

EXPLANATORY STATEMENT

Issued by the Authority of the Minister for Communications

Telecommunications Act 1997
Acts Interpretation Act 1901

Telecommunications (Low-impact Facilities) Determination 1997
(Amendment No. 2 of 2015)

Legislative authority

Subclause 6(3) of Schedule 3 of 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* (the Principal Determination), and it was subsequently amended on 12 August 1999, 13 December 2011, 20 November 2012 and 2 April 2015.

Under subsection 33 (3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument. Subsection 33(3) of the *Acts Interpretation Act 1901* allows the Minister to amend the Principal Determination.

Purpose

The *Telecommunications (Low-impact Facilities) Determination 1997* (the Principal Determination) is made under subclause 6(3) of Schedule 3 to the *Telecommunications Act 1997* (the Act). Schedule 3 provides carriers with power to inspect land to determine whether the land is suitable for the carrier's purpose; install certain types of facilities (primarily 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 or land owner consent.

The purpose of the *Telecommunications (Low-impact Facilities) Determination 1997 (Amendments No.2 of 2015)* (the Amending Determination) is to amend the Principal Determination to add two new regions to the definition of HFC Trial Region at section 1.3, thereby enabling NBN Co Limited (NBN Co) (and other carriers operating comparable, national, wholesale-only, non-discriminatory broadband networks) to install a range of specified above-ground and under-ground hybrid fibre-coaxial facilities in these additional regions during the remaining time of the Designated Installation Period (which lapses in April 2016).

Temporary amendments were made to the Principal Determination in April 2015 to support the NBN Co fibre-to-the-basement (FTTB) rollout and hybrid fibre-coaxial (HFC) construction trials. Since the temporary amendments were made, NBN Co has

identified two additional HFC trial sites. In order to commence trials in these areas with the benefit of carrier powers and immunities as soon as possible, these areas need to be added to the list of HFC Trial Regions.

The two new HFC Trial Regions are:

- the Carramar Exchange Service Area, New South Wales; and
- Wheelers Hill (City of Monash), Victoria.

Where facilities of the kind listed in item 6 at Part 4, and several items at Part 4B of the Schedule to the Principal Determination are proposed to be deployed outside of the specified HFC Trial Regions (including the proposed two additional regions noted above) or after the Designated Installation Period (as defined in section 1.3 of the Principal Determination), the deployment cannot occur in reliance on Schedule 3 to the Act.

The Principal Determination (as amended) is expected to be updated further, following public consultation on broader ongoing amendments later in 2015.

Background

The Australian Government is committed to the delivery of better broadband to Australians. The Strategic Review by NBN Co in December 2013 recommended that the national broadband network should be completed using a multi-technology mix to deliver fast broadband sooner and at less cost to taxpayers. In light of this, the Government issued a new Statement of Expectations to NBN Co on 8 April 2014. The Statement instructs NBN Co to determine which technologies are to be used for the NBN in any given area on a case-by-case basis, so long as the NBN is constructed within a defined cost and in compliance with certain other criteria. The technologies that may be used by NBN Co include fibre-to-the-node (FTTN), fibre-to-the-premises (FTTP), FTTB, HFC, fixed wireless and satellite.

NBN Co is, or will be, conducting HFC construction trials in different areas of Australia to prepare for the wider HFC rollout. By way of the *Telecommunications (Low-impact Facilities) Determination 1997 (Amendment No. 1 of 2015)*, the following four regions were specified as HFC Trial Regions, enabling NBN Co to install a range of above-ground and under-ground hybrid fibre-coaxial facilities in those regions for a limited period (namely the Designated Installation Period, which lapses in April 2016):

- Merrimac within the local government area of the City of Gold Coast, Queensland;
- Redcliffe within the local government area of the Moreton Bay Regional Council, Queensland;
- Slacks Creek within the local government area of the City of Logan, Queensland; and
- Emu Plains within the local government area of the City of Penrith, New South Wales.

NBN Co is proposing to undertake HFC trials in two additional regions; the Carramar Exchange Service Area in New South Wales; and Wheelers Hill (City of Monash), Victoria.

In the absence of an amendment to the definition of ‘HFC Trial Region in section 1.3 of the Principal Determination, NBN Co and any other like carrier would need to obtain explicit land owner consent to inspect land and install and maintain the HFC facilities. This would mean a long and costly process for these carriers to install facilities. Given the variations in rules for overhead and other telecommunications facilities under state, territory and local government planning regimes, inclusion of these facilities in the LIFD streamlines national rollouts of these facilities. Therefore, to facilitate the advancement of trials in these two areas in Victoria and NSW, the Amending Determination makes this addition.

Carriers installing facilities using Schedule 3 powers and immunities must, among other things, comply with requirements at clause 12 of Schedule 3 to the Act. Specifically, the installation must meet relevant industry standards, including any relevant standards for the installation of telecommunications facilities on public utility infrastructure. In addition, carriers must make reasonable efforts to enter into agreements with public utilities when engaging in activities that are likely to affect the operations of the utility in accordance with Clause 11 of Schedule 3 in the Act.

