Federal Court of Australia

State of Queensland v Telecommunications Industry Ombudsman [2022] FCAFC 158

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| Appeal from: | *State of Queensland v Telecommunications Industry Ombudsman* [2021] FCA 522 |
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| File number: |  |
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| Judgment of: | **BESANKO, MIDDLETON AND RANGIAH JJ** |
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| Date of judgment: | 16 September 2022 |
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| Catchwords: | **COMMUNICATIONS LAW** – *Telecommunications Act 1997* (Cth) Sch 3 cl 7 – meaning of “maintenance” as part of power to “maintain a facility” – whether maintenance includes the installation of a new fibre optic cable in a conduit or duct owned by a third party with whom access agreement entered – where consent of landowner required absent authorisation to install or maintain facility under the Act – held: installation of proposed facility not within power to maintain – appeal allowed  **COMMUNICATIONS LAW** – *Telecommunications Act 1997* (Cth) Sch 3 cl 11 – *Telecommunications Code of Practice 2018* (Cth) s 6.29(e) – whether failure to make reasonable efforts to enter into an agreement with the State could be a basis for objecting to the proposed activities  **COMMUNICATIONS LAW** – *Telecommunications Code of Practice 2018* (Cth) s 6.29(b) – whether onus is on an objector to show an alternative location for a proposed activity |
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| Legislation: | *Acts Interpretation Act 1901* (Cth) s 15AA  *Competition* *and Consumer Act* *2010* (Cth) Pt XIB and Pt XIC ss 152AB(2), 152AL, 152AR(3)(a) and 152AXB(2)  *Telecommunications Act 1997* (Cth) ss 7, 3(1), 3(2), 42(1), 56, 61 and 484; Schs 1 and 3; cll 2, 5, 6, 7(1), 7(3), 11, 17(1), 17(2), 17(3), 17(4), 17(5), 18, 18(1), 18(5), 19(1), 26(2), 33(1), 34, 35, 36, 37(1), 38 and 47; Divs 2, 3 and 4  *Telecommunications Code of Practice 2018* (Cth) ss 6.22, 6.29, 6.35 and 6.36(1)  *Telecommunications (Low-impact Facilities) Determination 2018* (Cth) |
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| Cases cited: | *Anthony Hordern & Sons Ltd v Amalgamated Clothing & Allied Trades Union of Australia* (1932) 47 CLR 1  *Bayside City Council v Telstra Corp Ltd* (2004) 216 CLR 595  *Coco v The Queen* (1994) 179 CLR 427  *Electrolux Home Products Pty Ltd v Australian Workers’ Union* (2004) 221 CLR 309  *Freedom Foods Pty Ltd v Blue Diamond Growers* [2021] FCAFC 86; (2021) 286 FCR 437  *Hurstville City Council v Hutchison 3G Australia Pty Ltd* [2003] NSWCA 179; 200 ALR 308  *Lee v New South Wales Crime Commission* (2013) 251 CLR 196  *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566  *Minister for Immigration and Border Protection v WZAPN* (2015) 254 CLR 610  *Momcilovic v The Queen* (2011) 245 CLR 1  *NBN Co Ltd v Pipe Networks Pty Ltd* [2015] NSWSC 475; (2015) 295 FLR 256  *R v Independent Broad-Based Anti-Corruption Commissioner* (2016) 256 CLR 459  *State of Queensland v Telecommunications Industry Ombudsman* [2021] FCA 522  *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362  *Telstra Corporation Ltd v Hurstville City Council* (2002) 118 FCR 198  *Telstra Corporation Ltd v State of Queensland* [2016] FCA 1213 |
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| Solicitor for the Second Respondent: | Clayton Utz |

ORDERS

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|  | | QUD 167 of 2021 |
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| BETWEEN: | STATE OF QUEENSLAND  Appellant | |
| AND: | TELECOMMUNICATIONS INDUSTRY OMBUDSMAN  First Respondent  OPTUS FIXED INFRASTRUCTURE PTY LIMITED ACN  Second Respondent | |

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| order made by: | BESANKO, MIDDLETON AND RANGIAH JJ |
| DATE OF ORDER: | 16 September 2022 |

THE COURT ORDERS THAT:

1. Within fourteen (14) days the parties file an agreed form of orders, or in default of agreement, any submissions as to the form of the appropriate orders reflecting the reasons of the Court.
2. Subject to any further directions, the final orders of the Court will be made on the papers.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

BESANKO AND MIDDLETON JJ:

1. We have had the considerable advantage of reading the draft reasons of Rangiah J where his Honour sets out the relevant background to the appeal and the legislative context and scheme regulating the provision of the telecommunications services in Australia.
2. The principal issue and ground 1 in the appeal is one of statutory construction. Clause 7(1) of Sch 3 of the *Telecommunications Act 1997* (Cth) (the **Act**) provides that a carrier “may, at any time, maintain a facility”. Clause 7(3)(e) provides that a reference to “maintenance” of a facility includes a reference to “the installation of an additional facility in the same location as the original facility”. The issue is whether cl 7 authorises a carrier (in this case, Optus Fixed Infrastructure Pty Ltd (**Optus**)) to install its own fibre optics cables in the conduits installed and owned by a differentcarrier (in this case, NBN Co Ltd (**NBN Co**)), having obtained NBN Co’s consent to do so. If it does, the consequence is that the consent of the owner of the property on which the facility is installed (in this case, the State of Queensland (the **State**)) is not required.
3. There are two other grounds of appeal. These other grounds of appeal assert that the Telecommunications Industry Ombudsman (the **TIO**) and the primary judge wrongly construed provisions of the *Telecommunications Code of Practice 2018* (Cth) (the **Code of Practice**) concerning the State’s objections to activities proposed to be done by Optus. We agree with the reasons of Rangiah J in relation to these two grounds of appeal.
4. However, with respect, we do not agree with his Honour’s construction and views concerning the operation of cl 7 of Sch 3 of the Act as applicable to the facts of this case.
5. It is convenient to set out the structure and relevant clauses of Sch 3 although they are also to be found in the reasons of Rangiah J.
6. Schedule 3 is entitled “Carriers’ powers and immunities”. Schedule 3 provides three categories of powers and immunities which authorise carriers to engage in activities that would otherwise amount to trespass upon land.
7. The first category is under Div 2 of Sch 3, which consists only of cl 5. Clause 5 has the heading, “Inspection of Land”. The clause confers power upon a carrier to enter on and inspect land, and do anything on the land that is necessary or desirable for the purposes of determining whether the land is suitable for the carrier’s purposes, or surveying or obtaining information in relation to the land.
8. The second category is under Div 3 of Sch 3, which consists of cl 6. Clause 6 is entitled, “Installation of Facilities”, and provides, relevantly:

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

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

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

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

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

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

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

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

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

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

(iii) making cuttings and excavations; and

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

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

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

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

…

1. It can be seen that cl 6 authorises the installation of a facility in three circumstances, and adverts to the fact that any installation of a facility outside of the cl 6 authorisation may require approval under a State or Territory law (that is, the carrier would not benefit from the exemptions provided by Div 7, which we will come to later).
2. The third category is under Div 4, consisting of cl 7. That clause has the heading, “Maintenance of facilities”, and provides:

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

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

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

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

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

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

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

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

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

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

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

(3A) A reference in this clause to the ***maintenance*** of a facility (the ***original facility***) includes a reference to the installation of a temporary facility (other than a tower within the meaning of subclause 6(5)), where the following conditions are satisfied:

(a) the temporary facility is installed to minimise disruption to the supply of a carriage service that might result from the maintenance of the original facility;

(b) in a case where it is practicable to achieve the purpose mentioned in paragraph (a) by installing the temporary facility on the land on which the original facility is located—the temporary facility is installed on that land;

(c) in a case where paragraph (b) does not apply, but it is practicable to achieve the purpose mentioned in paragraph (a) by installing the temporary facility on public land—the temporary facility is installed on public land;

(d) in a case where neither paragraph (b) nor (c) applies—the temporary facility is installed in the vicinity of the original facility.

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) either:

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

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

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

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

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

(a) the measurement of the height of a tower is not to include any antenna extending from the top of the tower; and

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

(i) constitute the facility; and

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

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

1. It can be seen that cl 7 authorises carriers to enter and occupy land to “maintain” a facility. Subclauses (3)-(4) concern the definition of “maintenance”. Clause 7(3) provides a non-exhaustive definition of “maintenance”. Clause 7(3)(e) in particular operates with cl 7(1) to authorise installation of an additional facility in the same location as an original facility in certain circumstances.
2. Clause 2 of Sch 3 defines “installation” in relation to a facility to include:
3. construction of a facility on, over or under any land;
4. attachment of the facility to any building or other structure; and
5. any activity that is ancillary or incidental to the installation of the facility.

The running of fibre optical cable through the Kidd Bridge conduit would involve installation of a facility.

1. The principles of construction are not in dispute. The words of a statutory provision must be interpreted in light of their context and purpose. In *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, Kiefel CJ, Nettle and Gordon JJ emphasised that text, context and purpose must be construed together, observing at [14] :

The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.

1. In addition, the Full Court of this Court in *Freedom Foods Pty Ltd v Blue Diamond Growers* [2021] FCAFC 86; (2021) 286 FCR 437 (***Freedom Foods***) usefully summarised the principles at [27]-[30]:

[27] The meaning to be given to statutory instruments is their contextual meaning; that is, the text of the statute should be considered whilst at the same time having regard to its context and purpose: *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at [14] (Kiefel CJ, Nettle and Gordon JJ), [37]-[39] (Gageler J).

[28] Statutes speak as an entire instrument so it is necessary to consider the words in the context of the instrument as a whole and to construe them so as to ensure consistency between all provisions: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69]; and *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 320. The relevant context also includes legislative history and extrinsic materials: *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at [39].

[29]. In using purpose to resolve ambiguity, the Court must not conjure a purpose that is more specific than the context discloses and then use that purpose to construe the legislation: *Certain Lloyd’s Underwriters v Cross* (2012) 248 CLR 378 at [26]; and *Minister for Employment and Workplace Relations v Gribbles Radiology Pty Ltd* (2005) 222 CLR 194 at [21]. Further, the purpose must be one that “resides” in the “text and structure” of the legislation: *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at [44]. Ultimately, “the fundamental duty of the Court is to give meaning to the legislative command according to the terms in which it has been expressed”: *Northern Territory v Collins* (2008) 235 CLR 619 at [16].

[30] In an appropriate case where examination of contextual materials discloses an evident mischief that the statute was intended to remedy then the statute is to be read in that context: *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408.

1. However, before we consider the text, context and purpose of the relevant part of the Act, it is important to keep in mind the facility that is proposed to be installed by Optus, its location and the agreement between NBN Co and Optus.
2. The work that Optus (a carrier) proposes to carry out is on the Kidd Bridge at Gympie in Queensland. That bridge is operated and managed by the State on public land, and is itself the property of the State. The work proposed is the installation of Optus’ fibre optic cables across the Kidd Bridge in conduits owned by NBN Co (another carrier) and currently housing further facilities of NBN Co.
3. Optus does not have any existing cables or other telecommunications equipment in those conduits. Optus has the consent of NBN Co to insert the proposed new Optus cables into the conduits. It has no consent from the State as the owner of the Kidd Bridge. As between Optus and NBN Co, it is understood that the provisions of the Act relating to access to another carrier’s facilities have been satisfied: see Pt 3 and Pt 5 of Sch 1 of the Act.
4. The State objected to what was proposed by Optus, under s 6.28 and s 6.29 of the Code of Practice made under the Act. Accompanying the objection was a draft licence agreement, which if executed would have permitted Optus to have installed the fibre optic cables on the Kidd Bridge. The main purpose of the licence agreement was so that Optus would accept bearing the cost of any relocation of its cables when roadworks requirements necessitated their movement. This was necessary because, as the parties accepted, there is no provision in the Act allowing the owner of a road or bridge to relocate a facility without the consent of the carrier and so the common law of trespass to property (the carrier’s facilities) would apply.
5. However, the key premise is that, absent statutory authority, Optus installing additional fibre optic cable on the Kidd Bridge would, without the State’s consent, be a trespass to its land. The practical effect of Optus’ installation would be that the Kidd Bridge would be burdened with an extra tranche of cables and so the State would have to pay Optus, as owner of the cables, in the event of relocation necessitated because of roadworks. In interpreting the Act (and in particularly cl 7 of Sch 3) we should avoid a result that curtails the fundamental rights of others without “unmistakable and unambiguous language”: see *Coco v The Queen* (1994) 179 CLR 427 (***Coco***) at 436-437. Previous judgments in relation to cl 7 have had regard to the principle in *Coco* (often referred to as the “principle of legality”): see *Hurstville City Council v Hutchison 3G Australia Pty Ltd* [2003] NSWCA 179; 200 ALR 308 at [59]-[60] and *NBN Co Ltd v Pipe Networks Pty Ltd* [2015] NSWSC 475; (2015) 295 FLR 256 (***Pipe Networks***) at [68]-[72] and [91]-[93]. Clause 7 should not be read as permitting Optus to otherwise trespass on the State’s land without a clear indication in the Act that this is authorised.
6. We therefore now return to the text, context and purpose of the relevant provisions of the Act.
7. A carrier may still install a facility even if not authorised by cl 6 or for that matter cl 7, if permitted under State or Territory law. Without statutory authority under cll 6 or 7 though, the carrier will not enjoy the benefit of the immunity from a trespass suit provided by cll 6(2) and 7(2) and so if necessary will need to get permission to carry out its activities, whether on private or public land, from the owner of that land. Further, if not authorised to install its facility under cll 6 or 7, the carrier will not benefit from the exemption from certain State and Territory laws provided by cl 37 of Sch 3, and so will need to comply with or rely upon any other State or Territory law that applies to its activities. The Note to cl 6(1) specifically refers to the likely requirement of some type of approval by an administrative authority of the carrier’s installation of a facility.
8. It is to be observed that a State or Territory law may confer additional powers or immunities on carriers to enter private or public land. As cl 45 of Sch 3 states:

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

1. It was not suggested that any relevant State law conferred a power or immunity on Optus to enter the State’s land in relation to the proposed works.
2. So, under Sch 3 of the Act, carriers possess extensive rights to inspect land to determine its suitability and to maintain existing facilities. However, the right to install a facility is more circumscribed, and (ignoring cl 6(1)(c) for present purposes) is only authorised if the carrier holds a “facility installation permit” (**FIP**) or it is a “low-impact facility”. Any proposed installation falling outside these criteria is not authorised under the Act, but may be authorised under State or Territory law.
3. A FIP is essentially directed towards facilities of national significance: see the criteria for a FIP under cl 27 of Sch 3. When the Australian Communications and Media Authority (**ACMA**) considers under Div  6 of Sch  3 whether to issue a FIP, it must hold a public inquiry and must be satisfied of a number of detailed matters, including that the advantages that are likely to be derived from the operation of the facilities outweigh any likely environmental degradation and that the carrier has made reasonable efforts to negotiate with necessary proprietors and authorities.
4. A low-impact facility is defined by the *Telecommunications (Low-impact Facilities) Determination 2018* (**Determination**), pursuant to cl 6(3) of Sch 3 of the Act. Subclauses 6(4), (5) and (7) of Sch 3 preclude the Minister from designating as a low-impact facility certain facilities. The Determination refers to specified types of facilities, such as transmitters, receivers and other installations, and to specified areas, comprising residential, commercial, industrial and rural areas, or areas of environmental significance. A particular facility is a low-impact facility only if it complies with the specifications in the Schedule to the Determination and is installed in the particular areas specified in the Determination.
5. The Schedule to the Determination sets out the types of facilities determined to be low-impact facilities under various headings, for example (and most relevantly to this proceeding), underground facilities, above ground facilities and co-located facilities.
6. The Determination defines “co-located facilities” as follows:

***co-located facilities*** means one or more facilities installed on or within:

(a) an original facility; or

(b) a public utility structure.

