

Departmental Disclosure Statement

Telecommunications (Property Access and Other Matters) Bill

The departmental disclosure statement for a government Bill seeks to bring together in one place a range of information to support and enhance the Parliamentary and public scrutiny of that Bill.

It identifies:

- the general policy intent of the Bill and other background policy material;
- some of the key quality assurance products and processes used to develop and test the content of the Bill;
- the presence of certain significant powers or features in the Bill that might be of particular Parliamentary or public interest and warrant an explanation.

This disclosure statement was prepared by the Ministry of Business, Innovation and Employment.

The Ministry of Business, Innovation and Employment certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

13 June 2016

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Part One: General Policy Statement

Objective

The Bill seeks to reduce compliance costs for Telecommunications Development Levy (TDL) payers by addressing identified issues with the liability allocation process.

Approach taken

The Bill makes the following changes to the liability allocation process:

- the Bill will allow prospective liable persons to select their chosen financial year end date rather than mandating the year-ending-30-June format:
- the Bill will update terminology by replacing the term “consolidated statement of financial performance” with “group financial statement”:
- the Bill will amend the requirements to provide financial statements, so that group financial statements will be required only where they are already required under other legislation:
- the Bill will change the default audit and assurance standards for required financial information and provide the Commerce Commission with flexibility to depart from these standards where appropriate:
- the Bill will repeal the provision in the Act that prevents the finalisation of the Telecommunications Service Obligation (TSO) cost calculation for a given financial year before the final TDL liability allocation determination is finalised.

Justification for approach taken

These are minor technical changes that will reduce compliance costs for the telecommunications industry and preserve the integrity of the liability allocation system without compromising the purpose of the TDL.

Property access for next generation telecommunications networks

Objective

The Bill aims to allow more people to have the benefits of a fibre connection while also reducing the time taken to obtain the consent of all parties who have an interest in the property that a fibre connection needs to occupy, such as shared driveways or the common areas of multi-unit complexes.

Approach taken

The Bill implements a tiered consenting regime where a fibre installation method can be prescribed as one of 2 new categories according to the impact that method is deemed to have on property that multiple parties have an interest in. Category 1 installations will have no substantial enduring impacts on shared property. Those installations will be able to proceed by right provided that no fewer than 5 working days’ notice has been provided to all interested parties.

Category 2 installations will be those that have a greater level of impact, but where the impacts are still considered justifiable in support of the mass market roll-out of a next generation telecommunications network. Those methods will be subject to a deemed consent regime whereby an interested party will be provided with a high-level design plan of what is proposed, and, if no objections are received on specified grounds within 15 working days, the installation can go ahead by right.

Where the property in which multiple parties have an interest is overseen by a governing body, such as unit title or company share properties, category 1 installations will not apply. For those

premises, only category 2 will be relevant. The Bill does not change the decision-making structures within those developments. The authority to make decisions, as established by company constitution or by default through legislation, will continue to apply. However, the Bill will overlay a maximum time frame for considering a request of 15 working days from the date that the design plan for a building has been submitted.

Any installation method not prescribed as category 1 or category 2 will be subject to current requirements.

The Bill recognises that where multiple parties have an interest in property, problems similar to those that arise with the initial installation can manifest when re-entering the property for maintenance purposes. The Bill provides a statutory right of access for network operators to revisit fibre infrastructure that they own in instances where the consent of 1 or more parties was required for the initial installation.

The Bill replaces the existing regime for access to multi-unit complexes to which fibre-to-the-premises is to be deployed. There are 3 primary differences between the new regime and the existing regime, which are that:

- the new regime applies to a wider range of property types, taking in those where there is scope to improve the process of obtaining consent such as where driveways are shared or properties occupy land subject to a cross lease;
- the new regime better takes account of the physical impacts of installing fibre and excludes the methods considered to be too invasive for a right to be given for their use;
- the new regime results in a more efficient process because the number of notices that service providers and network operators are required to serve on affected persons is reduced from two to one and there is no precondition that the service provider or network operator has exhausted all reasonable attempts to negotiate access before the statutory right of access can be used.

