(1) would not apply if giving that access would be inconsistent with a limitation or restriction that, under paragraph 19H(2)(b), was applicable to the class (refer proposed subsection 19A(5)).

As a future safeguard to deal with unforeseen circumstances, proposed subsection 19A(6) would provide a mechanism for the Minister to determine, by legislative instrument, that the access obligation in proposed subsection 19A(1) does not apply if certain conditions are met. The power is not limited. Examples of the sort of condition that could be determined by the Minister could be restrictions on the use of certain equipment, or requirements on eligible persons to obtain specified approvals before installing equipment.

Proposed subsection 19A(7) establishes criteria that an NBN corporation must have regard to in order to determine whether an installation is regarded as technically feasible for the purposes of proposed paragraph 19A(1)(b). The criteria are based on, and are largely the same as, those set out in the current criteria for determining what is ‘technically feasible’ in subclause 33(4) of Schedule 1 of the Tel Act. They include considering whether the installation of equipment is likely to result in significant difficulties of a technical or
engineering nature, and whether the installation is likely to result in a significant threat to the health or safety of persons who operate, or work on, the tower. They also include potential risk mitigation strategies such as changing the configuration or operating parameters of a facility situated on the tower, or making alterations to the tower.

For the purposes of subsection 19A(7), the term ‘facility’ would have the same meaning as in section 7 of the Tel Act (proposed subsection 19A(8)). This is a broad definition and covers any part of the infrastructure of a telecommunications network; or any line, equipment, apparatus, tower, mast, antenna, tunnel, duct, hole, pit, pole or other structure or thing used, or for use, in or in connection with a telecommunications network.

**Proposed section 19B - Access to the site of a telecommunications transmission tower**

Proposed subsection 19B(1) would set out the primary access obligation in respect of access to sites upon which NBN telecommunications transmission towers are situated. The term ‘site’ would be broadly defined in proposed section 19J as land; a building on land; or a structure on land.

An NBN corporation would be required to give an eligible person access to a particular site subject to certain preconditions being met.

Firstly, access to the related site must be given if access has been given to the tower (under proposed subsection 19A(1)) for the purpose of enabling the eligible person to either install particular equipment on the tower; or maintain, operate or remove particular equipment installed by the eligible person on the tower. In this sense, the site access obligations flow from the tower access obligation; when an NBN corporation gives tower access, it must also give related access to the site for the same purpose.

Secondly, the site must be either owned, occupied or controlled by the NBN corporation, or the NBN corporation must have a right (whether conditional or unconditional) to use the site. ‘Controlled’ is not defined in the Bill, but it is intended that the same broad meaning as given in section 577N of the Tel Act would apply.

Thirdly, the access to the site must be for the sole purpose of enabling the eligible person to install particular equipment on the first tower or maintain, operate or remove particular equipment installed by the eligible person on the first tower.

Fourthly, in the case where the access is for equipment installation: the NBN corporation must be reasonably satisfied that the installation of the equipment is technically feasible and it would not be reasonable for the eligible person to install the equipment on another person’s tower that is in vicinity to the particular NBN tower.

The first note accompanying proposed subsection 19B(1) refers the reader to the definition of ‘eligible person’ in new section 19H.

The second note accompanying proposed subsection 19B(1) refers the reader to the definition of ‘site’ in new section 19J.

The third note accompanying subsection 19B(1) refers the reader to new section 19G for the meaning of ‘equipment’.

Proposed subsection 19B(2) largely mirrors subsection 19A(2), however the line of business restrictions under sections 9, 18 and 19 of the NBN Act apply in respect of the giving of site access; or the supply to the eligible person of goods that are incidental to the giving of site access. As with subsection 19A(2), subsection 19B(2) is critical as it establishes that the line of business restrictions under the NBN Act do not apply where an eligible person requests
access and the giving of access meets the requirements set out in the proposed new Subdivision.

Proposed subsection 19B(3) would provide a mechanism for the Minister to determine that the access in subsection 19B(1) does not apply if certain conditions are met. As with subsection 19A(5), this subsection allows the Minister to deal flexibly with unforeseen circumstances by determining conditions on access to NBN tower sites. For instance, the Minister could determine circumstances in which NBN corporations do not have a duty to provide access to tower sites, such as if there are environmental or safety concerns. The determination would be in writing and a legislative instrument for the purposes of the Legislation Act 2003.