Consultation

Local government areas in proposed new HFC trial regions and electricity network owners whose assets may be used were consulted. Only one submission was received by the closing date. This submission was from United Energy in Victoria, which was supportive of the trial taking place in Wheelers Hill.

Regulatory Impact Statement

OBPR previously advised that a Regulation Impact Statement was not required for the original changes in April 2015 that created the definition of HFC Trial Region (OBPR ID 18583). In giving this advice OBPR noted that the changes contained in the Amending Determination are time limited.

Notes on Amendments and Attachments

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 1 and the Statement of Compatibility with Human Rights for the Amending Determination is set out in Attachment 2.

ATTACHMENT 1**Details of the *Telecommunications (Low-impact Facilities) Determination 1997 (Amendment No. 2 of 2015)*****Section 1 – Name of Determination**

Section 1 provides that the title of the Determination is the *Telecommunications (Low-impact Facilities) Determination 1997 (Amendment No. 2 of 2015)* (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 Principal Determination) is amended as set out in the Schedule to the Amending Determination.

Section 4 – Expiry

Once the Amending Determination has come into effect, it will have fulfilled its purpose (i.e. amending the Principal Determination) which will have ongoing effect for the period specified in relation to the amendment. Therefore, the amending instrument itself can be removed from the Federal Register of Legislative Instruments. Accordingly, a self-expiry provision has been included in the Amending Determination at section 4.

Schedule – Amendments

The Schedule to the Amending Determination sets out the specific amendments being made to the Principal Determination.

Item 1 – Section 1.3, definition of ‘HFC Trial Region’ at the end of paragraph (c)

Item 1 of the Schedule make a minor mechanical change to remove the “and” which appears at the end of paragraph (c). This change is made to accommodate the additional two new paragraphs to be inserted by Item 2.

Item 2– Section 1.3, definition of ‘HFC Trial Region’ at the end of paragraph (d)

Item 2 of the Schedule inserts two new HFC trial regions into the definition of HFC Trial Region, as used in the Principal Determination:

- the locality known as the Carramar Exchange Service Area, in the State of New South Wales; and
- Wheelers Hill, a locality within the City of Monash, in the State of Victoria.

These are new areas where NBN Co has indicated it intends to conduct trials of the deployment of hybrid fibre-coaxial (HFC) networks. The expansion of this definition of ‘HFC Trial region’ to cover these additional two areas will mean that NBN Co (or any carrier constructing a like network) will be able to install a range of underground and above-ground HFC facilities (set out in Part 4, Item 6 and Part 4B of the Principal Determination), within a limited time period (until April 2016), using the powers and immunities set out in Schedule 3 to the Act. Facilities installed during this period will be able to remain in place and be inspected and maintained on an ongoing basis.

The Carramar Exchange Service Area is the area serviced by the Telstra exchange at Carramar in Sydney, New South Wales. The Carramar Exchange Service Area has been used in the Amending Determination, because the HFC trial region includes parts of the Bankstown, Fairfield and Liverpool local government areas, but is within the boundaries of Telstra’s Carramar exchange.

Item 2 also makes a minor consequential change by removing the period at the end of existing paragraph (d), to allow for the insertion of two additional paragraphs describing the additional areas.

ATTACHMENT 2***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. 2 of 2015)***

The *Telecommunications (Low-impact Facilities) Determination 1997 (Amendment No. 2 of 2015)* (the 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 Principal Determination) is made under subclause 6(3) of Schedule 3 to the *Telecommunications Act 1997* (the Act). 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 (primarily 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 or land owner consent.

Schedule 3 of the Act requires carriers to notify land owners of intended activities enabled by the Principal Determination. The *Telecommunications Code of Practice 1997* requires carriers to make reasonable efforts to resolve valid objections from land owners or occupiers. If the land owner or occupier is not satisfied with the carrier's proposed resolution, and no agreement can be reached, they may ask the carrier, in writing, to refer the objection to the Telecommunications Industry Ombudsman (TIO) for resolution if it wishes to continue with the activity. The carrier must comply with the request to refer the matter to the TIO. Carriers must comply with any direction made by the TIO.

The purpose of the Amending Determination is to amend the Principal Determination to add two new regions to the definition of 'HFC Trial Region' at section 1.3 of the Principal Determination. This is a term used in relation to HFC facilities listed at Parts 4 and 4B of the Schedule to the Principal Determination. The amendments will support the trial deployment of HFC facilities by NBN Co Limited in two additional areas in NSW (Carramar Exchange Service Area) and Victoria (Wheelers Hill) for a limited period (until April 2016). This will help NBN Co to deliver better broadband faster, and at lower cost to taxpayers. The powers and immunities are available to other carriers operating on a comparable basis. The Principal Determination (as amended) is expected to be updated further, following public consultation on broader ongoing amendments later in 2015.

Human rights implications

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

Conclusion

This Amending Determination is compatible with human rights as it does not raise any human rights issues.