

EXPLANATORY STATEMENT

Issued by the Authority of the Minister for Broadband, Communications
and the Digital Economy

Telecommunications Act 1997

Telecommunications (Low-impact Facilities) Determination 1997
(Amendment No. 1 of 2012)

Legislative authority

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

On 29 June 1997 the then Minister for Communications, Information Technology and the Arts made the *Telecommunications (Low-impact Facilities) Determination 1997* and it was subsequently amended on 12 August 1999 and 13 December 2011 (the Existing Determination). Subsection 33(3) of the *Acts Interpretation Act 1901* relevantly allows the Minister to amend the Existing Determination.

Purpose

The purpose of the *Telecommunications (Low-impact Facilities) Determination 1997 (Amendment No.1 of 2012)* (the Amending Determination) is to amend the Existing Determination to clarify that ancillary facilities which are necessary for the operation or proper functioning of a facility described in the Schedule to the Existing Determination are low-impact facilities for the purpose of Schedule 3 to the Act.

Background

Schedule 3 to the Act provides carriers with the power to inspect land to determine whether the land is suitable for the carrier's purpose install a facility on the land and maintain a facility that is situated on the land. Carriers also receive immunity from certain state and territory laws when exercising these powers. This ensures that carriers are able to deploy key elements of their networks under a streamlined nationally uniform approach.

The power to install a facility may only be exercised with respect to certain types of infrastructure, such as a facility described in the Existing Determination, or a temporary defence facility, or if the carrier holds a facility installation permit.

These powers afforded to carriers are subject to notification requirements and a range of other protections for land holders.

Facilities that are specified in the Existing Determination (i.e. low-impact facilities) are considered vital to the operation of telecommunications networks and are considered to be generally of low visual impact.

Consultation

On 5 October 2012, the department released an exposure draft of the Amending Determination and Explanatory Statement for public comment. That process ended on 19 October 2012. The department received four submissions, all of which supported the amendment.

The Amending Determination is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

Details of the accompanying Amending Determination are set out in the [Attachment](#).

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

*Telecommunications (Low-impact Facilities) Determination 1997
(Amendment No. 1 of 2012)*

This Amending Determination is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Amending Determination

The *Telecommunications (Low-impact Facilities) Determination 1997* (the Existing Determination) is made under subclause 6(3) of Schedule 3 to the *Telecommunications Act 1997* (the Act). The Existing Determination specifies facilities that are ‘low-impact facilities’ for the purposes of Schedule 3 to the Act. Under subsection 3.1(2) of the Existing Determination, a facility cannot be considered a low-impact facility (for the purposes of Schedule 3) if it would be installed in specified ‘areas of environmental significance’ under section 2.5 of the Existing Determination.

Schedule 3 provides carriers with the power to inspect land to determine whether the land is suitable for the carrier’s purpose; install certain types of facilities (including low-impact facilities) on the land; and maintain a facility that is situated on the land; without seeking state, territory or local government planning approval.

The *Telecommunications (Low-impact Facilities) Determination 1997 (Amendment No. 1 of 2012)* (Amending Determination) varies the Existing Determination to clarify that facilities that are necessary for the operation or proper functioning of a listed low-impact facility are themselves low-impact facilities. Such facilities have typically been installed in reliance on subclause 6(2) of Schedule 3. For the sake of clarity, the Amending Determination does not alter subsection 3.1(2) of the Existing Determination (which provides that a facility in an area of environmental significance cannot be a low-impact facility).

No human rights issues were raised during consultation undertaken in developing the draft Amending Determination.

Human rights implications

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

Conclusion

The Amending Determination is compatible with human rights because it does not engage any of the applicable rights or freedoms.

ATTACHMENT

Details of the *Telecommunications (Low-impact Facilities) Determination 1997 (Amendment No. 1 of 2012)*

Section 1 – Name of Determination

Section 1 provides that the title of the Determination is the *Telecommunications (Low-impact Facilities) Determination 1997 (Amendment No. 1 of 2012)* (the Amending Determination).

Section 2 – Commencement

Section 2 provides that the Amending Determination commences on the day after it is registered on the Federal Register of Legislative Instruments.

Section 3 – Variation

Section 3 provides that the *Telecommunications (Low-impact Facilities) Determination 1997* (the Existing Determination) is amended as set out in the Schedule to the Amending Determination.

Schedule – Amendments

Item [1] – Subsection 3.1(4)

Item 1 of the Schedule to the Amending Determination inserts a replacement subsection 3.1(4) into the Existing Determination. In addition to the existing class of ancillary facilities (i.e. those which are installed, or to be installed, solely to ensure the protection or safety of a low-impact facility specified in an item in the Schedule to the Existing Determination) a new class of ancillary facilities is specified. The new class covers facilities which are necessary for the operation or proper functioning of the low-impact facility.

For example, when a small radiocommunications antenna is installed (that is a low-impact facility specified in Part 1 of Schedule 1 to the Existing Determination), cabling leading from the antenna to a power source, and other associated equipment necessary for the operation of the antenna, will each be treated as low-impact facilities.

The term ‘proper functioning’ in paragraph 3.1(4)(a) is intended to cover a broad range of ancillary facilities which are installed to ensure a low-impact facility operates in a correct manner. There are many other examples of ancillary facilities that could be considered to fall within scope. For example, equipment that supports the efficient functioning of a low-impact facility (such as remote radio units or equipment that manages consumption of energy or other resources) is considered to be a facility which is for the proper operation of the low-impact facility. (The aforementioned example is not intended to limit the types of things which could fall within the scope of paragraph 3.1(4)(a)).

Typically, ancillary facilities and equipment which are necessary for the operation or proper functioning of a low-impact facility have been installed by carriers in reliance of subclause 6(2) of Schedule 3 to the *Telecommunications Act 1997* (the Act). That subclause allows a carrier to enter onto land to install the low-impact facility and ancillary facilities critical to operation of the low-impact facility. In *Hutchison 3G Australia Pty Ltd v Director of Housing* [2004] VSCA 99 the installation of supporting poles and cabling (which were not individually specified in the Existing Determination), as part of the installation of antennas (specified low-impact facilities) was held to be authorised under Schedule 3 because they were “necessary or desirable” for the purpose of carrying out the installation of the antennas (i.e. the low impact facility), in the context of subparagraph 6(2)(b)(i) of Schedule 3 to the Act.

Notwithstanding the scope of subclause 6(2), as judicially considered, the amendment to subsection 3.1(4) of the Existing Determination is intended to provide greater clarity for industry as to the status of these facilities. New paragraph 3.1(4)(a) is intended to make it abundantly clear that ancillary equipment and facilities intended for the proper operation or functioning of a low-impact facility are also low-impact facilities. This amendment is consistent with the existing operation of Schedule 3 to the Act, and the objects of the Act.