The Bill establishes an alternative disputes resolution process modelled on the one already in place in respect of the electricity and gas industries. This will ensure that any grievances that may arise as a consequence of a more streamlined access regime may be resolved fairly and efficiently.

Justification for approach taken

Providing 2 new classes of installation ensures that the installation methods that the majority of people are expected to find reasonable are permitted, while retaining degrees of protection against more invasive methods. The framework has been designed to find the right balance between respecting property rights and the efficient roll-out of infrastructure that is in the national interest.

The approach taken will reduce the frustrations experienced by the many New Zealanders who are seeking fibre and the companies who are installing fibre. Quantifying exactly how many households and businesses will benefit from the Bill is challenging because the mix of installation methods used across the country varies based on terrain, local authority planning rules, and the preferences and technological capability of companies undertaking this work. Noting this caveat, it is estimated that around one-third of all installations in residential driveways will fall under category 1, about a half will be category 2, and the approximately 20% remaining will be subject to the status quo.

Regulatory requirements for the Ultra-fast Broadband extension programme

Objective

The intent is to extend the regulatory requirements relating to the Ultra-fast Broadband programme. There are 3 primary objectives, which are:

- to ensure that any partner selected for the Ultra-fast Broadband extension programme abides by the same open access undertakings as the partners participating in the original Ultra-fast Broadband programme, so as to align with tele-communications regulation generally and bring benefits to retail service providers and end users:
- to ensure that any partner selected for the Ultra-fast Broadband extension programme is obliged to provide the same information on their network costs and characteristics to the Commerce Commission annually as partners participating in the original programme:
- to mirror the Commerce Act 1986 authorisations implemented for the original Ultra-fast Broadband programme, which would remove a barrier to Chorus participating in the extension programme should it be a successful bidder in the tender process.

Approach taken

The Bill amends the definition of UFB initiative to also include the Ultra-fast Broadband extension programme. This definition change flows through to the definition of UFB partner and consequently LFC. Those definition changes mean that participants in the Ultra-fast Broadband extension programme will be subject to the existing provisions in the Telecommunications Act 2001 that require open access deeds of undertaking and information disclosure.

The Bill includes a new provision granting a Commerce Act 1986 authorisation to any contract, arrangement, or understanding between the Crown and Chorus that would be required should negotiations lead to Chorus Limited being selected as a partner in a particular region for the Ultra-fast Broadband extension programme. This does not presuppose Chorus' selection; rather it is to ensure that the Government has all options available to it when approaching negotiations for the UFB2 programme.

Justification for approach taken

The approach is consistent with what Parliament has already enacted for the original Ultra-fast Broadband programme, which has proven to be successful in managing open access, information disclosure, and the statutory authorisations for that programme.

By limiting changes to the definition of UFB initiative, the policy objective can be achieved with very minimal legislative amendment and consequent risk of unforeseen outcomes. The statutory authorisation has been drafted specifically to be limited to a particular circumstance, again consistent with the approach of the UFB programme.

Part Two: Background Material and Policy Information

Published reviews or evaluations

2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this Bill?	NO
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Relevant international treaties

2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?	NO
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Regulatory impact analysis