Note: A facility installed near, but not either on or within, an original facility or public utility structure will not be a co-located facility

In addition, a number of other low-impact facilities are specified by reference to their installation within an existing structure or trench.

1. It was not in dispute in this appeal that Optus’ proposed facility did not fall within any of the specified low-impact facilities in the Determination. In particular:
2. the proposed facility was not an *underground* facility, and
3. the proposed facility was not a specified above ground facility, which was essentially required to be part of the wholesale national broadband network (pursuant to which it is understood NBN Co installed its original facilities on Kidd Bridge).

In addition, although the parties did not refer to the types of co-located facilities specified in the Determination, it is relevant that the Determination in this respect only specifies certain radio facilities, public payphones, temporary above ground facilities and marking posts or signs as low-impact facilities. Although accepting that there are limits on the Minister’s power to specify certain types of facilities as low-impact facilities, it is clear that the Minister’s power under cl 6(3) of Sch 3 is *able* to be exercised, and *has* been exercised, for the purposes of specifying certain co-located facilities as low-impact facilities in order to promote the co-location of facilities. The definition of “co-located facilities” does not refer to whether the carrier responsible for the installation is the same or a different carrier to that in respect of the original facility, and so in that regard does not discriminate between a “first carrier” and a “second carrier” in any given location. We will return to this issue of co-location later when we discuss the purpose of the relevant provisions of the Act in this proceeding.

1. So, returning to a carrier’s authority to install a facility, Optus accepted that its proposed facility would not be a ‘low-impact facility’ under the Determination and therefore it could not unilaterally install its facility under cl 6(1)(b) . As to the other two means of authority to which we have previously referred:
2. Optus has not applied for a FIP from the ACMA, noting the “very time-consuming and difficult” nature of the process; and
3. Optus does not accept the licence agreement the State offered to it as a condition for authorising the installation of the proposed facility on its land.
4. Being unable or unwilling to install its proposed facility by means of these mechanisms, Optus seeks to install its facility through the maintenance gateway of cl 7(3)(e) on the basis that its proposed facility constitutes the “installation of an additional facility in the same location as the original facility” installed by NBN and on the basis that it complies with the conditions specified in cl 7(6) (being certain noise and amenity conditions).
5. We now return to cl 7 of Sch 3 of the Act.
6. In another context, the meaning of the word “maintain” within cl 7 has been judicially considered previously: see *Pipe Networks* at [86]-[96] per Kunc J.
7. The word “maintain” is a term of ordinary meaning. The Macquarie Dictionary definition of “maintain” includes the following:

To keep in existence or continuance; preserve; retain ... to keep in due condition, operation or force; to keep unimpaired ... to keep in a specified state, position etc ... to provide with the means of existence.

1. It is to be noted that the definition of “maintain” here inherently incorporates a purposive aspect to keep a particular object in due condition, etc. Then it is to be recalled that the term “maintenance of a facility” in cl 7 of Sch 3 is not *exhaustively* defined, but a ‘reference’ to maintenance includes a “reference to the installation of an *additional* facility in the same location as the original facility” (our emphasis): cl 7(3)(e).
2. It is legitimate to consider the phrase “maintenance of a facility” (such as a pole, cable or conduit) in its ordinary meaning to inform what is meant by cl 7(3)(e). As we do not have an exhaustive term defined, reference to the ordinary meaning of “maintenance” is permitted. As Gageler J said in *Minister for Immigration and Border Protection v WZAPN* (2015) 254 CLR 610 at [48]:

The first difficulty with this aspect of the argument for the claimants is that s 91R(2) does not purport to define the term “serious harm to the person”. This is not a case which engages the proposition for which this Court’s decisions in *Wacal Developments Pty Ltd v Realty Developments Pty Ltd* (1978) 140 CLR 503; [1978] HCA 30 and *Owners of “Shin Kobe Maru” v Empire Shipping Co Inc* (1994) 181 CLR 404; [1994] HCA 54 stand as authority, that it is impermissible “to construe the words of a definition by reference to the term defined”. Section 91R(2) does not seek to define “serious harm”; rather, it provides instances of the serious harm referred to in s 91R(1)(b) by way of an aid in its application.

1. So, reading cl 7(3)(e) in the context of the ordinary meaning of “maintenance”, it can reasonably be read as an example of “maintenance of a facility”" within its ordinary meaning. It may also be possible to read cl 7(3)(e) widely and going beyond the ordinary meaning of “maintenance”, but for reasons of context and purpose (which we elaborate on later), this would not be the preferred construction. Some other paragraphs of cl 7(3) can similarly be read as falling within the ordinary meaning of “maintenance”. Nevertheless, it is important to remember that a definition such as for “maintenance” may include items that would usually fall within the ordinary meaning of the defined term together with items that go beyond the ordinary meaning and extend the statutory meaning of the defined term.
2. We now turn to the context in which cl 7 is to be found. Clauses 5 to 7 are complementary and staged provisions giving certain rights to carriers themselves: inspecting the land and installing a facility, then maintaining the facility that has been installed. It is significant that maintenance is the final stage – as Kunc J said in *Pipe Networks* at [92], “the third element of a trilogy”. The normal expectation is that the particular carrier will exercise each of these powers in turn. Therefore, the context of the power to maintain suggests that it is the carrier who originally installed the facility that is to maintain the facility. Of course, if a particular carrier wishes to employ an agent to maintain a facility (for instance), this is authorised by the Act, as cl 43 of Sch 3 extends the powers of a carrier to employees and persons acting for the carrier under contract.
3. It is true that cl 7 does not explicitly provide that the maintenance power is confined only to the carrier who installed the original facility. However, it is a mischaracterisation to conclude that a second carrier installing its own cable in the facility of another carrier is to, within its ordinary meaning, “maintain” that other carrier’s facility. One does not normally maintain another’s assets unless one is for instance authorised to do so by and on behalf of that person.
4. Clause 7 as a whole is directed at many possible maintenance activities that may in the future need to be carried out in order for a carrier to maintain a particular facility. Necessarily so, the legislature has given the carrier which has installed the original facility wide powers to maintain that facility. However, that “maintenance” is in the context of the carrier’s prior powers of “installation”. Although Optus’ proposed installation can be interpreted to be an “installation of an additional facility in the same location as the original facility” as a literal matter, it would be contrary to the context of the provision. That is because the powers of installation are strictly delineated by cl 6. In addition, as part of the cl 6 scheme, the power to install specific types of facilities is regulated to the extent they are specified as low-impact facilities as determined by the Minister. Relevantly here, the installation of certain co-located facilities, underground facilities and aboveground facilities is therefore dealt with at the “installation” stage, and so to read cl 7(3)(e) as widely as its literal words allow would undermine the delineation of powers to install under cl 6. We will return to this issue when we consider the purpose of the provisions under consideration.
5. So, as we have said above, the activity carried out by a carrier under cl 7(3)(e) must be “maintenance” – that is, aimed at keeping the facility in due condition, etc – and should be read as an instance of the ordinary meaning of “maintenance”. In our view, whoever the carrier (whether the original carrier who installed the original facility or a second carrier), the “installation of an additional facility in the same location as the original facility” within the meaning of cl 7(3)(e) must be such an installation for the purpose of maintenance (as noted earlier, the purpose inhering in the term “maintenance” itself). Whatever the bounds of cl 7(3)(e), the important point is that it does *not* enable a second carrier otherwise to install a *separate and unrelated* facility in the same location as the original facility. The “additional facility” ought to be properly “additional” to the original facility, for example, the installation of an additional component to the facility to maintain the operation of the original facility. There may be a question in any given case whether the installation of a second facility in the same location as an original facility is truly “additional” and therefore a form of “maintenance”, or is in fact a separate facility seeking to be installed under the guise of “maintenance” in order to circumvent cl 6. Counsel for the State made certain concessions as to what NBN Co could additionally install within its original conduit on the Kidd Bridge, but it must be remembered that NBN Co is able to take advantage of the provisions in the Determination which specify as low-impact facilities certain above ground facilities which are “part of a national network used, or for use, for the high speed carriage of communications, on a wholesale-only and non-discriminatory basis”. In this case, it is clear that Optus’ proposed facility is not a form of “maintenance” of the original facility.
6. As to the purpose of the relevant legislative provisions, Optus relies on s 3(1) and s 3(2)(e) of the Act to support its interpretation of cl 7, while the State emphasises s 3(2)(h). In addition, s 3(2)(i) is relevant.
7. Section 3(1) of the Act states:

The main object of this Act, when read together with Parts XIB and XIC of the *Competition and Consumer Act 2010*, is to provide a regulatory framework that promotes:

(a) the long term interests of end users of carriage services or of services provided by means of carriage services; and

(b) the efficiency and international competitiveness of the Australian telecommunications industry; and

(c) the availability of accessible and affordable carriage services that enhance the welfare of Australians.

1. Section 3(2) describes the “other objects” of the Act, relevantly including the following:

(e) to promote the effective participation by all sectors of the Australian telecommunications industry in markets (whether in Australia or elsewhere);

…

(h) to provide appropriate community safeguards in relation to telecommunications activities and to regulate adequately participants of the Australian telecommunications industry;

(i) to promote the placement of lines underground, taking into account economic and technical issues, where placing such lines underground is supported by the affected community;

1. It is important to recall that general statements contained in legislation as to its purpose or object may need to be treated with caution: see the authorities referred to earlier in *Freedom Foods* at [29]. Such statements should be understood by reference to other provisions contained in the legislation. In other words, like any other provision in legislation, a purpose or objects clause must be interpreted in its context.
2. While we note the objects of the Act extracted above, the Act contains specific provisions dealing with the issues of installation and maintenance of facilities by carriers under Sch 3 and dealing with the sharing of access to one carrier’s facilities so as to allow another carrier to establish their own facilities under Sch 1. After properly considering each of these provisions in context, it is unnecessary to divine the purpose of those provisions from the objects of the Act in order to apply them. In this case, it is inappropriate to invoke the objects of the Act to conclude that clauses 6 and 7 must promote the interests of carriers and the efficiency of telecommunications services over those of persons affected by the activities of carriers, by permitting the co-location of facilities without the consent of landowners.
3. The main purpose of the clauses we are dealing with in Sch 3 is to authorise carriers to enter land, install and maintain facilities in the manner regulated by Sch 3, and in exercising those powers to enjoy certain immunities. The effect of the immunities is that the carrier’s powers explicitly override certain State or Territory laws (pursuant to Div 7 of Sch 3) and landowners’ common law rights (for example, pursuant to cl 6(2) and cl 7(2)). Installation or maintenance activities outside the scope of cll 6 and 7 simply do not attract the powers and immunities provided by Sch 3 of the Act. It is clear that State or Territory law still applies in those circumstances, and so do the common law rights of landowners, whether public or private.
4. The scheme regarding access between carriers is dealt with in Sch 1 of the Act. That access regime under Sch 1 is separate to the installation regime under Sch 3. Schedule 1 is concerned with access rights to other carriers’ customer facilities, rather than rights to access the land of public or private landowners. To interpret “maintenance” as we do does not preclude Optus from using the access regime under Sch 1 so as to promote the efficient co-location of competitive facilities. In fact, it is in the context of that access regime that it has been able to agree terms of access with NBN Co to the facilities installed by NBN Co on the Kidd Bridge. If Optus’ proposed facility cannot be installed under cl 6of  Sch 3, it is now merely a matter of Optus complying with any relevant State law and getting the permission of the owner of the Kidd Bridge (the State) to access the land on which NBN Co’s original facility lies. The permission or consent of the landowner may be conditioned on the execution of an access or licence agreement, as here with the State. No relevant State law (for example, an environmental or planning law) was brought to our attention that impedes Optus from being permitted to install its proposed facility.
5. Absent authority to install its facility under cl 6 of Sch 3 and in the absence of any State law authorising Optus to install its proposed facility, Optus needs the State’s permission to allow access to the Kidd Bridge. As accepted by Optus, it is to be recalled that Optus had not applied to obtain an FIP and the facility was not a low-impact facility. The facility is not a low-impact facility as a result of the legislative scheme itself, including the Determination made under cl 6(3). The relevance of this Determination is that co-located facilities *can* bedeclared as low-impact facilities in some instances. This is so as a matter of statutory interpretation (and the fact that the Determination does specify certain co-located facilities), but it should also be noted that this option was specifically envisaged at the time of the commencement of the Act. The Explanatory Memorandum for the Telecommunications Bill 1996 (Cth) at p291 states the following in relation to the Minister’s power to make a determination as to low-impact facilities (emphasis added):

The instrument may provide for a particular class of facility to be determined for the purpose of this Part. For example, a determination could be made by reference to the type of facility, the type of location at which it is installed, **whether it is co-located with an existing facility** or any other basis of classification.

1. The predecessor to ACMA, the Australian Telecommunications Authority (AUSTEL), following a direction by the relevant Minister (which was also specifically envisaged in the Explanatory Memorandum at p291), considered the issue of low-impact facilities prior to the commencement of the Act in its report of April 1997 titled *Public Inquiry on Low-Impact Facilities and Code of Practice*. That report, among other things, addressed the policy questions involved in specifying co-located facilities as low-impact facilities. The final form of the Act, and its absence of a specific power to install co-located facilities under cl 6 of Sch 3 as a corollary to the access regime under Sch 1 was *not* an oversight of Parliament that needs to be remedied by circuitously inferring an additional power of installation under cl 7(3)(e) under the guise of maintenance.
2. In summary, the Minister has in fact made a determination allowing for some co-located low-impact facilities in certain areas, but not in relation to the Kidd Bridge and fibre optic cables attached to the bridge. Optus’ lack of authorisation to install its proposed facility under cl 6 or c 7 after agreeing to an access arrangement with NBN Co therefore is not a gap in the Act, but a natural and appropriate consequence of the legislative scheme: that is, once a competitor carrier has given approval to access its facility, there must then be authorisation to install the facility there, if not via cl 6 of Sch 3 then via State or Territory authorisation and landowner permission.
3. In our view, it is clear that cl 7 does not authorise Optus to install its proposed facility, and as a consequence Optus would need to comply with cl 6 or obtain the consent of the State as landowner.
4. Even if it were not clear in our view according to ordinary principles of statutory construction, the principle in *Coco* supports our construction, as the carrier’s right to enter land in these circumstances (which without statutory authority is a trespass and therefore tortious conduct) is not clearly expressed in unmistakeable and unambiguous language.