Proposed section 19C - Reasonableness—Ministerial determinations

Proposed subsection 19C(1) is intended to allow the Minister to determine, if necessary, the conditions on which it is reasonable or not reasonable for an eligible person to access an alternative tower site. It enables the Minister to determine specified conditions by legislative instrument, and if those conditions are specified then:

- for the purposes of paragraph 19A(1)(c), it is taken to be reasonable for an eligible person to install equipment on a telecommunications transmission tower; or
- for the purposes of paragraph 19A(1)(c), it is taken not to be reasonable for an eligible person to install equipment on a telecommunications transmission tower.

This power provides flexibility to deal with possible unforeseen circumstances. As any determination would be a legislative instrument, it would be subject to the consultation, disallowance and registration requirements under the Legislation Act 2003.

The first note accompanying proposed subsection 19C(1) refers the reader to the definition of ‘eligible person’ in new section 19H.

Proposed subsection 19C(2) specifies that a determination under subsection 19C(1) must be an instrument of a legislative character. This is included for the avoidance of doubt and ensures that the determination deals with identified circumstances or classes of persons rather than with specific persons.

Proposed section 19D - Publication of access terms and conditions—towers

Proposed section 19D would impose an obligation upon NBN corporations to publish standard offers on their websites detailing the terms and conditions on which they will supply tower access to eligible persons. Those supply terms and conditions must cover price and non-price terms. The requirement to publish standard offers is intended to provide transparency of the terms and conditions under which access may be sought. Such transparency is essential for the proper operation of the non-discrimination obligations set out in proposed section 19F.

Proposed section 19D also sets out that, if an NBN corporation has published standard offers for the supply of tower access and incidental goods, the terms and conditions on which access is given, or the goods are supplied, must be the same as the published terms. This ensures that an eligible person requesting access can be guaranteed supply on the basis of the standard terms.

Under proposed subsection 19D(1) an NBN corporation must publish on its website the price and non-price terms and conditions on which the NBN corporation offers to give access to its tower and the supply of incidental goods, in compliance with proposed subsection 19A(1), for the purpose of enabling the eligible person to:
• install equipment; or maintain, operate or remove equipment; and
• supply to a person goods that are incidental to the giving of that access.

The note accompanying proposed subsection 19D(1) reminds readers that the term ‘eligible person’ is defined in proposed section 19H.

Proposed subsection 19D(2) provides that an NBN corporation must comply with a request to provide access to a telecommunications tower in accordance with the terms and conditions published as mentioned in subsection 19D(1), if the NBN corporation is obliged to give access to a tower (or to supply goods incidental to giving that access) in accordance with subsection 19A(1).

Under proposed subsection 19D(3), if an NBN corporation is obliged to give access to a tower (or to supply incidental goods) in accordance with proposed subsection 19A(1) and these activities are not covered by an agreement between the NBN corporation and the eligible person, the NBN corporation must supply the access and goods on the terms and conditions that were published on the NBN corporation’s website, in accordance with proposed subsection 19D(1), at the time when the request was made.

**Proposed section 19E - Publication of access terms and conditions—sites**

Proposed section 19E is cast in somewhat similar terms to proposed section 19D however would impose an obligation upon NBN corporations to publish standard offers on their websites detailing the terms and conditions on which eligible persons can access the sites of telecommunications towers. Those supply terms and conditions (as mentioned in detail below) must cover price and non-price terms. The requirement to publish standard offers is intended to provide transparency of the terms and conditions under which access may be sought. Such transparency is essential for the proper operation of the non-discrimination obligations set out in proposed section 19F.

Proposed section 19E also sets out that, if an NBN corporation has published standard offers for the supply of tower access and incidental goods, the terms and conditions on which access is given, or the goods are supplied, must be the same as the published terms. This ensures that an eligible person requesting access can be guaranteed supply on the basis of the standard terms.

Under proposed subsection 19E(1) an NBN corporation must publish on its website the price and non-price terms and conditions on which the NBN corporation offers to give access to a tower site, in compliance with proposed subsection 19A(1), for the purpose of enabling the eligible person who is neither a carrier nor a service provider to:

• install equipment; or
• maintain, operate or remove equipment; and
• supply to a person goods that are incidental to the giving of that access.

To enliven the publication obligations under proposed subsection 19E(1), the site must be owned, occupied or controlled by the NBN corporation or the NBN corporation must have a conditional or unconditional right to use the site.