2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?	YES
<p>RIS 1: Land Access for Telecommunications to support the deployment of Ultra-Fast Broadband. MBIE, 3 March 2016 Information supplied by Northpower Fibre Limited relating to the costs of obtaining easements across private property is withheld as it is commercially confidential. As this information pertains to a proposal canvased in the Regulatory Impact Statement but not progressed in the Bill there are no public interest considerations that would require its release. The Regulatory Impact Statement can be found at the following link: http://www.mbie.govt.nz/publications-research/publications/telecommunications/ris-land-access-for-telecommunications-to-support-deployment-of-ufb.pdf</p> <p>RIS 2: Improvements to the allocation of Telecommunications Development Levy Liability Treasury's Regulatory Impact Analysis team determined that the TDL changes are sufficiently minor to be exempt from the need for an RIA.</p> <p>RIS 3: Amendments to the Telecommunications Act 2001 to support the extension of Ultra-Fast Broadband MBIE, 18 August 2015 Some information from Chorus is withheld as it is commercially confidential. Public release of this information would be likely to harm the commercial position of Chorus. This is not outweighed by public interest considerations. This RIS was not required to be assessed by Treasury, and was assessed by MBIE. The Regulatory Impact Statement can be found at the following link: http://www.mbie.govt.nz/publications-research/publications/telecommunications/ris-amendments-to-telecommunications-act-to-support-extension-of-ufb.pdf</p>	
2.3.1. If so, did the RIA Team in the Treasury provide an independent opinion on the quality of any of these regulatory impact statements?	YES for RIS 1. NO for RIS 2 and 3.

RIS 1: Land Access for Telecommunications to support the deployment of Ultra-Fast Broadband

"The Regulatory Impact Analysis (RIA) requirements apply to the proposal in this paper and a Regulatory Impact Statement (RIS) has been prepared and is attached.

The Regulatory Impact Analysis Team (RIAT) has reviewed the RIS prepared by the Ministry of Business, Innovation and Employment and associated supporting material, and considers that the information and analysis summarised in the RIS *meets* the quality assurance criteria.

This assessment takes into account the narrow scope of the proposed arrangements, being limited to fibre installations and departing from the established Public Works Act provisions for compensation. The impacts of the detailed provisions are well set out in the RIS, and the uncertain nature of some of the benefits (based on enablers that are not guaranteed to be utilised by private investors) are acknowledged."

2.3.2. Are there aspects of the policy to be given effect by this Bill that were not addressed by, or that now vary materially from, the policy options analysed in these regulatory impact statements?

NO

Extent of impact analysis available

2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?

YES

The Ministry of Business, Innovation and Employment received data in May 2016 from the telecommunications industry that succeeds some figures used in the RIS. This data relates to the size of the problem obtaining consent from affected parties for an Ultra-Fast Broadband (UFB) installation. The new information strengthens the case for intervention as follows:

- The percentage of UFB orders that are estimated to require consent has increased from 13% as stated in the RIS to a new estimate of 17%
- The percentage of UFB orders that require consent that are estimated to fail because consent cannot be obtained has increased from 25% as stated in the RIS to a new estimate of 31%
- The estimated number of end users that are unable to connect to UFB due to problems obtaining consent has increased from 44,000 as stated in the RIS to a new estimate of 71,145

This information has not been published but will be included in publically available information supplied to the relevant select committee to assist in its deliberation of the Bill.

2.5. For the policy to be given effect by this Bill, is there analysis available on:	
(a) the size of the potential costs and benefits?	YES
(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?	NO
<p>Information on the potential costs and benefits of the property access and UFB changes is contained in the Regulatory Impact Statements prepared for the Bill.</p> <p>These documents are available at the following links:</p> <p>http://www.mbie.govt.nz/publications-research/publications/telecommunications/ris-land-access-for-telecommunications-to-support-deployment-of-ufb.pdf</p> <p>http://www.mbie.govt.nz/publications-research/publications/telecommunications/ris-amendments-to-telecommunications-act-to-support-extension-of-ufb.pdf/</p> <p>A formal analysis of the costs and benefits of the changes to the Telecommunications Development Levy has not been undertaken. The changes are expected to produce minor benefits (from reduced compliance costs) for the companies involved.</p> <p>The costs of implementing UFB extension programme regulatory requirements is expected to be low and any potential participant can factor these into its bid. The benefits of open access resulting from these requirements are significant, though not quantifiable.</p>	

