

Explanatory Statement

Issued by the Authority of the Minister for Communications.

Telecommunications Act 1997

Telecommunications (Designated Service Area and Statutory Infrastructure Provider) Amendment Declaration (No. 5) 2022

Authority

The *Telecommunications (Designated Service Area and Statutory Infrastructure Provider) Amendment Declaration (No. 5) 2022* (the Amending Declaration) is made under section 360L of the *Telecommunications Act 1997* (the Act) and subsection 33(3) of the *Acts Interpretation Act 1901*.

Purpose

The purpose of the Amending Declaration is to amend the *Telecommunications (Designated Service Area and Statutory Infrastructure Provider) Declaration (No. 1) 2020* (the Principal Declaration) to provide a framework for the phased transfer of statutory infrastructure provider (SIP) responsibilities from Telstra to Opticomm in relation to Telstra's service areas. It does this together with another instrument being made at the same time, the *Telecommunications (Exceptions to Statutory Infrastructure Provider Obligations – Telstra and Opticomm Pty Ltd) Determination 2022* (the Exceptions Determination).

Background

The SIP regime is set out in Part 19 of the Act and commenced on 1 July 2020. It aims to ensure that all people in Australia can access high speed broadband services. Under the Act, NBN Co is the default SIP for Australia, reflecting its role in the market. However, the SIP regime provides for alternative carriers to be the SIPs for the geographic areas where they deploy telecommunications networks. This recognises that there is a competitive market in Australia for the provision of telecommunications networks.

There are three main routes by which alternative carriers become the SIPs for service areas: through deeming provisions in the statute; through carrier nomination; or by Ministerial designation.

The key obligations of SIPs are to connect premises in their service areas to their telecommunications networks, and supply wholesale services, on reasonable request from a carriage service provider (CSP) acting on behalf of an end-user within the designated SIP area. The wholesale services must allow the retail provider to supply 'qualifying carriage services', which are broadband services with peak download and upload speeds of at least 25/5 Mbps. On fixed-line or fixed wireless networks, the wholesale services SIPs supply must also enable CSPs to supply voice services. SIPs must also publish the terms and conditions on which they offer to connect premises and supply eligible services to CSPs.

Under section 360Z of the Act, the Australian Communications and Media Authority (ACMA) is required to maintain a register which, amongst other things, must contain the

name of each SIP and, for each of those SIPs, the relevant service area or areas. The ACMA will update its register to reflect that both Opticomm and Telstra are being designated as the SIPs for the Velocity estates. The data will also be available for display on the National Map.

Telstra – Opticomm network transfer

On 18 December 2020, the then Communications Minister declared Telstra as the SIP for 127 designated service areas in which it had deployed fibre-to-the-premises (FTTP) networks. These service areas are collectively known as ‘Velocity’ estates and include Telstra’s FTTP network in South Brisbane. Telstra has also declared a number of provisional nominated service areas under the SIP regime, for new stages of developments in the estates. Three of these areas are outside the existing designated service areas and are being incorporated into Telstra’s designated service areas by the Amending Declaration. This means the Amending Declaration deals with 130 Telstra Velocity estate areas in total.

On 24 December 2020, Telstra and Uniti announced that they had entered into a commercial agreement relating to the Velocity estates. The ownership of the Telstra FTTP networks in the estates passed to Uniti at that date, but Telstra retained operational control of the networks pending a transition process. As such it has continued to be responsible for connecting premises to the networks, and for providing wholesale services under the SIP regime. It has therefore remained the SIP for the estates until now.

The transition process will commence soon. While it is anticipated to be completed in about one year, there is the potential for delay and so the Amending Declaration and the Exemptions Determination allow for a transition period that ends by 1 July 2025.

Under the transition process, Telstra’s 130 SIP service areas in the Velocity estates are divided into 533 smaller areas, known as ‘Fibre Distribution Hub areas’ or FDHAs. For each of those 533 FDHAs, there is a scheduled date during the transition period for premises in the FDHA to be disconnected from the Telstra network, and then connected to the Opticomm network. Opticomm and Telstra have jointly published a Transition Roadmap and Schedule which includes transition commencement and end dates for each FDHA. This is available at <https://www.telstrawholesale.com.au/products/product-exits-and-solutions/fibre-access-broadband.html> and at <https://www.opticomm.com.au/velocity/>.