Two notes accompany proposed subsection 19E(1) to remind readers that the term ‘site’ is defined in proposed section 19J and that proposed section 19H defines ‘eligible person’.

When an NBN corporation is obliged to give an eligible person access to a site (or to supply incidental goods) in accordance with proposed subsection 19A(1), and the eligible person requests an NBN corporation to enter into an agreement on the same terms and conditions
published as mentioned in proposed paragraph 19E(1)(f), the NBN corporation must comply with the request (proposed subsection 19E(2)).

Under proposed subsection 19E(3), if an NBN corporation is obliged to give access to a site (or to supply incidental goods) in accordance with proposed subsection 19A(1), and the access to the site, or the supply of the related site access goods, is not covered by an agreement between the NBN corporation and the eligible person, the NBN corporation must supply access to the relevant site (and any incidental goods to the supply of access) on the terms and conditions that were published on the NBN corporation’s website, in accordance with proposed subsection 19E(1), at the time when the request was made.

Proposed section 19F - Terms and conditions of access to be on a non-discriminatory basis

Proposed section 19F sets out non-discrimination obligations applying to the giving of access under proposed sections 19A and 19B. Proposed subsection 19F(1) relates to the terms and conditions of access to towers, and proposed subsection 19F(2) relates to the terms and conditions of access to sites.

Proposed subsection 19F(1) provides that, in determining non-price and price or price-related terms and conditions on which an NBN corporation:

- gives an eligible person access to a tower in compliance with subsection 19A(1), to install particular equipment or maintain, operate or remove particular equipment; and
- supplies goods to an eligible person that are incidental to the giving of that access the NBN corporation must not discriminate between eligible persons who seek or obtain access in such circumstances.

A note accompanies proposed subsection 19F(1) to remind readers that ‘eligible person’ is defined in section 19H.

Proposed subsection 19F(2) provides that, in determining non-price and price or price-related terms and conditions on which an NBN corporation:

- gives an eligible person access to a site in compliance with subsection 19B(1), to install particular equipment or maintain, operate or remove particular equipment; and
- supplies goods to an eligible person that are incidental to the giving of that access the NBN corporation must not discriminate between eligible persons who seek or obtain access in such circumstances.

The non-discrimination obligations ensure that all eligible persons will receive the same terms and conditions of access when seeking access to a tower and the site on which that tower is situated. The obligations work with the requirement on NBN corporations to publish standard offers to ensure that there is clear transparency of terms and conditions of access and a level playing field for all eligible persons. The obligations are consistent with those applying generally to NBN corporations when they supply eligible services to carriers or service providers (see section 152AXC of the CCA).

Proposed 19G - Equipment

The concept of ‘equipment’ is central to the access provisions in new Subdivision BA. Proposed subsection 19G(1) would define ‘equipment’ to mean five types of things:

- a facility (within the meaning of the Tel Act); or
• an antenna; or
• a measuring device; or
• an apparatus; or
• a thing that belongs to a class of things specified in a ministerial determination under subsection 19G(2).

As noted above, ‘facility’ is defined broadly in the Tel Act and means any part of the infrastructure of a telecommunications network and includes such items as lines, equipment, masts or antennae. However, in section 7 of the Tel Act such facilities must be used, or be for use, in or in connection with a telecommunications network. While the majority of equipment to be installed by ESOs would be expected to fall under this definition, it is possible that some equipment may not be intended to carry communications. For example, it could include measuring devices designed (and intended to be deployed) to provide early warning of inclement weather, hazards, or risks of bushfires and floods etc. As a result, the definition in proposed section 19G also captures equipment that may not be for use in or in connection with a telecommunications network.

As the likely types of equipment that may need to be installed, and their uses, cannot be predicted with certainty over the long term, proposed subsection 19G(2) would confer a power on the Minister to specify, by legislative instrument, one or more classes of things as ‘equipment’. This power could be used to capture new types of equipment that may be developed but are not clearly captured by the specific classes of things included in the definition in the amendment. As any Ministerial determination would be a legislative instrument, that instrument would be subject to the consultation, disallowance and publication requirements in the Legislation Act 2003.

Proposed subsection 19H - Eligible person

Proposed section 19H defines who is an eligible person for the purpose of the tower and site access regime under new Subdivision BA of Division 2 of Part 2 of the NBN Act, as would be inserted by Schedule 1 to the Bill.

