

Explanatory Statement

Telecommunications Act 1997

Telecommunications (Carrier Licence Conditions) Amendment (Networks supplying Superfast Carriage Services to Residential Customers) Instrument 2020

Issued by the Authority of the Minister for Communications, Cyber Safety and the Arts

Authority

The *Telecommunications (Carrier Licence Conditions) Amendment (Networks supplying Superfast Carriage Services to Residential Customers) Instrument 2020* (the Amending Instrument) is made by the Minister for Communications, Cyber Safety and the Arts (the Minister) under subsection 63(5) of the *Telecommunications Act 1997* (the Act). The Amending Instrument is a legislative instrument for the purposes of the *Legislation Act 2003* (subsection 8(4)).

Purpose

The purpose of the Amending Instrument is to preserve the operation of the *Carrier Licence Conditions (Networks supplying Superfast Carriage Services to Residential Customers) Declaration 2014* as currently in force (the Declaration) consistent with the arrangements for the Declaration under Schedule 2 to the *Telecommunications Legislation Amendment (Competition and Consumer) Act 2020* (the TLA Act), which included an amendment to section 12 of the *Legislation (Exemption and Other Matters) Regulation 2015*, exempting the Declaration from automatic sunseting.

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

Background

On 14 December 2014, the then Minister for Communications made the Declaration to impose functional separation and wholesale supply obligations on carriers that extended existing fixed-line networks to supply superfast carriage services to residential customers, but were not subject to similar obligations in Parts 7 and 8 of the *Telecommunications Act 1997*.

The Declaration closed a loophole that allowed carriers to use an exemption in the Act to extend business networks by up to one kilometre into residential areas (particularly to multi-dwelling units) and offer vertically integrated services. The Declaration addressed concerns that vertically integrated networks could create local access bottlenecks that impede effective retail competition and that such operations therefore have an unfair competitive advantage over other networks that are subject to the rules in the Act.

The Amending Instrument removes the expiry date of the Declaration. This will prevent the Declaration from lapsing before the new arrangements in Schedule 2 of the TLA Act directed at preserving the operation of the Declaration, commence on 26 August 2020.

In addition, the Amending Instrument removes the expiry date for the functional separation and wholesale supply obligations in the Declaration to provide for their ongoing operation. The TLA Act will also amend the application of the Declaration so that it applies indefinitely to applicable networks rolled out between 1 January 2015 and the commencement of new arrangements in Schedule 2 (on 26 August 2020). The TLA Act will also exempt the

Declaration from sunseting. Combined, these changes will effectively preserve the operation of the conditions set out in the Declaration.

The extension of the Declaration is also consistent with recent reforms in the TLA Act, which amended structural separation requirements in the Act by inserting a functional separation undertaking process, under which network operators will be able to voluntarily submit undertakings to the ACCC for approval. This creates greater flexibility in the supply of services on an integrated, albeit functionally separated, basis.

Regulation Impact Statement

The Office of Best Practice Regulation (OBPR) has advised that, as the Amending Instrument is machinery in nature, the preparation of a Regulatory Impact Statement is not required. The OBPR reference number is 42599.

Consultation

Section 64 of the Act requires that before making an instrument under subsection 63(5) of the Act, the Minister must arrange for a draft version of the instrument to be provided to the licence holder and invite the holder to make a submission to the Minister on the draft.

Consistent with this requirement, the Department of Infrastructure, Transport, Regional Development and Communications, on the Minister's behalf, undertook public consultation between 7 May 2020 and 6 June 2020 via the Department's website. The Department also contacted licensed carriers, provided them with a link to the consultation page with the Amending Instrument, and invited submissions. Two organisations provided feedback in support of extending the Declaration. The feedback has been considered by the Minister as part of the making of the Amending Instrument. One submitter suggested the Declaration is fundamental to facilitating competition on networks other than the National Broadband Network, and noted the Declaration allows providers that do not operate such a network, to offer services over that network, placing downward pressure on prices.

Statement of compatibility with human rights

A statement of compatibility with human rights for the purposes of Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* is set out at [Attachment B](#).

Notes on Sections

Section 1

Section 1 provides that the name of the instrument is the *Telecommunications (Carrier Licence Conditions) Amendment (Networks supplying Superfast Carriage Services to Residential Customers) Instrument 2020* (Amending Instrument).

Section 2

Section 2 provides that the instrument will commence on the day after it is registered on the Federal Register of Legislation.

Section 3

Section 3 provides the legislative authority for the instrument. The Amending Instrument is made under subsection 63(5) of the *Telecommunications Act 1997*.

Section 4

Section 4 of the Amending Instrument provides that the Declaration is varied in the terms set out in each Schedule to the Amending Instrument. There is only one Schedule to the Amending Instrument.

Schedule 1 to the Amending Instrument

Item 1

Item 1 repeals section 3 of the Declaration, which contains the expiry date.

Item 2

Item 2 removes the reference date of '30 June 2020' at paragraph 6(1)(c) of the Declaration. The combined effect of Items 1 and 2 and the new arrangements in Schedule 2 of the TLA Act will be that the functional separation and wholesale supply obligations are grandfathered indefinitely.

Statement of Compatibility with Human Rights

Telecommunications (Carrier Licence Conditions) Amendment (Networks supplying Superfast Carriage Services to Residential Customers) Instrument 2020

This statement is prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. The *Telecommunications (Carrier Licence Conditions) Amendment (Networks supplying Superfast Carriage Services to Residential Customers) Instrument 2020* (the Amending Instrument) 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 Instrument

Licensed telecommunications carriers are currently subject to two classes of carrier licence conditions: standard licence conditions under the *Telecommunications Act 1997* (the Act); and specific licence conditions made by the Minister under section 63 of the Act. The purpose of the Amending Instrument is to indefinitely extend the expiry date of the *Carrier Licence Conditions (Networks supplying Superfast Carriage Services to Residential Customers) Declaration 2014* (the Declaration).

The Declaration imposes carrier licence conditions in respect of various types of vertically integrated networks to address concerns that such networks, which would not otherwise be subject to the Layer 2 bitstream service supply requirements established under the former Part 7 of the Act and structural separation rules under Part 8 of the Act, could create local access bottlenecks that impede effective retail competition and that such operations therefore have an unfair competitive advantage over other networks that are subject to the rules in the Act.

The Amending Instrument removes the expiry date of the Declaration at section 3 and the 30 June 2020 end date in paragraph 6(1)(c) of the Declaration. This will prevent the Declaration and substantive licence conditions from lapsing before the new arrangements in Schedule 2 of the *Telecommunications Legislation Amendment (Competition and Consumer) Act 2020* (the TLA Act), commence on 26 August 2020. Those new arrangements are directed at preserving the operation of the Declaration so the licence conditions apply indefinitely to the applicable networks captured by the Declaration and which were rolled out between 1 January 2015 and the commencement of Schedule 2 of the TLA Act (on 26 August 2020).

Combined, these changes will effectively ‘grandfather’ the Declaration.

Human rights implications

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

Conclusion

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