# DISPOSITION:

1. We consider that the appeal should be allowed, the decision below set aside, and in lieu thereof an order made quashing the decision made by the TIO dated 11 January 2021. In addition, Optus should pay the State’s costs of the appeal and the Originating Application for judicial review.
2. The State seeks a declaration that the activity proposed by Optus was not a “maintenance activity” permitted by cl 7 of Sch 3 of the Act or otherwise permitted to be carried out by Optus under the Act without the consent of the State.
3. However, the State also seeks alternatively, an order remitting the State’s objection to the activity proposed by Optus for further determination by the TIO in accordance with law.
4. It tentatively seems to us that a declaration substantially in the terms sought should be made and no remittal is necessary. Nevertheless, we will give the parties the opportunity to address this issue and (if appropriate) the terms of any appropriate declaration.
5. We therefore order that:
6. Within fourteen (14) days the parties file an agreed form of orders, or in default of agreement, any submissions as to the form of the appropriate orders reflecting the reasons of the Court.
7. Subject to any further directions, the final orders of the Court will be made on the papers.

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| I certify that the preceding fifty-eight (58) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Besanko and Middleton. |

Associate:

Dated: 16 September 2022

REASONS FOR JUDGMENT

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RANGIAH J:

1. In *State of Queensland v Telecommunications Industry Ombudsman* [2021] FCA 522, the primary judge dismissed an application by the State of Queensland (the **State**) for judicial review of a decision of the Telecommunications Industry Ombudsman (the **TIO**). The State appeals from that judgment.
2. The dispute may be summarised in the following way.
3. The State is the owner of the Kidd Bridge at Gympie in Queensland. A conduit carrying fibre optic cable has been attached to the Kidd Bridge by NBN Co Ltd (**NBN Co**). The conduit and cable are owned by NBN Co.
4. Optus Fixed Infrastructure Pty Ltd (**Optus**) entered into an agreement with NBN Co allowing Optus to install its own fibre optic cable within NBN Co’s conduit. Optus provided the State with notice of its intention to carry out the installation.
5. The State objected to Optus’ notice upon grounds including that the State’s consent for the installation on the Kidd Bridge was required, but the State was not willing to consent unless Optus entered into a licence agreement. Optus’ response was that the State’s consent was not required as Optus was empowered by cl 7(1) of Sch 3 of the *Telecommunications Act 1997* (Cth) (the **Act**) to carry out the installation.
6. The TIO rejected the State’s objection. The TIO ruled, in effect, that Optus was authorised to install the fibre optic cable without the State’s consent. The State then sought judicial review of that decision, naming the TIO and Optus as respondents. The primary judge upheld the TIO’s decision.
7. The principal ground of appeal involves an issue of statutory construction. Clause 7(1) of Sch 3 of the Act provides that a carrier “may, at any time, maintain a facility”. Clause 7(3)(e) defines “maintenance” to include, “the installation of an additional facility in the same location as [an] original facility”. The issue is whether cl 7(1) authorises *a carrier* (in this case, Optus) to install a facility in the same location as an original facility installed by a *different* carrier (in this case, NBN Co). If it does, then the consent of the owner of the property where the original facility is located (in this case, the State) is not required.
8. The issue arises in the context of an important and complex legislative scheme regulating the provision of telecommunications services, including telephone, internet and radio-communications services, in Australia. Telecommunications require the transmission of electromagnetic energy through networks of infrastructure to connect distant places. To establish the widespread networks required, carriers must be able to install infrastructure upon land owned or occupied by others, including privately owned and State land. In some circumstances, the Act overrides general law property rights of landholders by authorising carriers to install and maintain infrastructure without their consent. The Act seeks to balance the public interest in ensuring the availability of accessible and affordable carriage services with the public interest in safeguarding fundamental property rights. The main issue in this case is where the balance has been struck.
9. The State’s other grounds of appeal assert that the TIO and the primary judge wrongly construed certain provisions of the *Telecommunications Code of Practice 2018* (Cth) (the **Code of Practice**), which deal with objections to activities of carriers. Those grounds were given substantially less attention by the parties.
10. For the reasons that follow, I consider the primary judge was correct to dismiss the State’s application for judicial review. I would dismiss the appeal.

## Factual background

1. Optus is the holder of a “carrier licence” granted under s 56 of the Act, and is a “carrier” within the definition of that expression in s 7 of the Act.
2. Schedule 3 of the Act imposes certain requirements upon carriers which propose to carry out inspections, installations or maintenance of telecommunications facilities. Those requirements include notifying affected property owners and occupiers that the carrier intends to engage in the activity. The Code of Practice enacts a scheme allowing affected owners and occupiers to object to such activities, and for the TIO to determine such objections. Section 6.29 specifies five grounds upon which objections may be made.
3. The Kidd Bridge is located on Exhibition Road at Gympie in Queensland. It is owned by the State and is operated and managed by the Department of Transport and Main Roads (the **DTMR**).
4. On 24 July 2020, Optus provided the DTMR with a “Maintenance Access and Activity Notice” under s 6.22 of the Code of Practice, stating that Optus intended to carry out, “Maintenance of Facilities, Reference: Schedule 3 of the Act, Division 4, Clause 7”. The notice stated it was, “necessary to access your property and undertake the following activities during the timeframe specified”. The intended activity was described as:

Installation of fibre optic cable within existing conduit attached to the Kidd Bridge crossing on Exhibition Road.

1. The conduit attached to the Kidd Bridge and fibre optic cable running within the conduit were installed, and are owned, by NBN Co, another carrier. The Court was informed that NBN Co installed the conduit and cable pursuant to cl 6 of Sch 3 of the Act. Optus has entered into an agreement with NBN Co allowing Optus to run additional fibre optic cable through NBN Co’s conduit.
2. On 30 July 2020, the DTMR provided Optus with a notice of objection under s 6.28 of the Code of Practice to Optus’ proposed activity. Three particular objections can be discerned from the notice.
3. The first objection was that Optus had failed to comply with cl 11 of Sch 3 of the Act by failing to make any efforts to enter into an agreement with the DTMR. Under that provision, a carrier must make reasonable efforts to enter into an agreement with a public utility. The DTMR asserted it was a public utility and that Optus’ intended installation was likely to affect its operations.
4. The second objection was that Optus’ intended installation did not minimise detriment and inconvenience to the DTMR’s operation of Kidd Bridge, as it would affect any future refurbishment and decommissioning of the bridge by increasing costs and project times. It was also contended that the existing conduit was cut into brackets supporting a water pipeline and replacement of the pipeline would be made more expensive and inconvenient if relocation of the conduit were required in the future.
5. The DTMR’s third objection was:

Optus is proposing to install its fibre optic cable through a conduit owned by NBN Co. on the guise of it being ‘maintenance’ under clause 7 of Schedule 3 of the *Telecommunications Act*. TMR contends that the work cannot properly be considered as a ‘maintenance activity’ and is more correctly characterised as an ‘installation’ activity under clause 6 of Schedule 3.

For the above project we confirm that the works on the bridge is a Non-Low Impact Facility within clause 6 of Schedule 3 and accordingly a Licence Agreement is required between Optus and TMR for the execution and maintenance of the works.

1. The DTMR’s notice of objection attached a detailed draft licence agreement which set out terms and conditions upon which Optus would be permitted to install its fibre optic cable. These terms and conditions, in a number of respects, go beyond the requirements placed on a carrier under Sch 3 of the Act. They require, for example, that Optus must pay an unspecified “licence fee”; must remove its equipment within 60 days after the expiration or earlier termination of the licence agreement; and must indemnify and release and discharge the DTMR from and against all claims in connection with the relevant works and use and occupation of the licence area.
2. On 7 August 2020, Optus responded to the DTMR’s objection, asserting that its proposed activity was authorised as “maintenance activity” within cl 7 of Sch 3 of the Act. Optus did not agree to enter into the State’s proposed licence agreement.
3. The DTMR replied on 17 August 2020, stating that its grounds of objection were:
4. the Optus proposal did not minimise detriment and inconvenience to the DTMR’s operation of the bridge, as it would affect future refurbishment and decommissioning of the bridge by increasing costs and project times;
5. the existing conduit was cut into brackets supporting a water pipeline, so that replacement of the water pipeline would be more expensive and inconvenient if that work required relocation of the conduit; and
6. the proposed work was not a “maintenance activity” under cl 7 of Sch 3 of the Act but was instead an “installation activity” under cl 6.
7. The DTMR’s objection was not resolved. Optus then referred the objection to the TIO under s 6.35 of the Code of Practice*.* Optus informed the TIO, relevantly:

Optus believes the proposed activity involves the Maintenance of Facilities for the following reasons:

* Under the Schedule 3 category of Maintenance that Optus is relying on, Optus can install an “additional facility” in the same location as an “original facility”. There is no requirement, express or implied, that the original facility and the additional facility be owned by the same carrier.
* Clause 7(3)(e) of Schedule 3 permits such installation where certain conditions in Clause 7(6) are met, including that “the additional facility is located inside a duct, pit, hole, tunnel or underground conduit”. The installation proposed by Optus satisfies these conditions. A duct as an original facility, and a cable as an additional facility, is exactly the intended application of this clause.
* Optus has a Facility Access Agreement with NBN. This contractual agreement, founded in the Act allows Optus to use the ‘original’ facility. Under Clause 7(3)(e) there is no requirement that the ‘original’ facility and the ‘additional’ facility be under common ownership.
* The proposed maintenance activity complies with all relevant requirements of the Code and the Act.
* The Act in many places encourages co-location of one carrier’s new facilities with another carrier’s existing facilities.

1. Section 6.36(1) of the Code of Practice provides that if the TIO, “gives a direction to the carrier about the way in which the carrier should engage in the maintenance activity, the carrier must comply with the direction”. Section 6.36(2) requires that the objection which is the subject of the direction must come, in whole or in part, within the jurisdiction of the TIO.

## The TIO’s decision

1. The TIO’s decision was dated 11 January 2021. The decision was, in effect, to reject the DTMR’s objection. The only direction made by the TIO was to alter the timeframe for commencement and completion of the activity, since the dates originally nominated by Optus had expired.
2. Section 6.29 of the Code of Practice sets out reasons, or grounds, for objection. As the State had not specifically framed its complaints by reference to the grounds in s 6.29, it was necessary for the TIO to attempt to correlate the State’s complaints with those grounds. The TIO was not satisfied that the DTMR had substantiated any grounds for objection concerning the likely effect of the activity on the land, the location of the facility on the land and Optus’ failure to minimise detriment and inconvenience and do as little damage as practicable.
3. The TIO proceeded to consider whether she had jurisdiction to consider the objection. It appears that the TIO specifically considered the issue of jurisdiction because she proposed to require Optus to comply with a direction as to the new timeframe, and s 6.36(2) of the Code of Practice expressly provides that if a direction is to be made, the objection must fall within the jurisdiction of the TIO. In this context, the TIO was satisfied that Optus’ proposed activity was “maintenance” within cl 7(1) and cl 7(3)(e) of Sch 3 of the Act. The TIO found that Optus had a right to access the original facility (the conduit) because NBN Co had granted access to Optus, and that Optus could conduct the maintenance activity without constituting a trespass upon NBN Co’s property. The TIO was satisfied that she had jurisdiction in respect of the objection.

## The judgment of the primary judge

1. The State’s application for review of the TIO’s decision was brought under s 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth).
2. The State’s application raised the following grounds:

1. The TIO made an error of law within s 5(1)(f) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (**ADJR Act**) by misconstruing and misapplying clause 7 of Schedule 3 of the *Telecommunications Act*, in finding that the Optus proposal to install its fibre optic cable in a conduit on the Kidd Bridge owned by another Carrier, NBN Co, constituted ‘maintenance’ of Telstra’s (sic) conduit.

2. The TIO made an error of law within s 5(1)(f) of the ADJR Act by failing to find that Optus was attempting to do indirectly under the guise of ‘maintenance’ under clause 7 of Schedule 3, that which it could not directly do through clause 6 (‘Installation of facilities’) of Schedule 3 of the *Telecommunications* *Act*.

3. The TIO made an error of law within ss 5(1)(e) and 5(2)(g) of the ADJR Act by deciding this matter differently (and without justification) from a relevantly identical proposed activity of Optus concerning the ‘Granville Bridge’ near Maryborough, when the TIO found that the proposal was not ‘maintenance’ under clause 7 of Schedule 3 of the *Telecommunications Act*, should apply.

4. The TIO made an error of law within s 5(1)(f) of the ADJR Act by deciding the onus was on an objector to show an alternative location for the proposed work, by reference to section 6.29(b) of the *Telecommunications Code of Practice 2018*, as to the location of a facility on the objector’s land.

5. The TIO made an error of law within s 5(1)(f) of the ADJR Act by finding a failure of Optus to comply with clause 11 of Schedule 3 of the *Telecommunications Act*, to make ‘reasonable efforts’ to enter into an agreement with the Applicant, as a ‘public utility’ under that Act (on the manner in which the proposed work would be done) could not be a basis for objecting to the proposed activity.

(Particulars omitted.)

1. The primary judge dealt with the first and second grounds together. Her Honour described a key issue as whether the proposed activity by Optus was “maintenance” within cl 7 of Sch 3 of the Act. Her Honour observed that the parties differed upon whether a carrier which is a “stranger” to an original facility owned by another carrier can be said to “maintain” the original facility.
2. The primary judge held that, on a plain reading, cl 7 of Sch 3 supports Optus’ contention that its installation of fibre optic cable into and through ducts or conduits owned by NBN Co would satisfy the statutory definition of “maintenance”. Her Honour observed that cl 7(3)(e) extends the ordinary meaning of “maintenance” to encompass the installation of an additional facility in the same location as an original facility, where the conditions specified in cl 7(6) are satisfied. Her Honour noted that no qualification is expressed in respect of who installs the facility.
3. The primary judge considered that giving the words in cl 7(3) of Sch 3 their plain and ordinary meaning to encompass a wide range of conduct which does not interfere with the rights of others was unobjectionable. Her Honour stated that the State had conceded in oral submissions that NBN Co could put what it wished into its own conduits or ducts. It may be noted that the State disputes that it made the concession attributed to it. Her Honour considered that where NBN Co had consented to Optus placing its cables through the conduit, there was no real difference with a situation where, for example, Optus contractually engaged NBN Co to undertake the same task of installation on Optus’ behalf. Her Honour found that Optus’ proposed conduct in the present case did not interfere with the rights of NBN Co in respect of the original facility.
4. The primary judge concluded at [124]:

In my view, the TIO was correct in finding that the proposed activities were “maintenance” for the purposes of subcl 7(3)(e) of Sch 3 to the Telecommunications Act. The construction of subcl 7(3)(e) of Sch 3 advanced by the State requires the clause to be read down in a manner not warranted by either the plain language of the clause or the legislative framework. Had the clause been intended to be construed in the manner advanced by the State, Parliament could have limited the definition of “maintenance” accordingly.