The term, ‘eligible persons’, would be defined as covering five classes of persons: a police force or service (paragraph 19H(1)(a)), a fire service (paragraph (b)), an ambulance service (paragraph (c)), State or Territory emergency services (paragraph (d)); and any person included in a class of persons specified in a ministerial instrument from time to time (paragraph (e) and described in further detail below).

The term ‘State or Territory emergency service’ is not defined in the Bill and is therefore intended to have its ordinary meaning. An emergency service would in common terms, be understood to capture State or Territory Government agencies.

In circumstances where an NBN corporation is required to give the requesting eligible person access to a particular tower or facility, it will be an operational matter for that eligible person as to whether it directly accesses and installs the relevant equipment and facilities, or arranges for a contracted service provider to do so on its behalf. For example, a fire service may engage a specific third party contractor to install equipment on its behalf, and that company would act in accordance with the agreement established between the fire service and the NBN corporation.

NBN corporations may also be contracted by eligible persons to carry out the relevant installation on behalf of an eligible person.
There is strong public interest in allowing the specific class of entities specified in paragraphs 19H(1)(a)–(d) to access towers and associated sites that are owned or operated by NBN corporations as they can use the NBN towers to support more efficient and effective internal communications, especially in natural disaster or emergency situations. Installation of equipment on towers owned by NBN corporations will allow these eligible persons to, for instance, improve service or radio networks and assist in emergency response situations. This will help them reduce costs and operate efficiently.

While the Bill does not attempt to specify the purposes for which eligible persons may install equipment on towers, it is important to note that persons who fall within the definition of ‘eligible person’ under proposed section 19H may already access towers owned by telecommunications carriers or by independent tower providers under commercial arrangements. Requests to access towers owned by NBN corporations have been made where no other tower is available in the locality, or access at a nearby tower will not deliver a suitable outcome (for example, because the equipment cannot be installed at the appropriate height). The Bill attempts to provide a consistent framework for eligible persons.

Proposed subsection 19H(2) provides that the Minister may, by legislative instrument, specify one or more classes of persons who can seek access to NBN corporations’ towers (paragraph 19H(2)(a)) and also declare specified limitations or restrictions that are applicable to that class of persons (paragraph 19H(2)(b)). This power for the Minister to specify additional classes of persons provides flexibility to expand the tower access regime, if appropriate, in the future, if other classes of persons are identified who should access NBN towers. Expanding access should only be considered where there is a clear benefit to the public from doing so, and proposed subsection 19H(3) therefore provides that the Minister must not make an instrument under subsection 19H(2) unless the Minister is satisfied that it is in the public interest to do so.

The power to specify limitations or restrictions is provided to allow the Minister to consider the relevant circumstances in which access should be provided. For example, there may be public interest reasons for a class of persons to obtain access, but there may need to be certain restrictions for reasons of security, public safety or to promote competition. Those issues would be considered at the relevant time.

NBN corporations as carriers will be required, under subsection 313(1A) of the Tel Act (which takes effect on 18 September 2018) to do their best to protect telecommunications facilities they own, operate or use from unauthorised access that could compromise the confidentiality of information or the availability and integrity of facilities. Given this requirement, it is appropriate to ensure that the expansion of the class of persons eligible to access NBN transmission towers is suitably constrained. Therefore, before making a legislative instrument under proposed subsection 19H(2), the Minister must consult with the Minister who administers the Australian Federal Police Act 1979. It is expected that potential concerns and issues can be identified through the consultation required under proposed subsection 19H(4) and appropriate restrictions or limitations on access imposed in respect of any persons proposed to be specified in an instrument under proposed subsection 19H(2).

**Proposed section 19J - Site**

Proposed section 19J would define the term ‘site’ broadly as:

- land;
- a building on land; or
- a structure on land.
This definition captures the locations on which towers, or associated facilities, may be located and is consistent with the definition of ‘site’ in clause 31 of Schedule 1 to the Tel Act.

**Proposed section 19K - Goods**

Proposed section 19K sets out, for the avoidance of doubt, that goods include electricity. Typically, electricity is required to power and operate the equipment installed on towers. Section 4 of the CCA already defines electricity as a good.