2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be impacted by:	
(a) the level of effective compliance or non-compliance with applicable obligations or standards?	YES
(b) the nature and level of regulator effort put into encouraging or securing compliance?	NO
<p>Benefits to telecommunications providers will be impacted by the degree to which they use the new statutory rights and process the Bill affords them. There are no direct financial costs to property owners or bodies corporate resulting from the proposals in the Bill. This information is contained in the Regulatory Impact Statements prepared for the Bill.</p> <p>These documents are available at the following links:</p> <p>http://www.mbie.govt.nz/publications-research/publications/telecommunications/ris-land-access-for-telecommunications-to-support-deployment-of-ufb.pdf</p> <p>http://www.mbie.govt.nz/publications-research/publications/telecommunications/ris-amendments-to-telecommunications-act-to-support-extension-of-ufb.pdf/</p> <p>For the changes to the Telecommunications Development Levy liability allocation process, it is expected that because they will reduce compliance costs for businesses, there will be a high degree of compliance. The regulator, the Commerce Commission, has been involved in the process of designing the changes and will very likely ensure a high degree of compliance.</p> <p>For the regulatory requirements for the UFB extension programme, benefits will be secured by the Commerce Commission monitoring and enforcing the requirements. The Commission will not face significant costs in monitoring and enforcing the requirements given they are already in place for the original UFB programme.</p>	

Part Three: Testing of Legislative Content

Consistency with New Zealand's international obligations

3.1. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with New Zealand's international obligations?
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The policy to be given effect by the Bill relates only to the telecommunications industry and property owners in the domestic context. It does not impact on trade or New Zealand's diplomatic relations.

Consistency with the government's Treaty of Waitangi obligations

3.2. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi?

The Ministry of Business, Innovation and Employment has undertaken analysis and sought advice from Te Puni Kōkiri on whether the policy to be given effect by the Bill could impact on the rights and interests of Māori.

The main point considered is whether the proposals could create new statutory rights over collectively held Māori land. Te Puni Kōkiri advised that given the land affected by the rollout of Ultra-Fast Broadband is predominantly urban, it's unlikely that there will be an overlay with collectively held Māori land. If a conflict between the proposals in the Bill and Te Ture Whenua Māori Act 1993 does occur, agencies consider that Te Ture Whenua Māori Act 1993 contains appropriate overrides to protect Māori interests.

Consistency with the New Zealand Bill of Rights Act 1990

3.3. Has advice been provided to the Attorney-General on whether any provisions of this Bill appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990?	No
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The Ministry of Justice has stated that while minor, changes to the Telecommunications Development Levy liability allocation process set out in sections 81 and 83 engage Section 14 (freedom of expression) of the Bill of Rights Act. However, the analysis concludes that "the limits placed on the right to freedom of expression appear to be in due proportion to the importance of those objectives and are therefore justified under s 5 of the Bill of Rights Act" and therefore the Bill is consistent with the Bill of Rights Act.

Offences, penalties and court jurisdictions

3.4. Does this Bill create, amend, or remove:	
(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?	NO
(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?	YES
<p>The Bill does not create, amend, or remove any offences or penalties but section 155ZA creates a dispute resolution scheme which has the jurisdiction to deal with disputes arising from the statutory access rights created by the Bill.</p> <p><i>Section 155ZI(3)</i> outlines the scope of disputes which the scheme has the jurisdiction to deal with and <i>155ZJ</i> provides that scheme determinations be binding on the parties to the dispute in certain circumstances. The determinations may require interpretation of whether the statutory right of access created by this Bill applies, determine the validity of grounds for objection, and network operators' compliance with the requirements for exercising statutory access rights. Parties to a dispute (excluding network operators who are required to be members of the scheme) have the ability to appeal a determination, or to take alternative court action prior to a determination being made.</p> <p><i>Section 155ZL(1)</i> amends the right of appeal to the District Court. This creates an appeal procedure which differs to that outlined in the District Court rules. The new section sets out a timeframe for appeal and prevents the scheme from being a party to an appeal and the court from referring the matter back to the scheme. The timeframe requires appellants to bring an appeal within 5 working days after an appellant is notified of the determination to which the appeal relates is made, or any further time the court allows on an application made before or after that period ends.</p> <p><i>Section 155ZM</i> outlines the ability of the scheme to enforce compliance with the rules and determinations of the scheme. Specifically, <i>155ZM(4)</i> allows an order made by the dispute resolution scheme requiring the payment of a sum of money as part of a binding settlement to be enforced as if it were a judgement by a District Court.</p>	