1. It may be noted that the State had also submitted that the conduit attached to the Kidd Bridge was not a “duct” within cl 7(6) of Sch 3, arguing that a duct runs underground. The primary judge rejected that argument. That aspect of her Honour’s reasons has not been challenged in the appeal.
2. The primary judge rejected the State’s third ground. That ground is not reprised in the appeal, and it is unnecessary to discuss that aspect of her Honour’s reasons.
3. The fourth ground alleged that the TIO made an error of law in deciding, by reference to s 6.29(b) of the Code of Practice, that the onus is on an objector to show an alternative location for a facility on the objector’s land. In her decision, the TIO had stated that, “The Department has not identified an alternative location on its land for Optus to use”. The State submitted that the TIO had erroneously imposed a requirement or expectation on the objector to identify an alternative route.
4. The primary judge considered that as the intended activity was maintenance by installation of fibre optic cable entirely inside the existing conduit, the question of whether the activity could be conducted at an alternative location on the bridge was irrelevant. Her Honour found that any observations of the TIO in respect of onus were not material to the outcome of her decision.
5. The primary judge then considered the fifth ground, namely, whether the TIO made an error of law in respect of Optus’ failure to comply with cl 11 of Sch 3 of the Act. Clause 11 requires a carrier to make reasonable efforts to enter into an agreement with a public utility that makes provision for the manner in which the carrier will engage in an activity that is, relevantly, a maintenance activity. The expression “public utility” is defined by cl 2 in Sch 3 to include, “a body that provides to the public … transport services”. The TIO had concluded that Optus’ failure to comply with cl 11 was not a basis for objection to Optus’ intended activity.
6. The primary judge observed that there was a paucity of submissions in respect of the fifth ground. Her Honour considered it likely that the DTMR was a “public utility”. However, her Honour was not satisfied that the language of cl 11 or s 6.29(e) or any relevant legislative purpose indicates that a failure to comply with that clause is a ground of objection. Her Honour also found that the TIO had addressed issues of prospective detriment, inconvenience and/or damage to the State’s land for the purposes of s 6.29(e). Further, her Honour noted that the TIO had formed the view that the State had not explained any deleterious effect on its operations from the proposed activity warranting an agreement with the State. Her Honour considered that the finding by the TIO that Optus had adequately addressed the DTMR’s concerns, notwithstanding the State’s request for Optus to enter into a licence agreement with it, was open to the TIO in light of the communications between the parties.
7. The primary judge observed that if the TIO was wrong in deciding that the proposed activity was “maintenance”, an issue would arise as to whether the TIO had jurisdiction to deal with the State’s objection in that regard. In light of the rejection of the first and second grounds, her Honour considered it unnecessary to consider that issue.
8. Accordingly, the primary judge dismissed the application for judicial review.
9. It may be noted that there were two separate applications for judicial review filed by the State against the same respondents. One concerned the intended activity by Optus in respect of the Kidd Bridge. The other concerned an intended activity by Optus in respect of the Boobegan Creek Bridge at the Gold Coast in Queensland. The applications involved similar issues and were heard together and dealt with in the same reasons for judgment. The Boobegan Creek Bridge application was also dismissed by the primary judge, but that order is not the subject of any appeal. This appeal is only concerned with her Honour’s order dismissing the Kidd Bridge application.

## The grounds of appeal

1. The State relies upon the following grounds of appeal:

1. The Primary Judge erred in construing clause 7 of Schedule 3 of the *Telecommunications Act 1997* (Cth) in deciding that the term ‘maintenance’ extends to the installation of fibre optic cable by one carrier in or through a telecommunications ‘facility’ of a different carrier over the Appellant’s Kidd Bridge and without the Appellant’s consent or approval.

2. The Primary Judge erred in construing clause 11 of Schedule 3 of the *Telecommunications Act*, and s 6.29 of the *Telecommunications Code of Practice 2018*, in finding that a failure of a carrier to make reasonable efforts to enter into an agreement with a ‘public utility’ for the manner in which ‘maintenance’ work would be carried out by a carrier is not a ground of objection to the Telecommunications Industry Ombudsman.

3. The Primary Judge erred in finding that the statutory scheme places upon an objector the onus of identifying an alternative location for the work of a proponent carrier.

## Consideration

### Ground 1: Whether cl 7 of Sch 3 of the Act extends to allowing a carrier to install an additional facility in the same location as an original facility installed by another carrier

1. Clause 7(1) of Sch 3 of the Act authorises a carrier to, “at any time, maintain a facility”. Clause 7(3)(e) defines “maintenance” to include, “the installation of an additional facility in the same location as the original facility”. As an original facility will generally be located on land not owned by a carrier, cl 7(2) permits a carrier to do “anything necessary or desirable” for the purpose of maintaining a facility, including entering on, and occupying, land.
2. The first ground of appeal challenges the primary judge’s rejection of the State’s argument that cl 7 does not provide Optus with authority to install fibre optic cable within the conduit installed by NBN Co on the Kidd Bridge without having obtained either a facility installation permit under cl 6 or the consent of the State.
3. The ground asserts that the primary judge erred in construing cl 7 of Sch 3 such that the term “maintenance” extends to the installation of fibre optic cable by a carrier in or through a facility of *another* carrier without the consent of the owner of the land on which the facility is located.
4. The issue is whether cl 7(1) and cl 7(3)(e) authorise a carrier to “maintain” a facility it does not own, including by installing an additional facility in the same location as an original facility installed and owned by another carrier.
5. Before turning to consider the parties’ submissions, it is necessary to provide an overview of the scheme of the Act and its terminology.

#### Overview of the Act and terminology

1. The Act regulates the provision of telecommunications in Australia by “carriers” and “service providers”. In *Bayside City Council v Telstra Corp Ltd* (2004) 216 CLR 595, Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ observed at [7] that the regulatory framework is intended to:

promote the development of an efficient and competitive telecommunications industry, including the supply of carriage services to the public, and to ensure that such services are reasonably accessible, and are supplied efficiently and economically to meet the social and business needs of the Australian community.

1. The expression “carrier” is defined in s 7 of the Act to mean, “the holder of a carrier licence”. Section 42(1) provides, relevantly, that the owner of a “network unit” must not use the unit to supply a “carriage service” unless the owner holds a carrier licence. A “network unit” is defined in ss 26–28 to include single and multiple “line links” and “designated radiocommunications facilities”. Each of Optus and NBN Co isa “carrier”.
2. A carriage licence allows a carrier to provide a “carriage service”, which is defined in s 7 of the Act to mean, “a service for carrying communications by means of guided and/or unguided electromagnetic energy”. By way of contrast, a “carriage service provider” provides telecommunication services over network units owned by one or more carriers or in relation to which a relevant declaration is in force: s 87.
3. In order to provide a carriage service, a carrier must have a telecommunications network. A “telecommunications network” is defined in s 7 of the Act to mean, “a system, or series of systems, that carries, or is capable of carrying, communications by means of guided and/or unguided electromagnetic energy”.
4. The items of infrastructure required for the systems that comprise a telecommunications network are described in the Act as “facilities”. Section 7 of the Act defines “facility” to mean:

(a) any part of the infrastructure of a telecommunications network; or

(b) 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.

1. Some carriers had already installed some facilities prior to the commencement of the Act. New carriers entering the market must install their own facilities. It is apparent that carriers must have powers to install, preserve, alter and replace facilities that make up their telecommunications networks: see *Bayside* *City Council* at [6].
2. The broad definition of “facility” means that a facility may consist of, or contain, other facilities. For example, a pole is a facility; cables carried by the pole are facilities; and fastenings attaching the cables to the pole are also facilities.
3. The conduit installed by NBN Co on the Kidd Bridge is a “facility”. The fibre optic cable installed by NBN Co within the conduit is also a “facility”.
4. Clause 47 of Sch 3 of the Act provides, relevantly, that, unless the circumstances indicate otherwise, a facility supplied, installed, maintained or operated by a carrier remains the property of its owner, whether or not it has become a fixture. NBN Co is the owner of the conduit attached to the Kidd Bridge and the fibre optic cable within the conduit. NBN Co has agreed that Optus may install fibre optic cable in NBN Co’s conduit.
5. Section 61 of the Act provides that a carrier licence is subject to the conditions specified in Sch 1. Schedule 1 has the heading, “Standard carrier licence conditions”. Although the first ground of appeal is centrally concerned with the interpretation of cl 7 of Sch 3, Sch 1 provides important context for the construction of cl 7.
6. Section 484 of the Act provides that Sch 3 has effect. Schedule 3 is entitled, “Carriers’ powers and immunities”. Schedule 3 provides three categories of powers and immunities that authorise carriers to engage in activities that would otherwise amount to trespass to land if done without the consent of the landholder.
7. The first category is under Div 2 of Sch 3, which consists only of cl 5. Clause 5 has the heading, “Inspection of land”. The clause confers power upon a carrier to enter on and inspect land; and do anything on the land that is necessary or desirable for the purposes of determining whether the land is suitable for the carrier’s purposes or surveying or obtaining information in relation to the land.
8. The second category is under Div 3 of Sch 3, which consists only of cl 6. Clause 6 is entitled, “Installation of facilities”, and provides, relevantly:

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

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

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

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

…

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

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

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

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

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

(iii) making cuttings and excavations; and

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

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

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

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

…

1. The third category of powers and immunities conferred on carriers is under Div 4, consisting only of cl 7. That clause has the heading, “Maintenance of facilities”, and provides:

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

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

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

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

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

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

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

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

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

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

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

…

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) either:

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

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

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

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

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

(a) the measurement of the height of a tower is not to include any antenna extending from the top of the tower; and

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

(i) constitute the facility; and

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

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

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

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

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

1. Clause 7(1) authorises a carrier to “maintain a facility”. In this context, the ordinary meaning of “maintain” is, as Kunc J observed in *NBN Co Ltd v Pipe Networks Pty Ltd* (2015) 295 FLR 256; [2015] NSWSC 475 at [92], “keeping the facility in good repair”. However, the inclusive definition of “maintenance” in cl 7(3) operates to give “maintain” in cl 7(1) an extended meaning. It is an extended meaning because several paragraphs of the definition are cast in broad terms that do not confine the authorised activities to “maintenance” within its ordinary meaning. Under para (a), an original facility may be altered, for example, to increase the capacity of a facility, not merely to preserve it or otherwise keep it in good repair. Under para (b), a carrier may provision an original facility with material or information in order to increase its capacity over its original capacity. Under para (d), an original facility may be replaced in whole or in part by a newer and better facility with greater capacity than the original. Under para (e), a carrier may, for example, install a second fibre optic cable in an existing conduit to allow the carrier to provide better or more carriage services to an area, or to provide carriage services to a broader geographical area. The language of the definition does not seek to restrict the activities authorised under cl 7(1) to “maintenance” in its ordinary sense of keeping an original facility in good repair. Accordingly, the State accepts that, “Maintenance does have an extended meaning…”
2. Clause 2 of Sch 3 defines “installation” in relation to a facility to include: construction of a facility on, over or under any land; attachment of the facility to any building or other structure; and any activity that is ancillary or incidental to the installation of the facility. It is not in dispute that the running of fibre optic cable through the Kidd Bridge conduit would involve installation of a facility.

#### The legislative and factual background calling for construction of cl 7 of Sch 3

1. To reiterate, the Kidd Bridge is owned by the State. NBN Co installed a conduit on the Kidd Bridge, apparently pursuant to cl 6 of Sch 3 of the Act. NBN Co has agreed to allow Optus to install fibre optic cable within the conduit. The State does not consent to Optus’ installation.
2. The primary judge rejected the State’s submission that cl 7(3)(e) of Sch 3 does not authorise a carrier to install an additional facility in the same location as an original facility installed by another carrier without the State’s consent. Her Honour upheld the TIO’s finding that Optus is entitled to “maintain” the Kidd Bridge conduit installed by NBN Co.
3. A carrier would commit a trespass by installing a facility upon the land of another in the absence of either statutory authority or the consent of the landholder. Optus has not accepted the State’s offer to enter into a licence agreement and the State has not consented to the proposed installation.
4. There are four possible sources of statutory authority for Optus to carry out the installation without the State’s consent: cl 6(1)(a), cl 6(1)(b), cl 6(1)(c), or cl 7(1) of Sch 3.
5. Clause 6(1)(a) authorises a carrier to install a facility without the consent of a landholder where the carrier has a “facility installation permit”. A “facility installation permit” is issued by the Australian Communications and Media Authority (the **ACMA**). Optus has not obtained a facility installation permit in respect of its intended installation of fibre optic cable in the Kidd Bridge conduit.
6. Clause 6(1)(b) authorises installation of a “low‑impact facility”. It is common ground that Optus’ intended installation does not fall within the *Telecommunications (Low-impact Facilities) Determination 2018* (Cth), and is therefore not a “low-impact facility”.
7. Clause 6(1)(c), which authorises a temporary installation of a facility for “defence purposes”, has no present relevance and may be left aside.
8. The final potential source of statutory authorisation is through an interpretation of cl 7(1) and cl 7(3)(e) as authorising a carrier to install an additional facility in the same location as an original facility installed by another carrier. If that construction is correct, Optus will be authorised to install fibre optic cable in the Kidd Bridge conduit installed by NBN Co without the consent of the State. The interpretation of cl 7 will now be considered.

#### The language of cl 7

1. The starting point for determining the meaning of any statutory provision is its text: *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at [47] (Hayne, Heydon, Crennan and Kiefel JJ).
2. Clause 7(1) of Sch 3 provides that, “A carrier may, at any time, maintain a facility”. It is not in dispute that cl 7(1) authorises a carrier to “maintain” its own facility. The dispute is limited to whether a carrier is authorised to “maintain” a facility installed by another carrier.
3. Optus submits that cl 7(1) imposes no limitation upon which carrier may maintain which facilities. Optus argues that the natural and ordinary language of the clause is consistent with authorising a carrier to maintain a facility even if the facility has been installed, and is owned by, another carrier.
4. It can be accepted that the general language of cl 7(1) is consistent with Optus’ construction. The construction of cl 7(1) urged by the State as only authorising a carrier to maintain *its own* facility is inconsistent with use of the indefinite article “a” in the phrase, “a facility”.
5. Clause 7(3)(e) provides that “maintenance” includes a reference to, “the installation of an additional facility in the same location as the original facility”. Under cl 7(3), the “original facility” is “a facility” already installed. The general language of cl 7(3)(e), taken with cl 7(1), is consistent with any carrier being authorised to install another facility in the same location as a facility already installed. It does not suggest that installation of another facility is “maintenance” only when done by the carrier which installed the original facility.
6. However, text alone is not decisive. A statutory provision must also be interpreted in light of its context and purpose. In *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, Kiefel CJ, Nettle and Gordon JJ observed at [14]:

The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.