**Item 3 - Section 37**

Item 3 makes a consequential amendment to section 37 of the NBN Act to include references to new sections 19A, 19B, 19D, 19E and 19F. The effect of this change is that compliance with the new access regime, and associated non-discrimination and publication obligations will constitute carrier licence conditions.

**Item 4 - Subsection 38(2)**

Item 4 makes a consequential amendment to subsection 38(2) of the NBN Act to include references to new sections 19A, 19B, 19D, 19E and 19F. The effect of this change is that if an NBN corporation is a service provider, the NBN corporation must comply with the new provisions which are described in detail above.

**Item 5 - Section 39**

Item 5 makes a consequential amendment to section 39 of the NBN Act to include references to new sections 19A, 19B, 19D, 19E and 19F. The effect of this change is to ensure that the new provisions would not limit any carrier licence conditions that may be declared under section 63 of the Tel Act. Section 63 of the Tel Act provides that the Minister may, by written instrument, impose conditions applying to carrier licences.

**Item 6 - Section 40**

Item 6 makes a consequential amendment to section 40 of the NBN Act to include references to new sections 19A, 19B, 19D, 19E and 19F. The effect of this change is that these new sections would not limit the rules that may be set out under section 99 of the Tel Act. Section 99 of the Tel Act allows the ACMA, after consulting the ACCC, to make a written determination setting out rules that apply to service providers in relation to the supply of specified carriage services or specified content services.
Schedule 2 – Temporary Facilities

The amendments set out in Schedule 2 to the Bill would amend Schedule 3 to the Tel Act to enable temporary towers to be specified by the Minister as low-impact facilities in certain circumstances.

The amendments would include specified conditions to ensure that the temporary towers are removed within a set timeframe and that carriers restore the land on which the temporary facilities were installed.

The proposed changes would allow carriers to install temporary telecommunications facilities using carrier powers and immunities. These facilities would be used to assist ESOs in times of emergencies and natural disasters, to minimise disruption to services during maintenance or replacement of existing facilities, and to provide additional coverage during events (e.g. sporting events and music festivals) and high-demand holiday periods.

Item 1 – Clause 2 of Schedule 3

Item 1 of Schedule 2 to the Bill would insert two new definitions of terms that would be included in operative provisions of Schedule 3 to the Tel Act.

The term **high-demand holiday period** would be defined to mean a school holiday period, or a public holiday and the weekend either immediately before or after that public holiday in any State or internal Territory. A holiday period would not be limited to the official holidays in the State or Territory in which the facility is to be installed. Public and school holidays are usually published by each State or internal Territory. This term is relevant to proposed paragraph 6(5)(f) and new clause 8C.

The term **public land** would be defined to mean land that is the property of the Commonwealth, a State or Territory, a local government body, or an authority of a Commonwealth, a State or Territory. The land must also be a public place, which is defined in existing clause 2 of Schedule 3 to the Tel Act. ‘Land’ is already defined in Schedule 3 to the Tel Act. The term, ‘public land’ would be relevant to proposed paragraphs 6(5)(b)-(f).

Item 2 – Paragraphs 6(5)(a) and (b) of Schedule 3

Part 1 of Schedule 3 to the Tel 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. State or Territory law regulates the installation of other facilities.

Clause 37 of Schedule 3 provides certain immunities for telecommunications carriers undertaking inspection, installation and maintenance activities, including from State and Territory laws relating to land use, planning, design and construction.

Subclause 6(1)(b) of Schedule 3 to the Tel Act allows for the installation of a low-impact facility and subclause 6(3) allows the Minister to determine that specified facilities are low-impact facilities for the purpose of clause 6 of Schedule 3 to the Tel Act.

Existing paragraphs 6(5)(a) and (b) allow for a tower to be a low-impact facility if that tower is attached to a building and its height does not exceed 5 metres.