The transition process will involve the disconnection of Telstra’s equipment and the installation of new equipment owned by Uniti’s subsidiary, Opticomm. Both Telstra and Opticomm have stated that the process at any individual premises will be completed in a single day, meaning disruptions to service for end-users should be limited. Once the Opticomm equipment has been installed, Opticomm will fully control the networks and take over the role of providing network connectivity and wholesale services in the Velocity estates. As such, it should also be the SIP for the estates.

The role of the Amending Declaration in the transition

The Amending Declaration and the Exceptions Determination establish a framework for SIP obligations in the Velocity estates to transfer from Telstra to Opticomm on a phased basis during the transition period, consistent with the Transition Roadmap and Schedule. The objective is to deliver a smooth and streamlined switchover for end-users and maintain continuity of service.

The Amending Declaration inserts key definitions and interpretive clauses into the Principal Declaration that are required to establish the framework for the transition. It makes both Telstra and Opticomm SIPs for the Velocity estates during the transition period, with Opticomm becoming the sole SIP for the estates after the transition period ends. This approach reflects the structure of the statute and the difficulty in establishing in advance the point in time at which operational control will pass from Telstra to Opticomm at any individual premises.

The Amending Declaration also adds three nominated service areas that Telstra has declared to the Schedule of Telstra's designated service areas. This allows the nominated service areas as well as the designated service areas to be subject to the transition framework.

The Exceptions Determination performs three key functions.

First, it defines a ***Premises Transition Date***, which establishes a time when individual premises are transferred from Telstra's operational control to Opticomm's.

Second, the Exceptions Determination specifies exceptions from Telstra's and Opticomm's SIP obligations as follows:

- Opticomm does not have to fulfil SIP obligations at individual premises *prior* to the Premises Transition Date for those premises.
- Telstra does not have to fulfil SIP obligations at individual premises *after* the Premises Transition Date for those premises.

Third, the Exceptions Determination specifies conditions in relation to the exceptions. The exceptions only apply if the conditions are met. The conditions are:

- Telstra and Opticomm have executed an agreement on the operational measures required to comply with a request to fulfil SIP obligations.
- Details of those measures are made available on their respective websites.
- The details remain on the websites during the transition period.
- The agreement remains in force during the transition period.

Consultation

The Department of Infrastructure, Transport, Regional Development, Communications and the Arts consulted Opticomm and Telstra on the two instruments, and also consulted NBN Co Limited, as the default SIP for Australia, consumer and industry representatives and the ACMA, as the regulator for the SIP regime. These organisations did not raise any concerns with the instruments.

Legislative requirements

The Amending Declaration is a legislative instrument for the purposes of the *Legislation Act 2003* and therefore subject to the default consultation, sunset and disallowance requirements under that Act. The Amending Declaration commences the day after it is registered.

The Amending Declaration is covered by a standing Regulatory Impact Statement (RIS) exemption issued by the Office of Best Practice Regulation (OBPR), as the regulatory impacts of the Amending Declaration are minor and/or machinery in nature, and were considered and costed as part of the implementation of the wider SIP regime (OBPR ID: 44338).

Details of the Amending Declaration are set out in Attachment A.

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.

Details of the *Telecommunications (Designated Service Area and Statutory Infrastructure Provider) Amendment Declaration (No. 5) 2022*

Section 1 – Name

This section provides that the name of the instrument is the *Telecommunications (Designated Service Area and Statutory Infrastructure Provider) Amendment Declaration (No. 5) 2022* (the Amending Declaration).

Section 2 – Commencement

This section provides for the Amending Declaration to commence on the day after it is registered on the Federal Register of Legislation.

Section 3 – Authority

This section provides that the Amending Declaration is made under section 360L of the *Telecommunications Act 1997* (the Act) and subsection 33(3) of the *Acts Interpretation Act 1901*.

Section 4 – Schedule

This section provides that each instrument specified in the Schedule to the Amending Declaration is amended or repealed as set out in the applicable item in the Schedule concerned, and that any other item in a Schedule to the Amending Declaration has effect according to its terms. The Schedule specifies amendments to the Principal Declaration.

Schedule 1 – Amendments

Schedule 1 to the Amending Declaration sets out amendments to the *Telecommunications (Designated Service Area and Statutory Infrastructure Provider) Declaration (No. 1) 2020* (the Principal Declaration).