(Citations omitted.)

1. One matter of context emphasised by the State concerns the consequences which it asserts Optus’ construction would produce.

#### Consequences of construing cl 7 as allowing a carrier to install a facility in the same place as another carrier’s facility

1. It is relevant to consider the potential consequences of the competing constructions of cl 7 of Sch 3. In *Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation* (1981) 147 CLR 297, Mason and Wilson JJ held at 321:

On the other hand, when the judge labels the operation of the statute as “absurd”, “extraordinary”, “capricious”, “irrational” or “obscure” he assigns a ground for concluding that the legislature could not have intended such an operation and that an alternative interpretation must be preferred. But the propriety of departing from the literal interpretation is not confined to situations described by these labels. It extends to any situation in which for good reason the operation of the statute on a literal reading does not conform to the legislative intent as ascertained from the provisions of the statute, including the policy which may be discerned from those provisions.

Quite obviously questions of degree arise. If the choice is between two strongly competing interpretations, as we have said, the advantage may lie with that which produces the fairer and more convenient operation so long as it conforms to the legislative intention. If, however, one interpretation has a powerful advantage in ordinary meaning and grammatical sense, it will only be displaced if its operation is perceived to be unintended.

1. The State submits that Optus’ construction of cl 7 as authorising a carrier to maintain a facility even if the facility is installed and owned by another carrier would produce absurd consequences that cannot have been intended. Clause 7(3) gives “maintain” an extended meaning by providing that “maintenance” of a facility includes alteration or removal of the original facility (para (a)) and replacement of the whole or part of the original facility (para (d)). The State submits that if Optus’ construction of cl 7(1) is correct, any carrier is authorised to, at any time, alter, remove or replace a facility installed and owned by any other carrier. The consent of the other carrier would not be required as, on Optus’ argument, cl 7(1) contains no words imposing such a limitation.
2. It can be accepted that a legislative intention to authorise a carrier to alter, remove or replace the property of another carrier without consent is quite improbable. However, it will be necessary to return to this aspect of the State’s argument after considering the broader statutory scheme, including the interaction between Sch 1 and Sch 3 of the Act. In particular, Sch 1 provides that carriers may access each other’s facilities upon such terms as are agreed or determined, and that affects the construction of cl 7(1).

#### The principle of legality

1. The State argues it would be inconsistent with the “principle of legality” to construe cl 7 as permitting a carrier to commit what would otherwise be a trespass upon a facility owned by another carrier and a trespass upon the land on which the facility has been installed. The principle was described by French CJ in *Momcilovic v The Queen* (2011) 245 CLR 1 at [43]:

It is expressed as a presumption that Parliament does not intend to interfere with common law rights and freedoms except by clear and unequivocal language for which Parliament may be accountable to the electorate. It requires that statutes be construed, where constructional choices are open, to avoid or minimise their encroachment upon rights and freedoms at common law.

(Citations omitted.)

1. In *Coco v The Queen* (1994) 179 CLR 427, the principle was applied in determining whether a statutory provision permitted a judge to authorise entry by police officers onto premises for the purpose of installing a listening device where that entry would otherwise constitute a trespass. The plurality held at 435-437:

Every unauthorized entry upon private property is a trespass, the right of a person in possession or entitled to possession of premises to exclude others from those premises being a fundamental common law right … Statutory authority to engage in what otherwise would be tortious conduct must be clearly expressed in unmistakable and unambiguous language. Indeed, it has been said that the presumption is that, in the absence of express provision to the contrary, the legislature did not intend to authorize what would otherwise have been tortious conduct. But the presumption is rebuttable and will be displaced if there is a clear implication that authority to enter or remain upon private property was intended. Such an implication may be made, in some circumstances, if it is necessary to prevent the statutory provisions from becoming inoperative or meaningless. However, as Gaudron and McHugh JJ observed in *Plenty v. Dillon*:

“[I]nconvenience in carrying out an object authorized by legislation is not a ground for eroding fundamental common law rights.”

In England, Lord Browne-Wilkinson has expressed the view that the presence of general words in a statute is insufficient to authorize interference with the basic immunities which are the foundation of our freedom; to constitute such authorization express words are required. That approach is consistent with statements of principle made by this Court, to which we shall shortly refer.

…

The insistence on express authorization of an abrogation or curtailment of a fundamental right, freedom or immunity must be understood as a requirement for some manifestation or indication that the legislature has not only directed its attention to the question of the abrogation or curtailment of such basic rights, freedoms or immunities but has also determined upon abrogation or curtailment of them. The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose if they do not specifically deal with the question because, in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights.

(Citations omitted.)

1. The State’s arguments based upon the principle of legality deal with two aspects of interference with property rights. The first concerns the property rights of a carrier which has installed and which owns an original facility. The State argues that cl 7(1) does not clearly and unmistakeably express an intention that a carrier may maintain, and thereby trespass upon, a facility installed and owned by *another* carrier.
2. In response, Optus argues that cl 7(1) clearly expresses an intention to allow carriers to interfere with the property of other carriers, by authorising “a carrier” to maintain “a facility”, and by cl 7(3) extending the definition of “maintenance” to expressly encompass activities that involve interference with “the original facility”. Optus also argues that such an intention is made clear by provisions of Sch 1 requiring a carrier to give other carriers access to its facilities.
3. The second aspect of interference with property rights relied upon by the State concerns the right of landholders to exclude others from their land. The State argues that cl 7 does not authorise entry by a second carrier onto land. It may be seen that cl 7 expresses a clear intention, “in unmistakable and unambiguous language”, to authorise a carrier which has already installed a facility to engage in what would otherwise be trespass to land. Such a carrier is authorised, under cl 7(2), to enter the land and do anything necessary or desirable for the purpose of maintaining their own facility. The State’s argument is that cl 7 does not unmistakably and unambiguously express an intention to confer the same authority upon a second carrier.
4. It will be necessary to return to the State’s argument concerning the principle of legality after considering the interaction of Sch 1 and Sch 3 of the Act.

#### The objects of the Act

1. Optus argues that its construction of cl 7 as allowing a carrier to maintain a facility installed and owned by another carrier, including by installing another facility in the same location as an original facility, is consistent with the objects of the Act.
2. Section 3(1) of the Act states:

**3 Objects**

The main object of this Act, when read together with Parts XIB and XIC of the *Competition and Consumer Act 2010*, is to provide a regulatory framework that promotes:

(a) the long-term interests of end-users of carriage services or of services provided by means of carriage services; and

(b) the efficiency and international competitiveness of the Australian telecommunications industry; and

(c) the availability of accessible and affordable carriage services that enhance the welfare of Australians.

1. Section 3(2) describes the “other objects” of the Act as including:

(e) to promote the effective participation by all sectors of the Australian telecommunications industry in markets (whether in Australia or elsewhere).

1. The Explanatory Memorandum for the *Telecommunications Bill 1996* (Cth) confirms that the intention of the Bill was to reduce barriers to entry into the telecommunications infrastructure market and to increase competition. It states that the Bill, “creates obligations on carriers and carriage service providers which will promote competition”, and adds:

the Bill will enable the further evolution of competition in the telecommunications industry by removing existing regulatory barriers to entry into the telecommunications infrastructure market and current technology distinctions in the regulation of infrastructure providers.

There will be no restrictions on the number of carrier licences which may be issued and carriers will no longer benefit from a ‘reserved right’ to install certain telecommunications infrastructure or to be the primary suppliers of certain services.

1. As s 3(1) makes clear, the regulatory framework for carriers is contained, not only in the Act, but also in Pt XIB and Pt XIC of the *Competition* *and Consumer Act* *2010* (Cth). Part XIB prohibits carriers from engaging in anti-competitive conduct. Part XIC sets out a regime for provision by carriers of access to their telecommunications networks, requiring providers of declared services to comply with standard access obligations. Schedule 1 of the Act also requires carriers to allow competing carriers access to their facilities, as will be discussed.
2. The emphasis placed upon competition and access to facilities must be understood against the background of telecommunications services in Australia having historically been supplied under a statutory monopoly. Between 1975 and 1991, the regulatory framework gave the Australian Telecommunications Commission (which became known as Telecom) a monopoly as a telephone carrier: see *Bayside City Council* at [4], [107]-[108]. Under the *Australian and Overseas Telecommunications Corporation Act 1991* (Cth), the property of Telecom was vested in what was later renamed, Telstra Corporation Limited. Optus was granted a carrier licence under the *Telecommunications Act 1991* (Cth). Under s 137(2) of that Act, a carrier had the right to, “interconnect its network facilities to a network of any other carrier”, for the purpose of carrying communications across the network. Telstra and Optus then formed a duopoly of carriers. By the time the Act was enacted in 1997 and telecommunications carriage was more widely opened to competition, Telstra and Optus had already developed extensive telecommunications networks, including through widespread aerial and underground cabling: see *Bayside City Council* at [4].
3. The current Act commenced in 1997. Telstra and Optus remain carriers. A construction of cl 7 of Sch 3 as allowing a carrier to install a facility in the same location as an original facility already installed by another carrier would allow new entrants to make use of existing infrastructure, promoting the object in s 3(2)(e) of the Act of effective participation of carriers in the market for carriage services. It would promote the objects in s 3(1) by enhancing the availability and affordability of carriage services and the efficiency and competitiveness of the industry and, thereby, benefiting the long term interests of end-users of carriage services. In addition, allowing carriers to co-locate facilities would be consistent with the objective in s 152AB(2) of Pt XIC of the *Competition and Consumer Act* of encouraging the economically efficient use of telecommunications infrastructure, including infrastructure already established over decades of monopolistic or duopolistic control of telecommunications services.
4. As the State points out, another object described in s 3(2) of the Act is:

(h) to provide appropriate community safeguards in relation to telecommunications activities and to regulate adequately participants in sections of the Australian telecommunications industry

1. It is evident that the Act seeks to balance the interests of carriers and end-users against the interests of other parts of the community. It does so through appropriate community safeguards and adequate regulation of participants. The community includes landholders on whose land facilities may be located. The Act clearly and intentionally erodes some common law rights of landholders in some circumstances, but a construction of cl 7(1) of Sch 3 as allowing carriers to install additional facilities in the same location as other facilities without the consent of landholders seems inconsistent with providing “community safeguards”. Accordingly, not all objects of the Act point in favour of such a construction.
2. However, as will be discussed, cl 7(3)(e) and cl 7(5) of Sch 3 build in some protections or safeguards for landholders, including by expressly limiting where any additional facility can be installed and the level of audible and visual intrusion of the additional facility. Those protections attempt to strike a balance between the competing objects of the Act.
3. Section 15AA of the *Acts Interpretation Act 1901* (Cth) provides:

**15AA Interpretation best achieving Act’s purpose or object**

In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation.

1. The objects of the Act are, as has been explained, not entirely consistent. Where there is more than a single legislative purpose, it may be difficult to identify which, if any, of the overarching legislative purposes is apposite to an individual provision: see *Carr v Western Australia* (2007) 232 CLR 138 at [5] (Gleeson CJ). However, the object in s 3(1) of the Act is designated as “the main object”, while the objects in s 3(2) are described as “other objects”. That differential and tiered designation suggests a legislative preference for an interpretation that would best achieve the main object.

#### The interaction of Sch 1 and Sch 3

1. Optus submits that to read a restriction into cl 7 that only a carrier which owns a particular facility may maintain that facility would be inconsistent with the manner in which Sch 1 and Sch 3 of the Act interact with each other, and would thereby fail to promote the main object of the legislation. That submission makes it necessary to examine the content and operation of Sch 1 in some detail.
2. Schedule 1 of the Act is entitled, “Standard carrier licence conditions”. Part 3 of Sch 1 (cll 16–19) has the heading, “Access to supplementary facilities”.
3. Clause 17(1) of Sch 1 provides:

A carrier (the ***first carrier***) must, if requested to do so by another carrier (the ***second carrier***) give the second carrier access to facilities owned or operated by the first carrier.

(Notes omitted.)

1. Clause 17(2) provides that the first carrier is not obliged to comply with cl 17(1) unless, relevantly:

(a) the access is provided for the sole purpose of enabling the second carrier:

(i) to provide competitive facilities and competitive carriage services; or

(ii) to establish its own facilities; and

(b) the second carrier’s request is reasonable;

…

1. Under cl 17(3) and cl 17(4), in determining whether the second carrier’s request is reasonable, regard must be had to, and is limited to, whether compliance with the request will promote the long-term interests of end-users of carriage services or of services provided by means of carriage services. Clause 17(3) states that the question of reasonableness is to be determined in the same manner as it is determined for the purposes of Pt XIC of the *Competition and Consumer Act*, which requires, under s 152AB(2), consideration of objectives including promoting competition and encouraging the economically efficient use of, and investment in, the infrastructure by which services are supplied.
2. It may be seen that the language of cll 17(2)–(4) reflects the main object in s 3(1) of the Act. The purpose of requiring carriers to allow other carriers to access their facilities is evidently to allow access to markets, enhance competition and increase the availability of carriage services and, ultimately, to promote the long-term interests of end-users.
3. Under cl 17(5), the expression “facility” is given an extended definition for Pt 1 of Sch 1, such that the access to be provided may be on or within a facility, on land or a building or a structure where a facility is located, or through customer equipment or customer cabling.
4. The expression “give … access” in cl 17(1) is not defined in Pt 3. However, as access is given under cl 17(2) *solely* for the purposes of enabling the second carrier to *provide* competitive facilities and carriage services, or to *establish* its own facilities, cl 17(1) must be understood as requiring the first carrier to allow a second carrier access to a facility for the second carrier to install its own facility in the same location. Another way of describing giving access to facilities is allowing co-location of facilities.
5. Clause 18(1) of Sch 1 requires agreement between the first carrier and the second carrier as to the terms and conditions of access to facilities, or failing agreement, determination by an agreed arbitrator or the Australian Competition and Consumer Commission (the **ACCC**). Clause 18(5) and cl 19(1) envisage that the agreement or determination may include financial terms. If a second carrier makes a reasonable request, the first carrier cannot (subject to cl 17) refuse to allow the second carrier to co-locate its facilities, but can negotiate the terms and conditions upon which co-location will be allowed.
6. Part 5 of Sch 1 (cll 30–39) has the heading, “Access to telecommunications transmission towers and to underground facilities”.
7. Clause 33(1) requires a first carrier to provide a second carrier with, “access to a telecommunications transmission tower owned or operated by the first carrier”. Under cl 33(2), the first carrier is not required to comply with cl 33(1) unless, relevantly:

(a) the access is provided for the sole purpose of enabling the second carrier to install a facility used, or for use, in connection with the supply of a carriage service by means of radiocommunications;

…

1. Clause 34 contains similar provisions in respect of access to the site of a telecommunications transmission tower. Clause 35 contains similar provisions in respect of access to an eligible underground facility (ie one used or intended to hold lines), except that the access must be in connection with the *supply* of a carriage service. Again, the language of these clauses reflects the main object of the Act set out in s 3(1).
2. Clause 36 requires agreement between the carriers as to the terms and conditions of access or, failing agreement, determination by an agreed arbitrator or the ACCC.
3. A telecommunications transmission tower and eligible underground facility each fall within the definition of “facility” in s 7 of the Act. The expression “giving access” in Pt 5 of Sch 1 is defined in cl 32 to include *replacing* a tower with another tower located on the same site, so that cl 33(1) may require a first carrier to allow a second carrier to replace the first carrier’s transmission tower where the other requirements of the provision are met. The intention of Pt 5 is clearly to require a first carrier to allow a second carrier to install its own facility in the same location as the first carrier’s facility. This is reinforced by cl 38 of Sch 1 which provides that, “A carrier, in planning the provision of future carriage services, must co-operate with other carriers to share sites and eligible underground facilities”.
4. That the intention of Pt 5 is to require carriers to allow co-location of facilities is also reinforced by the Explanatory Memorandum for the Telecommunications Billwhich states:

In the face of increasing demand for mobile communications services and restrictions on the use of aerial cabling, there will be a continuing increasing demand for transmitter sites and underground ducts. Part 5 of Schedule 1 to the Bill will impose a licence condition requiring carriers to allow co-location of their mobile communications towers and sites and underground cable facilities on request. If a carrier gives reasonable notice to another carrier to co-locate one of these facilities, access must be given …

1. The Explanatory Memorandum also states, in respect of Part 5:

This Part establishes obligations on carriers to provide other carriers with access to

* facilities and sites used for the supply of a carriage service by means of radiocommunications; and
* underground facilities used for, or designed to hold, lines;

with the aim of ensuring as far as possible that these facilities are co-located. A carrier will have rights of access to another carrier’s site in order to maintain its facilities installed on that site by reason of the carrier powers provided in Part 1 of Schedule 3.

1. It may be noted that cl 37(1) of Sch 1 provides that, “The ACCC may, by legislative instrument, make a Code setting out conditions that are to be complied with in relation to the provision of access under this Part”. The ACCC has made such a code in relation to Part 5, entitled, *A Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities* (the **Access Code**).
2. In addition, Part XIC of the *Competition and Consumer Act* establishes a “telecommunications access regime” with the object of promoting the long-term interests of end-users of carriage services. Under s 152AL, carriage services which are “declared services” are required to comply with “standard access obligations”. These require, under s 152AR(3)(a) and s  152AXB(2), that an access provider provide, on request, access to an access seeker.
3. It must be concluded that Pt 3 and Pt 5 of Sch 1 of the Act express a clear intention to allow a carrier to access the facilities of another carrier, including by allowing co-location of facilities, or, in other words, allowing a carrier to install an additional facility in the same location as an original facility already installed by another carrier.

#### Construction of cl 7 of Sch 3 in light of objects and purpose

1. Although Sch 1 of the Act expresses an intention to allow a carrier to install an additional facility in the same location as an original facility already installed by another carrier, it does not *authorise* the second carrier to *install* any facility. The Act leaves the power or authorisation to install facilities to Sch 3.
2. Part 3 and Pt 5 of Sch 1 require the provision of access to a facility or site for the purpose of a second carrier *establishing* its own facilities. Part 3 also requires access for the additional purpose of a second carrier *providing* competitive facilities and carriage services. The achievement of these purposes requires that, in some circumstances, a second carrier must have authority to install its own facility in the same location as the first carrier’s facility without the consent of the landholder, just as there are provisions allowing installation of an original facility without consent of the landholder. There are only two provisions of Sch 3 that may authorise installation of an additional facility without the landholder’s consent: cl 6 and cl 7.
3. Clause 6 stipulates that a carrier may install a facility where the facility is a low-impact facility or the carrier has obtained a facility installation permit. If the facility is a low-impact facility, then a carrier is authorised under cl 6 to install the facility without the landholder’s consent, whether or not that involves co-location with another carrier’s facility. If it is not a low-impact facility, the only mechanism available under cl 6 will be obtaining a facility installation permit. If the State’s construction of cl 7 is correct, there is no other way for a carrier which does not have the landholder’s consent to install a non low-impact facility.
4. A facility installation permit may be granted only in restricted circumstances and involves an onerous process. Under cl 25(2) of Sch 3, the ACMA must hold a public inquiry. Clause 27(1)(a) requires that the telecommunications network to which the facilities relate must be, or be likely to be, of “national significance”. Under cl 27(1)(b), the facilities must be, or be likely to be, an “important part” of that telecommunications network. Clause 27(1)(c)(i) requires that the greater part of the telecommunications network must have already been installed. Under cl 27(1)(d), the advantages likely to be derived from the operation of the facilities must outweigh any form of degradation of the environment. Clause 27(1)(g) requires full consultation with the community where the facility is proposed to be located near a “community sensitive site”.
5. It is evident that a facility installation permit is intended to allow installation of important facilities as part of a nationally significant telecommunications network that has already been substantially installed. It is not intended for telecommunications networks of less than national significance, or for relatively minor parts of a nationally significant telecommunications network, or for a new entrant which has not yet installed any facilities. The process does not appear to be designed to facilitate the co-location of additional facilities with facilities that have already been established under a facility installation permit. What appears to be intended is that once a carrier has gone through the onerous process of obtaining a facility installation permit and installed a facility, other carriers will have access to that facility and be permitted to co-locate their facilities.
6. The issue to be determined is whether a second carrier granted access to an existing facility under Pt 3 and Pt 5 of Sch 1 by a first carrier:

(a) may install its own non low-impact facility *only* by either obtaining a facility installation permit or obtaining the consent of the landholder; or

(b) may install a facility under cl 7(1) and cl 7(3)(e).

1. It may be observed that cl 6 leaves a gap in respect of facilities that fall in between low-impact facilities and those eligible for a facility installation permit. The intended installation of fibre optic cable in the Kidd Bridge conduit may provide an example of such a facility, since it is not a low-impact facility, and it is unclear whether, for example, the fibre optic cable is an “important part” of Optus’ network so as to be eligible for a facility installation permit. Apart from the consent of landholders, the only mechanism that may allow installation of facilities falling into that gap is cl 7.
2. The type of “additional facility” contemplated by cl 7(3)(e) must be one that is not a low-impact facility, since authorisation for a carrier to install a low-impact facility is already provided under cl 6. Further, the type of “additional facility” contemplated by cl 7(3)(e) must be one that is not eligible for a facility installation permit, or unsuited to the onerous process required for a facility installation permit. Therefore, cl 7(3)(e) is intended to partly fill the gap left by cl 6, at the very least for carriers which have already installed a facility under a facility installation permit and wish to install an additional facility.
3. It is of significance that cl 7(3)(e) expressly restricts the installation to “the same location” as the original facility, and requires that, “the conditions specified in subclause (6) are satisfied”. Clause 7(6) imposes conditions designed to ensure that the additional facility will impose no additional detriment to landholders by restricting the combined noise level and requiring that the additional facility be located in a fully enclosed building (which cannot be externally modified), or in a duct, pit, hole, tunnel or underground conduit. Accordingly, the installation of an additional facility will leave no additional external footprint. In these circumstances, there is no apparent reason why the legislative intention would be that the onerous requirements for obtaining a facility installation permit, such as a public inquiry and community consultation, must be met. The restrictions imposed by cl 7(3)(e) and cl 7(6) are inconsistent with any legislative intention that a carrier wishing to install an additional (non low-impact) facility in the same location as an original facility owned by another carrier must do so through a facility installation permit.
4. It may be noted that cl 33(1) of Sch 1 requires a first carrier to provide a second carrier with access to a telecommunications transmission tower, and that cl 32 defines “giving access” to include *replacing* a tower with another tower on the same site. These provisions correspond with cl 7(1) and cl 7(3)(d) of Sch 3 which allow a carrier to *replace* a facility in the original location, where the conditions specified in cl 7(5) are satisfied. Clause 7(5)(b) expressly sets out conditions for replacement of a tower. These provisions are consistent with authorising a second carrier to “maintain” an original facility installed by a first carrier, including by replacing it.
5. Where a facility is neither a low-impact facility nor eligible for a facility installation permit, the only other possible means by which a carrier may install a facility is obtaining the consent of the landholder. The Act contemplates, in cl 6(2) and cl 7(2) of Sch 3, that where landholders are unwilling to consent, the public interest requires that mechanisms must nevertheless be available to authorise carriers to carry out certain installations and maintenance. Otherwise, where consent is withheld, carriers might be unable to provide carriage services; or carriers might decline to agree to unreasonable terms demanded by landholders thereby impeding the availability of carriage services. The object in s 3(1) of the Act of encouraging accessible and affordable carriage services is inconsistent with leaving the consent of the landholder as the only mechanism available for a second carrier to install a non low-impact facility for which a carrier cannot obtain a facility installation permit.
6. The present case provides an example of the control over the supply of carriage services that could be left to landholders if their consent was the only means by which a carrier could install a facility and the potential for detriment to end-users. The State requires Optus to enter a licence agreement as a condition of its consent to the installation of fibre optic cable on the Kidd Bridge. The licence agreement requires Optus to pay an unspecified “licence fee” and to agree to conditions that significantly exceed those set out in Sch 3 and the Code of Practice. If the installation does not proceed, it may be that telecommunications services that would otherwise be provided to Gympie will not be provided.
7. The Explanatory Memorandum is consistent with a construction of cl 7(3)(e) as authorising a second carrier to install an additional facility in the same location as an original facility owned by another carrier, stating in respect of Pt 5 of Sch 1:

A carrier will have rights of access to *another carrier’s site in order to maintain its facilities installed on that site* by reason of the carrier powers provided in Part 1 of Schedule 3.

(Emphasis added.)

1. An explanatory memorandum may be considered in order to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision, taking into account its context in the Act and the purpose or object underlying the Act: s 15AB(1)(a) of the *Acts Interpretation Act*.
2. It can be accepted that if the Act confers authority upon a second carrier to grant access to a first carrier’s facility to install an additional facility in the same location, it does so in a somewhat circuitous way. A free-standing provision dealing with the authority of a second carrier could have been adopted. The Act instead adopts the less specific method of conferring the authority on “a carrier” to “maintain” a facility and then expanding the meaning of “maintenance” to include installing an additional facility in the same location.
3. Nevertheless, Pt 3 and Pt 5 of Sch 1, understood by reference to the main object of the Act and the extrinsic material, make it unmistakeably clear that a second carrier is granted access to a first carrier’s facility for the purpose of allowing the second carrier to install an additional facility in the same location. That purpose corresponds with the language of cl 7(3)(e). Subject to consideration of the State’s arguments, cl 7(1) and cl 7(3)(e) should be construed as authorising a second carrier to install an additional facility in the same location as an original facility installed and owned by another carrier.

#### Consideration of the State’s arguments

1. The arguments made by the State in support of its argument that cl 7(1) and cl 7(3)(e) do not authorise a carrier to install an additional facility in the same location as the original facility, can now be appraised in light of the purposive and other contextual matters that have been discussed.
2. The State relies on *Hurstville City Council v Hutchison 3G Australia Pty Ltd* (2003) 127 LGERA 95; [2003] NSWCA 179 at [69] for a proposition that the power under cl 7 does not allow a carrier to do under the guise of maintenance that which is not permitted under the installation power under cl 6. In *Hurstville*, the respondent proposed to replace a Council-owned light pole with a new light pole upon which a low-impact facility would be installed, maintained and operated. The carrier argued that removal of the existing light pole and replacement with the new pole was “maintenance” of “a facility” within cl 7 of Sch 3.
3. Two of the issues considered in *Hurstville* are presently relevant. The first was whether the carrier was authorised to “maintain” the Council’s light pole under cl 7 by replacing it. President Mason (Handley and McColl JJA agreeing) proceeded to consider the issue upon an assumption that the Council’s light pole was a “facility” for the purposes of cl 7. His Honour held at [59]:

On that assumption, the right conferred by cl 7(1) has significant and sufficient content in relation to facilities which are already owned by the carrier concerned (cf cl 47) or over which the carrier has existing rights sufficient to ground the right of maintenance of what cl 7(3) calls the *original facility*. In other words, cl 7(1) can and in the circumstances should be construed as operating only in situations where the carrier’s maintenance of an original facility would not constitute a trespass or other wrong. To construe cl 7(1) as going beyond this necessarily conjures up the vexing hypothetical situations of a carrier descending upon a publicly or privately owned bridge, steeple or other structure and removing it for the purpose of “repair” or “installation of an additional facility” (cf cl 7(3)(e)).

1. The second issue was whether the Council’s light pole was in fact a “facility” within the definition of that term in s 7 of the Act. As to that issue, Mason P held at [65]-[67] that an existing (non purpose-built) pole, structure or thing upon which a “facility” is placed is not itself a facility. Accordingly, the Council’s light pole was not a “facility”.
2. President Mason at [69] described an additional difficulty with the carrier’s construction of “the maintenance power”:

It enables the respondent by indirect means to achieve something directly addressed and prohibited by Div 3, ie the installation of a tower without passing through any of the gateways offered by cl 6(1) … The respondent submits that this argument is circular. But it is not, if by examination of Divs 3 and 4 together it emerges that Div 4 can be read down so as to avoid driving a horse and cart through the closely controlled gateways in Div 3, as fleshed out by Div 8 with reference to facility installation permits. In my view the argument is not circular.

(Citations omitted.)