Item 2 of Schedule 2 to the Bill would repeal paragraphs 6(5)(a) and (b) of Schedule 3 and insert seven replacement paragraphs. The existing tower requirement as set out in paragraph 6(5)(a) would be maintained (refer replacement paragraph 6(5)(a)). However, the additional paragraphs to be inserted into subsection 6(5) would allow for temporary towers to be
specified by the Minister as low-impact facilities, provided the proposed facilities were used for one of the following purposes:

- minimise disruption to the supply of a carriage service during emergency or routine maintenance of an existing facility: proposed paragraph 6(5)(b);
- minimise disruption to the supply of a carriage service during the construction or installation of a replacement facility: proposed paragraph 6(5)(c);
- provide additional capacity to supply carriage services to persons attending an event at a venue: proposed paragraph 6(5)(d);
- provide additional capacity to supply carriage services to persons attending any or all of two or more events at a venue, where the events are no more than 28 days apart: proposed paragraph 6(5)(e);
- provide additional capacity to supply carriage services to persons during a high-demand holiday period: proposed paragraph 6(5)(f). This would ensure that a temporary facility can be installed as a low-impact facility on public land in an area that experiences high services demand during parts of the year, such as seaside towns and ski lodges; or
- provide capacity, either wholly or partly, to supply carriage services to one or more ESOs so that the ESO can deal with an emergency or natural disaster: proposed paragraph 6(5)(g).

A temporary tower would be limited to no more than 30 metres in height (measured from the ground to the top of the tower), except when it is being installed to:

- minimise disruption to the supply of a carriage service that might result from the maintenance or replacement of another facility in a rural area, in which case it could be the higher of 30 metres or the height of the tower being maintained or replaced; or
- provide capacity to an ESO so that it can deal with an emergency or natural disaster, in which case there is no height restriction given the purpose of the installation and need for prompt and effective deployments.

In setting the proposed height limits for temporary towers in the new measures under Schedule 2 to this Bill, the Government considered the New South Wales (NSW) requirements set out in Item 17 of Schedule 3A to the State Environment Planning Policy (Infrastructure) 2007, and the Victorian requirements in section 5.3 of the Code of Practice for Telecommunications Facilities. NSW and Victoria exempt temporary facilities from planning processes in certain circumstances. NSW does not have a height limit. Victoria provides that the height of the temporary facility must not exceed 25 metres above its base or the height of the existing facility, whichever is greater.

Item 2 includes requirements that there be a clear nexus with particular land for some temporary tower installations—i.e. a temporary facility installed to minimise disruption during maintenance of an existing facility or installation of a replacement facility; or installed to provide additional capacity during an event or events.

In these circumstances, Item 2 provides a cascading list of scenarios that dictate where a carrier can install the facility. Where it is practicable to achieve the permitted purpose for which the temporary facility is intended to be installed (i.e. to minimise the disruption to the supply of a carriage service or to provide additional capacity), the temporary tower must be installed:
on the land on which the other facility is located; or in the case of an event the land on which the venue is located;
where installation on the original land is not possible, the tower is to be installed on public land, or
where installation on public land is not possible, the tower is to be installed in the vicinity of the original facility or where the event is being held. The term ‘vicinity’ is not defined and is intended to have its ordinary meaning. The owner of the land where the temporary facility is proposed to be installed would be able to make an objection to the TIO in the same way as they otherwise would be able to do for any other low-impact facility.

**Item 3 – After subclause 6(5) of Schedule 3**

Item 3 of Schedule 2 to the Bill would insert three new subclauses after existing subclause 6(5) of Schedule 3 to the Tel Act. These new provisions are consequential to the change proposed by Item 2.

*Subclause 6(5A)*

Proposed subclause 6(5)(b) would allow temporary telecommunications facilities not higher than 30 metres to be specified by the Minister as low-impact facilities when used to minimise disruption to the supply of a carriage service during emergency or routine maintenance of an existing facility. For the avoidance of doubt, proposed subclause 6(5A) would set out that for the purposes of proposed paragraph 6(5)(b), the term ‘maintenance’ would have the same meaning as in existing clause 7.

*Subclause 6(5B)*

For the purposes of proposed subclauses 6(5)(d) and (e), proposed subclause 6(5B) would provide that a concert, festival or sporting event are examples of an event. These examples would not constitute an exhaustive list of events. The term ‘event’ has not been defined and it is intended that the term would have its ordinary meaning and given a broad interpretation. For example, an event could include a major conference, exhibition or commemoration.

*Subclause 6(5C)*

Proposed subclause 6(5C) would specify that for the purposes of proposed subclauses 6(5)(b)-(f), the height of a tower is to be determined as the distance between the top of the tower and ground level. For example, if there is a temporary tower mounted on a trailer or other platform, the height limitation for the tower will also encompass the trailer height.