3.4.1. Was the Ministry of Justice consulted about these provisions?	YES
<p>The Ministry of Justice has provided ongoing advice on the development of the Bill which has been incorporated into weekly reports to the Minister for Communications seeking decisions on key aspects of the Bill. The Minister for Communications had regard for the Ministry of Justice's advice when making these decisions in her capacity as Minister for Justice and Minister for the Courts.</p>	

Privacy issues

3.5. Does this Bill create, amend or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information?	NO
3.5.1. Was the Privacy Commissioner consulted about these provisions?	NO

External consultation

3.6. Has there been any external consultation on the policy to be given effect by this Bill, or on a draft of this Bill?	YES
<p>The Minister for Communications consulted with the public on the property access for telecommunications aspects of the Bill in June and July 2015. 46 submissions were received and the matters raised were taken into account when developing the policy reflected in the Bill. The Minister for Communications consulted with levy payers about changes to the Telecommunications Development Levy liability allocation process in September 2014.</p> <p>The Ministry of Justice, the Ministry for the Environment, the Treasury, Te Puni Kokiri, Land Information New Zealand and the Department of Prime Minister and Cabinet were consulted on the Bill in May 2016. In addition, the Commerce Commission was consulted on the text of the Bill relating to changes to the Telecommunications Development Levy Liability Allocation process in May 2016, and in relation to the Commerce Act authorisation proposals in July and August 2015.</p> <p>Crown Fibre Holdings and the Government Centre for Disputes Resolution have been consulted on the policy given effect by the Bill.</p> <p>The Crown's Ultra-Fast Broadband partners and the Telecommunications Forum have been consulted on the policy the Bill gives effect to in general terms.</p>	

Other testing of proposals

3.7. Have the policy details to be given effect by this Bill been otherwise tested or assessed in any way to ensure the Bill's provisions are workable and complete?	YES
<p>The Crown's Ultra-Fast Broadband partners were provided with a general outline of proposals and asked to provide analysis about the extent of Ultra-Fast Broadband installations that could meet the test for inclusion in the consenting framework the Bill gives effect to. The outcome of this analysis was a retrospective examination of how the Bill would have helped two samples, each comprising 100 completed complex Ultra-Fast Broadband installations. From this, the estimation that the proposals in the Bill will assist with 80 percent of complex installations in residential driveways was obtained.</p> <p>The Commerce Commission implements the Telecommunications Development Levy liability allocation process, and it has been consulted on the drafting of the changes to ensure they are workable.</p> <p>The provisions extending the regulatory requirements of the original Ultra-Fast Broadband programme rely on the existing legislative provisions, which have been in effect since 2011 and which are workable.</p>	

Part Four: Significant Legislative Features

Compulsory acquisition of private property

4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property?	NO
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Charges in the nature of a tax

4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax?	YES
<p>The government has an existing power to levy telecommunications companies (the Telecommunications Development Levy [TDL]). The changes to the TDL do not change this overarching power, rather they make minor improvements to the TDL liability allocation process. An efficient and fair disputes resolution scheme is vital to ensure that all parties with an interest in a fibre installation, including those that haven't requested it, have a backstop. The Bill provides for either an approved or a regulated disputes resolution scheme. If, for some reason the market doesn't put forward a solution for a preferred scheme and a regulated scheme needs to be established, new section 155ZN provides for a levy on certain network operators who would benefit from the proposals in the Bill to establish it.</p>	

Retrospective effect

4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?	YES
<p>The Commerce Act statutory authorisations apply to any contract, arrangement, or understanding that is entered into in respect of the UFB extension programme before the date on which the legislation comes into force, as if the authorisation were in force at the time of the entry. This is necessary because some contracts for the UFB extension programme may be entered into prior to the legislation coming into force. This is justified on the basis that there is significant public benefit in the Government being able to proceed with the tender process for the UFB extension programme in parallel to legislation being enacted. The authorisations remain in effect for two years from the date of the legislation coming into force.</p>	