1. The issue being considered in *Hurstville* at [65]–[67] was whether a structure on which a facility could be installed was itself an “original facility” which could be replaced by a carrier under cl 7 of Sch 3. The comments made by Mason P in the immediately following paragraphs at [68]–[69] were aimed at the artificial construction of “facility” urged by the carrier, involving regarding a structure like a light pole, bridge or steeple as a “facility” and replacing it with some other “facility” to enable the carrier to bypass cl 6. Those comments were not concerned with, or aimed at, the issue being addressed in this appeal, namely whether the maintenance power in cl 7 allows a carrier to install an additional facility in the same location as something that is undoubtedly a facility already installed by a different carrier. They cannot be regarded as establishing some general proposition that to regard a second carrier installing an additional facility in the same location as an original facility as “maintenance” would impermissibly bypass cl 6. Accordingly, the passage at [69] does not advance the State’s argument.
2. In fact, Mason P’s comment at [59], derived in part from the principle of legality, that, “cl 7(1) can and in the circumstances should be construed as operating only in situations where the carrier’s maintenance of an original facility would not constitute a trespass or other wrong”, is entirely accurate, as will now be discussed.
3. The State argues that if its construction of cl 7(1) is rejected, a second carrier will be authorised to, at any time, alter, remove or replace a facility without the consent of the first carrier which owns the facility. The State argues that such a consequence is inconsistent with the principle of legality and is improbable and unintended.
4. However, the rights of carriers under Sch 3 cannot be considered in isolation from their obligations under Sch 1. The right of a second carrier under cl 7 to “maintain” a facility must be construed in the context of constraints upon that right contemplated under Sch 1. As has been discussed, cll 17, 33(1), 34(1) and 35(1) of Sch 1 require a first carrier to give a second carrier access to its facility for the purposes of enabling the second carrier to provide competitive facilities and competitive carriage services, or to establish its own facilities. Clause 18 and cl 36 require that the terms and conditions of access to facilities are to be agreed by carriers or, failing agreement, are to be determined by an arbitrator or the ACCC. The terms and conditions of access that are contemplated must include clauses restricting interference with the other carrier’s facilities, including for the purposes of “maintenance” under cl 7.
5. It may be observed that the ACCC’s Access Code contains standard conditions for Pt 5 of Sch 1, which may be displaced by agreement. Clause 4.2 requires the first and second carrier to make reasonable endeavours to negotiate a “Master Access Agreement” making provision for, inter alia, their respective rights and obligations in relation to physical access to eligible facilities, including what work should be carried out. Clause 5.1(3) states that carriers are responsible for the maintenance of their respective equipment. Clause 5.2 allows a carrier to undertake emergency work upon the other carrier’s equipment. Clause 5.4 provides that a carrier must not otherwise do anything which causes interference or materially obstructs, interrupts or impedes the continuous use or operation of any equipment of another carrier. That is not to suggest that the Access Code can be used to interpret provisions of the Act, but to note that these are amongst the kinds of terms and conditions that must be contemplated under cl 18 and cl 36 of Sch 1.
6. Clause 47 of Sch 3 of the Act provides in effect that, unless the circumstances indicate otherwise, a facility installed by a carrier remains the property of the carrier. An agreement between first and second carriers or a determination under Sch 1 allows the second carrier to avoid a trespass. The right of a carrier under cl 7 to “maintain” another carrier’s co-located facility must be understood to be confined by the terms of the agreement between carriers or the determination by an arbitrator or the ACCC. A carrier may only interfere with the facility of another carrier under the maintenance power in cl 7 where that inference is authorised under the agreement between carriers or determination. In other words, a carrier’s authority to maintain a facility does not extend to a trespass upon the facility of another carrier: cf. *Hurstville* at [59].
7. Accordingly, the State’s argument that the principle of legality requires that cl 7 should not be construed as allowing one carrier to trespass upon the facility of another should be accepted. Since the right of a carrier to “maintain” a facility under cl 7 should be understood as subject to restrictions imposed by an agreement or determination, the State’s argument that Optus’ construction of cl 7 means that a carrier may alter, remove or replace a facility owned by another carrier without the owner’s consent falls away.
8. The second aspect of the State’s argument relying on the principle of legality is that cl 7 does not authorise a second carrier to engage in what would otherwise be trespass to land by installing an additional facility. The State argues that such an activity would involve abrogation or curtailment of the fundamental right of a landholder to exclude others and would require a clear intention expressed in unmistakable, unambiguous and specific language.
9. In *Telstra Corporation Ltd v Hurstville City Council* (2002) 118 FCR 198, Sundberg and Finkelstein JJ observed at [23]:

This survey of Sch 3 shows that one of its objects is to make lawful the conduct of a carrier when engaged in the activities described in Divs 2, 3 and 4 that might otherwise be unlawful, either because of a provision of a State or Territory statute, such as a local government statute, or because of a rule of the common law, for example, trespass or nuisance.

1. There is no doubt that cl 7 abrogates or curtails the right of landholders to exclude carriers who have already installed a facility on the land. Clause 7(2) clearly authorises such carriers to do anything necessary or desirable for the purpose of exercising powers to “maintain” their facility, including entering on, and occupying, land. Such a carrier is also authorised under cl 7(3)(e) to install an additional facility in the same location. Accordingly, the issue to be determined is not *whether* carriers are authorised to engage in what would otherwise be trespass by installing an additional facility upon land, but *which* carriers have that authority. In particular, is the authority restricted to the carrier which installed the facility, or does it extend to other carriers? That issue does not involve the fact of curtailment of landholders’ common law rights, but the *extent* of that curtailment.
2. The principle of legality certainly has application in determining the limits of the intended interference with a landholder’s property rights, but, as Gleeson CJ observed in *Electrolux Home Products Pty Ltd v Australian Workers’ Union* (2004) 221 CLR 309 at [19], “The assistance to be gained from a presumption will vary with the context in which it is applied”. Since cl 7, although expressed in general language, clearly manifests an intention that a fundamental right will be curtailed, the presumption has less force in identifying the circumstances in which interference with that right is permitted. That is particularly so where a narrow construction would be inconsistent with the main purpose of the Act, while a wider construction would cause little or no additional detriment for landholders.
3. In considering whether cl 7(3)(e) should be construed as allowing, not just a first carrier, but also a second carrier, to install an additional facility, the extent of any additional impingement upon the rights and amenity of the landholder is relevant. As has been discussed, cl 7(3)(e) and cl 7(6) limit the detriment that will be caused to a landholder by imposing restrictions upon the location and nature of the additional facility. Clause 7(3)(e) restricts an additional facility to “the same location” as the original facility, while cl 7(6) imposes conditions ensuring that the additional facility will not add any visible or audible footprint. Accordingly, whether installed by a first carrier or second carrier, the additional facility itself will not create any additional burden upon the land and the amenity of the landholder. To the extent that the installation of the original facility involves acquisition of land, the landholder will already have been paid compensation by the first carrier under cl 62(1) of Sch 3.
4. It may be observed that the conditions imposed by Div 5 of Sch 3 upon the carrying out of authorised activities under Divs 2, 3 and 4 to protect the interests of landholders would apply as much to a second carrier as to a first carrier. Examples of such provisions are cl 8 (“a carrier” must cause as little detriment and inconvenience and do as little damage as practicable), cl 9 (“a carrier” must restore land), and cl 17 (“a carrier” must give notice to an owner and occupier of its intention to engage in an activity). In addition, the obligation under cl 42 (to pay compensation for loss or damage) applies to “a carrier”. Further, although the State argues that cl 11 (“a carrier must make reasonable efforts to enter into an agreement with a public utility”) would have no work to do under Optus’ construction, that cannot be so because cl 11 expressly makes a carrier’s engagement in an activity under Div 4 subject to making reasonable efforts to enter into an agreement with the relevant public utility. Therefore, there are protections that apply equally to the activities of a second carrier under the maintenance power in cl 7(1) and cl 7(3)(e) as to a first carrier.
5. The State submits that Optus’ construction of cl 7 of Sch 3 could produce the consequence of the State having to pay Optus (as owner of the additional fibre optic cables) should maintenance of the bridge require their relocation because there is no provision in the Act allowing a landholder to relocate a facility without the consent of the carrier. That is true, but the absence of legislative authority for a landholder to relocate a facility without the consent of the carrier applies equally in respect of a low-impact facility installed by any carrier and an original facility installed by the first carrier. If there is a deficiency in the legislative scheme in this regard, it is not one that affects the present issue of construction. The answer for the landholder may lie in negotiating an agreement with the first carrier to require a second carrier to allow the landholder to relocate any additional facility (negotiation with a first carrier is contemplated under cl 27(1)(e) and cl 27(2)(a)). It may also be noted that cl 11 may apply in this particular case as the primary judge found that the DTMR is a “public utility”, and that finding has not been challenged.
6. The State submits that the general power under cl 7 of Sch 3 cannot be used to install a facility when that power is specifically conferred under cl 6, relying on the principle from *Anthony Hordern & Sons Ltd v Amalgamated Clothing & Allied Trades Union of Australia* (1932) 47 CLR 1. In that case, Gavan Duffy CJ and Dixon J held at 7:

When the Legislature explicitly gives a power by a particular provision which prescribes the mode in which it shall be exercised and the conditions and restrictions which must be observed, it excludes the operation of general expressions in the same instrument which might otherwise have been relied upon for the same power.

1. In *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566, Gummow and Hayne JJ explained at [59] that, for the *Anthony Hordern* principle to apply:

it must be possible to say that the statute in question confers only one power to take the relevant action, necessitating the confinement of the generality of another apparently applicable power by reference to the restrictions in the former power.

1. Their Honours rejected the application of the principle to the statutory provisions considered in that case, holding at [61] that, “the two powers do not deal with the same subject matter”.
2. It is unclear where the State’s submission leads. If accepted, it would mean that even a carrier which had already installed an original facility could not use the power under cl 7(3)(e) to install an additional facility in the same location. That is an untenable construction which would leave the provision with no work to do.
3. In any event, cl 6 and cl 7(3)(e) cover different subject matters. As has been discussed, while cl 6 allows installation of low-impact facilities and facilities authorised under a facility installation permit, cl 7(3)(e), taken with cl 7(1), is intended to allow installation of non low-impact facilities and those ineligible for a facility installation permit or unsuited to the process of applying for such a permit. Clause 7(3)(e) is intended to authorise the installation of an additional facility which will not add to the audible or visible footprint of an original facility. The *Anthony Hordern* principle has no application in this case.
4. Schedule 1 and Sch 3 are part of a cohesive scheme designed to allow and encourage co-location of facilities to promote the main object of the Act. As Gageler J observed in *R v Independent Broad-Based Anti-Corruption Commissioner* (2016) 256 CLR 459 at [77]:

any common law principle or presumption of interpretation must surely have reached the limit of its operation where its application to read down legislation plain on its face would frustrate an object of that legislation or render means by which the legislation sets out to achieve that object inoperative or nonsensical.

(Citations omitted.)

1. To read cl 7 as not authorising a carrier to install another facility in the same location as an original facility already installed by a different carrier would frustrate the legislative scheme for co-location of facilities. It would mean that a second carrier unable to obtain the consent of a landholder would have no ability to install an additional facility which is not a low-impact facility and is not eligible for a facility installation permit. That will be so even though the additional facility will cause little or no additional detriment to the landholder.
2. Since cl 7 clearly authorises a carrier which has already installed a facility to engage in what would otherwise be a trespass by maintaining the facility, including by installing another facility in the same location, it is not a large step to construe the provision as also authorising such an installation by another carrier. That construction is consistent with Sch 1 requiring a first carrier to grant a second carrier access to its facility, and allowing the installation of another facility in the same location, in pursuit of the main object of the Act. It is consistent with the object in s 152AB(2) of Pt XIC of the *Competition and Consumer Act* of encouraging the economically efficient use of telecommunications infrastructure. It is consistent with cl 7(3)(e) limiting the location and nature of an additional facility such that the facility causes no additional loss of amenity to the landholder. It is also consistent with the Explanatory Memorandum for the Telecommunications Billwhich states that a carrier will have, “rights of access to another carrier’s site in order to maintain its facilities installed on that site”.
3. The provisions of Sch 1 and Sch 3 considered as a whole satisfy the description given by Gageler and Keane JJ in *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 at [314] of legislation where:

the objects or terms or context of legislation make plain that the legislature has directed its attention to the question of the abrogation or curtailment of the right, freedom or immunity in question and has made a legislative determination that the right, freedom or immunity is to be abrogated or curtailed.

1. When the statutory scheme is considered as a whole, it is apparent that cl 7(3)(e) authorises what would otherwise be a trespass to land by permitting a second carrier to install another facility in the same location as an original facility installed by a different carrier without the consent of the landholder.

#### Summary of conclusions in respect of Ground 1

1. The necessity to collect, analyse and synthesise many aspects of the statutory scheme has meant that these reasons have been expressed in a somewhat discursive manner. I will draw the threads together in a summary of my conclusions.
2. Clause 7(1) of Sch 3 of the Act, which provides that, “A carrier may, at any time, maintain a facility”, must be construed as authorising a carrier to maintain a facility installed and owned by another carrier. Such authorisation is subject to the second carrier reaching an agreement with the first carrier or obtaining a determination under cl 18 and cl 36 of Sch 1. It is also subject to compliance with other provisions of Sch 3, such as cl 11.
3. When cl 7(1) is read with cl 7(3)(e), a carrier is authorised to install an additional facility in the same location as an original facility installed by another carrier, where the conditions in cl 7(6) are satisfied.
4. Where a carrier has authorisation under cl 7(1) to “maintain” a facility, cl 7(2) authorises the carrier to do anything necessary or desirable for the purpose of maintaining the facility, including entering on, and occupying, land. Where cl 7(3) applies, that authorisation includes entering and occupying land for the purpose of installing an additional facility. The consent of the landholder is not required.
5. The TIO was correct to conclude that Optus, having obtained the agreement of NBN Co to install fibre optic cable in the conduit on the Kidd Bridge, was authorised by cl 7(1) and cl 7(3)(e) to do so without the consent of the State. The primary judge was correct to uphold the TIO’s conclusion.
6. Accordingly, I consider that the State’s first ground of appeal should be rejected.

### Ground 2: Whether failure to comply with cl 11 of Sch 3 is a ground of objection under s 6.29 of the Code of Practice

1. The State’s second ground asserts that the primary judge erred in construing cl 11 of Sch 3 of the Act, and s 6.29 of the Code of Practice, in finding that a failure of a carrier to make reasonable efforts to enter into an agreement with a public utility is not a ground of objection to the TIO.
2. Section 6.28 of the Code of Practice allows the owner or occupier of land to object to a maintenance activity proposed to be conducted by a carrier. The grounds on which an objection may be made are set out in s 6.29.
3. On 24 July 2020, Optus gave the DTMR notice that it intended to carry out “maintenance” by installing fibre optic cable within the existing conduit attached to the Kidd Bridge. The DTMR objected. The reasons for objection expressed in the DTMR’s letters of 30 July and 17 August 2020 included that Optus had not made any efforts to enter an agreement with the DTMR as required under cl 11 of Sch 3 and that Optus’ proposal did not minimise detriment and inconvenience to the DTMR’s operation of the bridge (the latter reflecting s 6.29(e) of the Code of Practice). The objection was referred to the TIO.
4. The TIO treated the DTMR’s complaint about non-compliance with cl 11 as purporting to be a free-standing reason for objection, as well as being part of an objection based upon s 6.29(e) of the Code of Practice. That is evident from the following passages:

I am not satisfied the Department's concerns about Optus' proposal to minimise detriment, inconvenience, and damage is substantiated. This is because I am satisfied Optus has adequately addressed the Department's concerns in its response and through Optus fulfilling its obligations under the Act and the Code.

Under this ground, the objector is required to identify a specific concern about detriment, inconvenience, or damage to the land which has not otherwise been addressed.