**Item 4 – After subclause 7(3) of Schedule 3**

Item 4 of Schedule 2 to the Bill would insert a new subclause 7(3A) into Schedule 3 to the Tel Act. This new provision would provide that a reference to maintenance in existing clause 7 includes a reference to the installation of a temporary facility (other than a tower within the meaning of proposed subclause 6(5) of Schedule 3 to the Tel Act), provided that the facility is installed to minimise disruption to the supply of a carriage service during maintenance of an original facility.

The temporary facility would need to be installed on land in accordance with the cascading list of scenarios described above under Item 2.

The change proposed by Item 4 removes any doubt about the ability for carriers to temporarily install facilities, such as mobile exchanges on wheels, as part of maintenance
activities undertaken by a carrier in accordance with Division 4 of Part 1 of Schedule 3 to the Tel Act.

**Item 5 – After clause 8 of Schedule 3**

In exercising a power under Division 2, 3 or 4 of Part 1 of Schedule 3, existing clause 8 requires carriers to take all reasonable steps to ensure that the carrier causes as little detriment and inconvenience, and does as little damage, as is practicable.

Item 5 would insert three new clauses (clauses 8A, 8B and 8C) in Schedule 3 to the Tel Act to ensure that temporary facilities installed under clause 6 of Schedule 3 are removed within a set timeframe. These new requirements would be in addition to the existing requirements under clause 8.

**Clause 8A - Carrier to remove temporary facilities**

Proposed subclause 8A(1) would provide that if a carrier installs a low-impact facility under Division 3 and the installation is covered by paragraph 6(5)(b), the carrier must remove the facility within 28 days after the completion of the maintenance. This requirement applies to a temporary facility installed to minimise disruption during maintenance of an existing facility.

Proposed subclause 8A(2) substantially mirrors proposed subclause 8A(1), however applies in respect of facilities covered by new paragraph 6(5)(c), being facilities installed to minimise disruption to the supply of a carriage service that might result from the carrying out of the replacement of another facility. In such a case, the carrier must remove the facility within 28 days after the completion of the replacement works.

Proposed subclause 8A(3) substantially mirrors proposed subclause 8A(1), however applies in respect of facilities covered by new paragraph 6(5)(d), being facilities installed to provide additional capacity to supply carriage services to persons who are attending an event at a venue. In such a case, the carrier must remove the facility within 28 days after the end of the event.

Proposed subclause 8A(4) substantially mirrors proposed subclause 8A(1), however applies in respect of facilities covered by new paragraph 6(5)(e), being facilities installed to provide additional capacity to supply carriage services to persons who are attending any or all of two or more events at a venue. In such a case, the carrier must remove the facility within 28 business days after the end of the last of the events.

Proposed subclause 8A(5) substantially mirrors proposed subclause 8A(1), however applies in respect of facilities covered by new paragraph 6(5)(g), being facilities installed to provide additional capacity to supply carriage services to one or more ESOs so that the ESO can deal with an emergency or natural disaster. The carrier would be required to remove the facility within 28 days after the facility ceases to be needed by the ESO.

Proposed subclause 8A(6) substantially mirrors subclause 8A(1), however applies in respect of a temporary facility installed under proposed paragraph 7(3A) of Schedule 3 to the Tel Act, being facilities installed as part of a maintenance activity. The carrier would be required to remove the facility within 28 days after the maintenance is completed.

Proposed subclause 8A(7) is included to avoid doubt, and would specify that the term ‘low-impact facility’ as used in the new clause 8A has the same meaning as in existing clause 6.

The 28 calendar days’ timeframe to remove a temporary tower should provide carriers with a sufficient period of time to arrange for the dismantling and removal of the temporary facility once it is no longer required.
**Clause 8B - Low-impact facility installed at a venue—annual limit**

Proposed subclause 8B(1) would provide that a carrier installs one or more low impact facilities at a particular place under Division 3 and the installations are covered by paragraph 6(5)(d) or (e) (i.e. a temporary facility installed to provide additional capacity during an event or events), the carrier must ensure that the total number of days in a calendar year on which those facilities remain at that place does not exceed 183. This is an annual limit applies to all temporary facilities installed at the event venue to ensure that carriers cannot swap out one temporary facility with another after the 183 day limit has been reached. The limit operates by reference to each venue regardless of whether there is one or more than one temporary tower installed at the venue. For example, if carrier A installed a temporary tower at a well-known concert venue for 100 days during a calendar year, and then removed the tower and installed another temporary tower at the same venue, the maximum number of days in which the second temporary tower could remain at the venue would be 83 days, and after that time had lapsed, carrier A would not be permitted to install any further temporary towers to provide additional capacity at that venue for the remainder of the calendar year. This time limit requirement also applies to a temporary facility installed to service one or more events.