Strict liability or reversal of the usual burden of proof for offences

4.4. Does this Bill:	
(a) create or amend a strict or absolute liability offence?	NO
(b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding?	NO

Civil or criminal immunity

4.5. Does this Bill create or amend a civil or criminal immunity for any person?	NO
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Significant decision-making powers

4.6. Does this Bill create or amend a decision-making power to make a determination about a person's rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests?	NO
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Powers to make delegated legislation

4.7. Does this Bill create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation?	NO
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4.8. Does this Bill create or amend any other powers to make delegated legislation?	YES
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155ZO(1)(a) This provision allows for regulations to be made to prescribe how Category One and Category Two notices may or must be given. This is necessary to ensure flexibility and to allow for new methods of communication to be assessed for their appropriateness and included for the convenience of property owners. For instance, should there be a time where it becomes acceptable to provide legal notice through social media or text message. Given this regulation making power has no significant negative impacts on people, safeguards are not considered warranted.

155(ZO)(1)(b) This provision allows new technology other than fibre to be included in the property access regime if required. This allows for the regime to be technology neutral but defers the assessment of the appropriateness of including new technology to the time when that technology is needed. To ensure the power is constrained, the Minister for Communications is obliged to do the following before recommending that regulations be made to bring new technology into the regime:

- Consult with the persons or organisation that appear to the Minister to be representative of the interests of those persons likely to be substantially affected by the regulations
- Be satisfied that the technology proposed is to be deployed on a large scale
- Be satisfied that the technology proposed will provide benefits to New Zealand, and
- Be satisfied that technology requires the consent of multiple parties to install and that this requirement is preventing, or likely to prevent, the benefits of the technology being realised.

155ZO(1)(c) This provision is used to place limits on the time that any new technology can be brought into the access regime for. Given this regulation making power is a safeguard in itself, no additional safeguards are considered warranted.

155(ZO)(1)(d) This provision allows for regulations to prescribe the content of a Category One or Category Two notice issued under the regime. This is necessary to ensure that requirements can be updated in response to feedback from property owners about whether the information they are receiving contains the information they need to make an informed decision. Given this regulation making power has no significant negative impacts on people, safeguards are not considered warranted.

155(ZO)(1)(e)-(f) These provisions allow regulations to prescribe different installation methods into Category One or Category Two. This is necessary to provide flexibility as new methods of installing UFB come online or the existing methods are altered in a way that changes the impacts they have on property. Safeguards are included in the scope of Category One and Two which is self-limiting.

S155ZO(1)(g)-(i) provide for the Minister for Communications to make regulations specifying the grounds that an individual or body corporate may put forward to object to a Category Two installation, including the instances when the objections specified in legislation may apply or apply only with modifications. This flexibility is considered important as, despite best efforts to ensure the grounds for objection are robust from the outset, it is not known how these objections will work in practice until tested through the disputes resolution process. The ability for the Minister to modify the objections is required to ensure changes can be made to better protect the rights of property owners and ensure the efficient roll out of modern telecommunications networks. It is expected that the objections specified in primary legislation will serve as a benchmark for assessing any modifications. This affords less power to the executive than allowing for these objections to be made primary through delegated legislation would, whilst still retaining the objective of flexibility.

155(ZO)(1)(j) This provision places limits on the length of time that a fibre to the premises network operator can spend on property shared by multiple parties carrying out an installation.

155(ZO)(1)(k) This provision allows for fees to be prescribed for members for disputes to be dealt with by a regulated disputes resolution scheme.

155(ZO)(1)(l) This provision prescribes how a notice must be served to an individual or body corporate under the regime. This is necessary to ensure that requirements can be updated in response to feedback from property owners about whether they are receiving information for example in a timely way or at the correct address.

Any other unusual provisions or features

4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?	NO
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