The Department says Optus could have limited detriment by entering into a License agreement or offering to indemnify the Department against any future costs associated with the cable. The Department says the proposed installation will affect its operations, and as a result Optus must make reasonable efforts to enter into an agreement for the installation under clause 11 of Schedule 3 of the Act.

Clause 11 says that if the installation or maintenance of a low impact facility is likely to affect the operation of a public utility, a carrier must make reasonable efforts to enter into an agreement with the public utility. However, clause 11 is not a basis for objecting to the proposed activity.

1. The TIO concluded that a contravention of cl 11 of Sch 3 is not a basis for objection under s 6.29 of the Code of Practice. In view of that conclusion, the TIO did not make any ruling upon that complaint, inferentially on the basis that to do so would be beyond her functions and powers.
2. The primary judge considered it likely that the DTMR was a “public utility” within cl 11 of Sch 3 and proceeded upon the assumption that it was. Her Honour considered that a contravention of cl 11 was not a reason for objection within s 6.29, as the language of cl 11 of Sch 3 and the grounds of objection under s 6.29 are quite different, and there is no direct link between those provisions. Her Honour upheld this aspect of the TIO’s decision.
3. The State submits that the main purpose of the licence agreement proposed by the State was for Optus to agree to relocate its cables at its own cost for the purposes of maintenance of the bridge. The State contends that there was therefore a direct connection between the obligation on Optus under cl 11 and the detriment and inconvenience to which the Kidd Bridge would be exposed because of the proposed work. The State submits that if a failure to comply with cl 11 is outside the scope of s 6.29(e), an objector is left without a remedy and that this could not be intended. The State also submits that the objection process in the legislation is beneficial to an objector whose rights are interfered with and ought to be read beneficially.
4. Optus submits that the ground of objection in s 6.29(e) of the Code of Practice does not address non-compliance with cl 11 of Sch 3. Optus submits that such non-compliance could, in an appropriate case, be susceptible to judicial remedies.
5. It is necessary to consider the scheme of the Code of Practice and the functions and powers it confers upon the TIO.
6. The Code of Practice was made pursuant to cl 15 of Sch 3. Clause 15 provides, relevantly:

**15 Conditions specified in a Ministerial Code of Practice**

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

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

…

1. Chapter 6 of the Code of Practice deals with maintenance of facilities, and consists of five Parts. In Pt 1, s 6.1(1) provides, relevantly, that if a carrier engages, or proposes to engage, in a maintenance activity, the carrier must comply with the conditions set out in the Code of Practice. Section 6.1(2) states that Pt 2 and Div 2 of Pt 5, “set out some of the carrier conditions in the Act, in simplified form, to assist the reader of the Code”. Section 6.1(3) describes Pt 3 and Pt 4, and the other Divisions of Pt 5, as setting out “the Code conditions”.
2. Part 2 of Ch 6 is stated to be provided “for information only”. Within that Part, a number of clauses of Sch 3 of the Act are substantially reproduced, rewritten or paraphrased. The purpose of Pt 2 seems to be to assist readers by collecting all the relevant obligations of carriers in a single document.
3. Within Pt 2, s 6.6 substantially reproduces cl 11 of Sch 3 of the Act. Clause 11 provides:

**11 Agreements with public utilities**

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

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

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

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

1. Also within Pt 2, s 6.9(1) of the Code of Practice paraphrases cl 19(1) of Sch 3 of the Act, which provides, relevantly, that a carrier must give written notice of its intention to install a facility on, over, or under a bridge to the authority responsible for the care and management of the bridge.
2. Part 5 of Ch 6 of the Code of Practice (ss 6.20–6.36) is entitled, “General notification arrangements and objections to maintenance activities”. The provisions in Div 3 (ss 6.25–6.27), Div 4 (ss 6.28–6.33) and Div 5 (ss 6.34–6.36) of Pt 5 are among those described in s 6.1(3) as “the Code conditions”. By reference to s 6.1(1), “the Code conditions” are conditions established by the Code of Practice with which a carrier engaging, or proposing to engage, in a maintenance activity must comply.
3. Within Div 2 of Pt 5, which is also, “for information only”, s 6.22 substantially repeats cl 17 of Sch 3, which requires a carrier to give written notice of its intention to carry out a maintenance activity to the owner and occupier of the land.
4. Division 4 of Pt 5 is entitled, “Objection made to carrier”. Section 6.28(1) provides that, “If the carrier gives notice to an owner or occupier of land of its intention to engage in a maintenance activity, the owner or occupier (the ***objector***) may give the carrier a written objection to the activity”. Under s 6.28(2), the objection, “must include the reasons for objection”.
5. Section 6.29 of the Code of Practice provides:

**6.29 Reasons for objection**

The reasons for the objection may relate only to all or any of the following matters:

(a) using the objector’s land to engage in the activity;

(b) the location of a facility on the objector’s land;

(c) the date when the carrier proposes to start the activity, engage in it or stop it;

(d) the likely effect of the activity on the objector’s land;

(e) the carrier’s proposals to minimise detriment and inconvenience, and to do as little damage as practicable, to the objector’s land.

Note The carrier is required to take all reasonable steps to ensure that the carrier causes as little detriment and inconvenience, and does as little damage, as practicable in engaging in the activity: see Act, Schedule 3, clause 8.

1. Division 5 of Pt 5 is entitled, “Objection made to Telecommunications Industry Ombudsman”. Section 6.35(1) provides that, “the objector may ask the carrier, in writing, to refer the objection to the [TIO]”. Under s 6.35(2), the carrier is required to comply with the request.
2. Section 6.36 of the Code of Practice provides:

**6.36 Compliance with directions of Telecommunications Industry Ombudsman**

(1) Subject to this section, if the Telecommunications Industry Ombudsman gives a direction to the carrier about the way in which the carrier should engage in the maintenance activity, the carrier must comply with the direction.

(2) This section applies only if the objection which is the subject of the direction comes, in whole or in part, within the jurisdiction of the Telecommunications Industry Ombudsman.

(Notes omitted.)

1. It is not entirely clear what is meant in s 6.36 by “the jurisdiction” of the TIO, but it must at least refer to the functions and powers conferred on the TIO under the Code of Practice. Those functions and powers are not expressly described in the Code of Practice but can be inferred to include: considering objections made in accordance with s 6.28 and s 6.29; determining whether, in light of those objections, directions should be given to carriers about the way in which they should engage in the relevant maintenance activity; and giving any directions. The “jurisdiction” of the TIO cannot be understood to include considering and determining objections which fall outside the scope of s 6.29.
2. The State’s submissions seem to conflate two issues. The first is whether a failure to comply with cl 11 of Sch 3 is of itself a reason, or ground, for objection. The second is whether a failure to comply with cl 11 may be relevant to consideration of an objection under s 6.29(e) of the Code of Practice. It is better to consider these issues separately.
3. It is convenient to deal with the second issue first. Section 6.29(e) of the Code of Practice states that a reason for objection may relate to, “the carrier’s proposals to minimise detriment and inconvenience, and to do as little damage as practicable, to the objector’s land”. The note to s 6.29(e) suggests that this reason for objection is taken from cl 8 of Sch 3. However, the reason for objection stated under s 6.29(e) of the Code of Practice is more confined than the obligation of a carrier under cl 8.
4. Clause 8 of Sch 3 provides:

**8 Carrier to do as little damage as practicable**

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

1. The reasons for objection under s 6.29 of the Code of Practice are confined to detriment, inconvenience and damage, “to the objector’s land”. In contrast, cl 8 is not restricted to the objector or to land, but extends to detriment, inconvenience and damage generally.
2. There is some awkwardness in the expression of s 6.29(e) as relating to proposals to, “minimise detriment and inconvenience, and to do as little damage as practicable, to the objector’s land”, since there cannot be inconvenience to land but only to persons or other entities. The provision should be understood as concerned with detriment and damage to land and inconvenience to the owner or occupier in respect of their enjoyment and use of the land.
3. In some cases, the land affected by a maintenance activity may be owned or occupied by a public utility, and the public utility may be caused inconvenience in its operations or functions by that activity. In such cases, there may be a connection between a failure of a carrier to make reasonable efforts under cl 11 of Sch 3 to enter into an agreement with a public utility and an objection under s 6.29(e) relating to inadequacy of the carrier’s proposals to minimise inconvenience to the public utility in its use of the land. Accordingly, a failure or refusal of a carrier to enter into an agreement under cl 11 may inform the TIO’s consideration of the adequacy of its proposals to minimise inconvenience.
4. In this case, the TIO’s reasons make it plain that the TIO understood the State’s assertion that Optus’ failure or refusal to enter an agreement under cl 11 was relevant to consideration of s 6.29(e) of the Code of Practice. The TIO noted that the DTMR claimed that the proposed installation would affect its operations in the event that it needed to move the cable, and that Optus could have limited any detriment by entering into a licence agreement under cl 11 or by offering to indemnify the DTMR against any future costs associated with the cable. The TIO was satisfied that Optus had adequately addressed the DTMR’s concerns in its response and through the necessity for Optus to fulfil its obligations under the Act.
5. The State seems to submit that the TIO either regarded as irrelevant the State’s argument that Optus’ failure to comply with cl 11 affected the TIO’s consideration of s 6.29(e), or failed to consider that argument. In either case, the State’s argument cannot be accepted. The State’s argument was considered and was not rejected as irrelevant.
6. The second issue is the State’s assertion that a failure of a carrier to make reasonable efforts to enter into an agreement with a public utility in contravention of cl 11 of Sch 3 is itself a ground of objection. Clause 11 imposes an obligation on a carrier to make reasonable efforts to enter into an agreement with a public utility that makes provision for the manner in which the carrier will engage in an activity that is likely to affect the operations of the public utility.
7. Section 6.29 of the Code of Practice specifically sets out five reasons, or grounds, for objection. These are the only reasons for objection that may be advanced. Those reasons do not expressly include a contravention of cl 11 of Sch 3. It is therefore necessary to examine whether such a reason may be implied or otherwise encompassed within the five expressed reasons.
8. Only two of the five expressly-stated reasons for objection, s 6.29(d) and s 6.29(e), relate specifically to an obligation imposed upon a carrier under Sch 3, namely the obligation under cl 8 to take all reasonable steps to ensure that the carrier causes as little detriment and inconvenience, and does as little damage, as is practicable. While cl 8 is specifically referenced in the note appearing beneath s 6.29(e), cl 11 is not.
9. However, cl 11 is substantially reproduced in s 6.6 of Pt 2, Ch 6, “for information only”. Section 6.1(3) distinguishes between provisions such as s 6.6 which are included, “to assist the reader of the Code”, and the “Code conditions”, which are substantive provisions creating rights and obligations. The fact that cl 11 is a provision specifically included in the former category but omitted from mention as part of the latter indicates that a contravention of cl 11 is not, of itself, reason for objection.
10. Contrary to the State’s submission, if an objection may not be made on the basis of a contravention of cl 11 of Sch 3, that does not leave the owner or occupier of land without a remedy. The remedy is to seek injunctive or other relief from a court.
11. The second ground of appeal must be rejected.

### Ground 3: Whether the TIO erred in finding that the objector has an onus of identifying an alternative location for an installation of a facility

1. The State’s third ground asserts that the primary judge erred in finding that the statutory scheme places upon an objector the onus of identifying an alternative location for the work of a carrier.
2. In the course of considering the DTMR’s objection based in s 6.29(b) of the Code of Practice, relating to the location of a facility on the objector’s land, the TIO stated:

I am not satisfied the Department has substantiated its objection to the location of the activity on the land.

This ground of objection is narrow and there are limited circumstances in which an objector can rely on it. To meet this objection, the objector is expected to point out an alternative location on its land the carrier could use.

Optus proposes to install the cable inside existing NBN conduit on the bridge. The Department says the conduit is cut into brackets supporting a water pipeline and installing additional cable would make replacing the water pipeline more expensive and inconvenient.

However, the Department has not identified an alternative location on its land for Optus to use.

1. The State submitted before the primary judge that it was an error of law for the TIO to impose a requirement or expectation on the objector to identify an alternative route. The primary judge considered that it was unnecessary to make any conclusive determination concerning which party bears an onus in respect of s 6.29(b) of the Code of Practice. Her Honour considered that as the intended activity involved maintenance by installation of fibre optic cable entirely inside the existing conduit, the question of whether the activity could be conducted at an alternative location on the bridge was irrelevant.
2. The State submits that for the TIO to impose the requirement of an “expectation” on the objector to identify an alternative route was an error of law. The State also submits that the primary judge’s view that it was not necessary to make any conclusive findings in respect of the onus, constitutes an error of law. The State argues that the effect of her Honour’s reasons is that once a proposed activity fell within the scope of either cll 5, 6 or 7 of Sch 3, there was no basis for the TIO to consider objections based on s 6.29 of the Code of Practice.
3. The State’s submissions fundamentally misunderstand several aspects of the decisions of the TIO and the primary judge.
4. The third ground asserts that the primary judge erred in finding that the statutory scheme places upon an objector the onus of identifying an alternative location for the work of a proponent carrier. However, her Honour made no such finding.
5. Instead, her Honour found that it was unnecessary to determine any such issue. The reason or ground of objection under s 6.29(b) of the Code of Practice relates to the location of a facility on the objector’s land. The ground is concerned with whether there is another location on the objector’s land which may be a more suitable location for the facility. In this case, there was only one possible location on the State’s bridge for Optus’ fibre optic cable, namely within the conduit already installed by NBN Co. There was simply no suggestion that Optus might instead install fibre optic cable at a different location on the bridge. The primary judge considered it unnecessary to determine any question of whether the TIO erred in finding that the objector carried an onus to demonstrate an alternative location because no question of any alternative location arose. Her Honour’s view was correct.
6. The State has also misunderstood the TIO as deciding that there is a legal onus under s 6.29(b) of the Code of Practice to demonstrate an alternative location on the land for the intended facility. The TIO made no such finding. The TIO was merely stating that which is obvious from the reason for objection itself. After a carrier notifies the owner and occupier of land of the proposed installation, the owner or occupier may make an objection for any of the five reasons in s 6.29. Section 6.29(b) is concerned with whether there is another location on the objector’s land which may be more suitable or convenient for the facility. If the objector makes an objection on that basis, it can naturally be expected that the objector has some other location on their land in mind which the objector considers to be preferable. The TIO was saying no more than that there was no basis for upholding an objection under s 6.29(b) as the DTMR had not suggested there was some alternative to the location of Optus’ fibre optic cable in NBN Co’s conduit. The TIO was not purporting to insert any concept of onus of proof into the administrative decision required to be made.
7. The State’s third ground cannot succeed.

## Conclusion

1. In my opinion, the State has not established any of its grounds of appeal.
2. Accordingly, I consider that the appeal should be dismissed with costs.

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| I certify that the preceding two hundred and sixteen (216) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Rangiah. |

Associate:

Dated: 16 September 2022