Proposed subclause 8B(2) is included to avoid doubt, and would specify that the term ‘low-impact facility’ as used in the new clause 8B has the same meaning as in existing clause 6.

**Clause 8C - Facility installed to provide additional capacity during a high-demand holiday period—annual limit**

Proposed subclause 8C(1) would provide that a temporary facility installed under proposed paragraph 6(5)(f) of Schedule 3 to the Tel Act (i.e. a temporary facility installed during a high-demand holiday period) would not be permitted to be installed for more than 90 days in a calendar year in that place. The 90 calendar days’ timeframe should provide an adequate amount of time for the required seasonal coverage while balancing the interests of the impacted local community. The 90 calendar days’ annual limit applies to all temporary facilities installed at a particular location to provide additional capacity during a high-demand holiday period and by operation of the limit, carriers cannot swap out one temporary facility with another after the 90 day limit has been reached for the particular locality. The limit operates by reference to each locality regardless of whether there is one or more than one temporary tower installed at the locality during the applicable calendar year.

For example, if carrier A installed a temporary tower on public land at a ski resort during New South Wales winter school holidays to provide additional coverage during this busy period, and the first tower remained at the particular locality for 70 days, and at the end of the period, the carrier removed the tower and wished to install a second temporary tower to cover the Tasmanian school winter holidays, the maximum number of days in which the second temporary tower could remain at the particular location would be 20 days. Should a carrier wish for the tower to be a permanent facility, it would need to reach agreement with a landowner and comply with the applicable State planning requirements.
Item 6 – Clause 9 (heading) of Schedule 3

Existing clause 9 of Schedule 3 to the Tel Act provides that 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.

Item 6 would make a minor consequential change to the heading at clause 9 of Schedule 3 by replacing the heading with, ‘Carrier to restore land—general’. This change recognises that the updated clause 9 would also cover restoration requirements in the proposed clause 9A (see item 7 of Schedule 2 to the Bill).

Item 7 – After clause 9 of Schedule 3

Item 7 of Schedule 2 to the Bill would insert clause 9A into Schedule 3 to the Tel Act, comprising six new subclauses.

Proposed subclause 9A(1) would provide that if a carrier installs a low-impact facility under Division 3 on particular land and the installation is covered by paragraphs 6(5)(b) to (g), when removing the facility, 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 installation began. This requirement applies to a temporary facility installed to minimise disruption during maintenance of an existing facility or installation of a replacement facility; or installed to provide additional capacity during an event or events, or during a high-demand holiday period; or to provide capacity to an ESO so that the ESOs can deal with a natural disaster or emergency.

Proposed subclause 9A(2) substantially mirrors proposed subclause 9A(1), yet applies in respect of facilities covered by new subclause 7(3A), in general terms being facilities installed to minimise disruption to the supply of a carriage service that might result from the maintenance of another facility.

Proposed subclauses 9A(3) and (4) would require a carrier to take all reasonable steps to commence the restoration within 10 business days after the removal of the facility.

Proposed subclause 9A(5) dis-applies the 10 business day removal timeframe set out in proposed subclauses 9A(3) and (4) in cases where the carrier reaches agreement with the owner or occupier of the land. In such cases, the carrier would need to complete land restoration activities within the timeframe agreed with the owner or occupier.

Proposed subclause 9A(6) is included to avoid doubt, and would specify that the term ‘low-impact facility’ as used in the new clause 9A has the same meaning as in existing clause 6.

Item 8 – At the end of clause 17 of Schedule 3

Item 8 of Schedule 2 to the Bill would insert subclause 17(8) into Schedule 3 to the Tel Act so that a temporary tower installed under proposed paragraph 6(5)(g) (i.e. a temporary tower installed to provide capacity to an ESO so that the ESOs can deal with an emergency or natural disaster) does not need to comply with the notification requirements in subclause 17(1) of Schedule 3 to the Tel Act.

Item 8 of Schedule 2 to the Bill would insert subclause 17(9) into Schedule 3 to the Tel Act to make clear that ‘low-impact facility’ has the same meaning as in clause 6 of Schedule 3 to the Tel Act.