Item 1 – Section 4 (Heading)

Item 1 amends section 4 of the Principal Declaration by changing the heading of the section. Currently, section 4 is titled ‘Definitions’. Item 1 will retitle the section ‘Interpretation’. The change in title is consequential to the insertion of subsection 4(2) by item 7 of the Amending Declaration, which is an interpretive clause rather than a strict definition.

Item 2 – Section 4

Item 2 amends section 4 of the Principal Declaration by repealing the note at the start of the section and replacing it with an expanded note. The note provides that a number of expressions used in the Principal Declaration are defined in the Act, including *designated service area* (section 360A), *carriage service provider* (section 7), *eligible service* (section 142A), *GDA94* (section 360A), *qualifying fixed-line carriage service* (section 360A), *statutory infrastructure provider* (section 360A) and *TAB vector format* (section 360A). The new cross-references inserted by the Amending Declaration are those to *carriage service provider*, *eligible service* and *qualifying fixed-line carriage service*. They are included because they are used in the definitions and interpretive clauses being inserted by the Amending Declaration.

Item 3 – Section 4

Item 3 amends the beginning of section 4 of the Principal Declaration by inserting a new subsection number (1) before the words ‘In this instrument’. This amendment is consequential to the insertion of new subsection 4(2) by item 7.

Item 4 – Section 4 (definition of “Opticomm Ltd”)

Item 4 amends section 4 of the Principal Declaration by repealing the definition of *Opticomm Ltd* and replacing it with a definition of *Opticomm Pty Ltd*. This reflects organisational changes in that company. The definition, including the Australian Company Number, is otherwise the same as in the Principal Declaration, with Opticomm Pty Ltd defined to mean Opticomm Pty Ltd (ACN 117 414 776), as the company exists from time to time (even if its name is later changed).

Item 5 – Section 4 (after definition of “Taipan Networx Pty Ltd”)

Item 5 inserts a new definition of *Telstra* into the Principal Declaration, with Telstra defined to mean either of Telstra Corporation Limited or Telstra Limited. The amendment is one of a number of provisions dealing with the impact of Telstra’s corporate restructure on its SIP obligations, along with items 6, 7, 12 and 13 of Schedule 1 and Schedule 2.

Together these amendments:

- repeal an instrument made earlier in 2022, the *Telecommunications (Designated Service Area and Statutory Infrastructure Provider) Amendment Declaration (No. 1) 2022* (the First Amending Declaration);
- define Telstra, Telstra Corporation Limited and Telstra Limited; and
- specify when Telstra Corporation Limited and then Telstra Limited respectively must fulfil SIP obligations.

The First Amending Declaration anticipated Telstra’s restructure into different corporate entities. Telstra has developed a Scheme of Arrangement that provides that Telstra assets and business lines will be allocated to different companies within Telstra’s overall corporate group on 1 January 2023. Operational control of the FTTP networks in the Velocity estates will be transferred from Telstra Corporation Limited to Telstra Limited. Given that, the First Amending Declaration also provided for SIP responsibilities to be transferred to Telstra Limited, as it would be the entity best placed to fulfil those obligations.

The First Amending Declaration is expected to commence after 1 January 2023, when the transfer of property under Telstra’s Scheme of Arrangement becomes effective.

The First Amending Declaration would amend Schedule 16A of the Principal Declaration to insert new table headings. These amendments would not be able to be reconciled with the amendments proposed by the Amending Declaration. The Amending Declaration will insert new table headings into Schedule 16A to provide that both Telstra and Opticomm are the SIPs for the Velocity estates (see items 12-13 below). As a result, Schedule 2 will repeal the First Amending Declaration.

The repeal of the First Amending Declaration then needs to be supplemented with new drafting to reflect Telstra’s restructure and transfer SIP responsibilities, after 1 January 2023,

from Telstra Corporation Limited to Telstra Limited. This is achieved by items 6 and 7 of Schedule 1 (below).

Item 6 – Section 4 (after definition of “Telstra Corporation Limited”)

Item 6 inserts two new definitions into section 4 of the Principal Declaration.

First, it inserts a definition of *Telstra Limited*. This is defined to mean Telstra Limited (ACN 086 174 781) as the company exists from time to time (even if its name is later changed). The definition is consequential to item 5. Telstra Limited will assume operational control of the FTTP networks in the Velocity estates once Telstra’s restructure has taken effect on 1 January 2023.

Second, item 6 inserts a definition of *Telstra-Equipped Services*. This is a key definition for both the Amending Declaration and the Exceptions Determination and is used to identify services that can only be supplied at premises in the Velocity estates before Telstra disconnects its equipment.

Telstra-Equipped Services are defined by reference to two characteristics.

First, the service must be one in relation to which Telstra is in a position to exercise operational control of:

- all or part of the telecommunications network in the designated service area; or
- the kinds of services that are supplied using the telecommunications network in the designated service area.

Second, the service must be either:

- a qualifying fixed-line carriage service which Telstra supplies to end-users at the premises in a designated service area; or
- an eligible service which Telstra supplies to another CSP in order that the other CSP can provide qualifying fixed-line carriage services to end-users at premises in a designated service area.

‘Operational control’ is not defined and is therefore to be understood in relation to ordinary usage. The intention is that it would refer to an ability to control the day-to-day management and operation of the FTTP networks in the Velocity estates, including control of the kinds of services that are supplied. Once Telstra has disconnected Telstra-Equipped Services at premises, and Opticomm has connected the premises to its networks, Telstra would no longer be able to control such things as the day-to-day management and operation, or the kinds of services that are supplied. These would instead be determined by Opticomm.

‘Qualifying fixed-line carriage service’ is defined in section 360A of the Act, and means a carriage service where:

- a) the carriage service enables end-users to download communications; and
- b) the carriage service is supplied using a line to premises occupied or used by an end-user; and
- c) the peak download transmission speed of the carriage service is at least 25 megabits per second (Mbps); and

d) the peak upload transmission speed of the carriage service is at least 5 Mbps.

Item 7 – Section 4 (after definition of “Transact Capital Communications Pty Ltd”)

Item 7 inserts two new definitions into section 4 of the Principal Declaration, and adds a new subsection 4(2).

First, item 7 inserts a definition of *Transition Period*. This means the period of time during which both Telstra and Opticomm are the SIPs for the designated service areas specified in Schedule 16A of the Principal Direction, and continues until the day before the Transition End Date.

The *Transition End Date* will occur on one of two days, whichever comes earlier. It will either be the day on which Telstra has disconnected all Telstra-Equipped Services supplied in all the designated service areas, or 1 July 2025. Although Telstra and Opticomm expect to complete disconnections before 1 July 2025, the Amending Declaration provides a buffer in case of delays, for example due to complex disconnections or the impacts of natural disasters or other force majeure events.

Together, these two definitions determine the period of time during which both Telstra and Opticomm will be the SIPs for the Velocity estates, and during which the transfer of the premises from Telstra’s networks to Opticomm’s networks will occur.

Item 7 then inserts new subsection 4(2), which is an interpretive provision linked to the definition of *Telstra* and provides clarity about which Telstra entity will be the SIP for the Velocity estates during and after Telstra’s restructure. It provides that *Telstra* will only mean Telstra Limited if Schedules 2 and 3 of the *Telstra Corporation and Other Legislation Amendment Act 2021* (the Telstra Amendment Act) commence. In all other circumstances, Telstra means Telstra Corporation Limited.

Schedules 2 and 3 of the Telstra Amendment Act commence when any of the property of Telstra Corporation Limited is transferred to, and vested in, Telstra Limited by virtue of a court order. A court order was made on 19 October 2022. As noted above, property, including control of the FTTP networks in the Velocity estates, will be transferred from Telstra Corporation Limited to, and vested in, Telstra Limited on 1 January 2023.

Item 8 – Section 5 (Designated service areas and statutory infrastructure provider)

Item 8 repeals paragraph 5(1)(b) of the Principal Determination and substitutes a new paragraph.

Currently paragraph 5(1)(b) provides that each carrier specified in the heading of a Schedule to the Principal Determination is the SIP for each designated service area specified in the Schedule. Item 8 adds that this is subject to a new subsection 5(3), being inserted by item 9.

Item 9 – Section 5 (Designated service areas and statutory infrastructure provider)

Item 9 inserts new subsection 5(3) into the Principal Determination. This provides that, for the purposes of Schedule 16A to the Principal Determination, Telstra and Opticomm Pty Ltd are the SIPs in respect of each designated service area specified in the Schedule during the Transition Period. Telstra ceases to be the SIP for each designated service area on the

Transition End Date, and Opticomm Pty Ltd will be the sole SIP for each designated service area in the Schedule on and from the Transition End Date.

The Minister has a general power, under section 360L of the Act, to designate service areas and carriers as SIPs for those service areas. The power allows the Minister to declare a single SIP for a service area, or multiple SIPs for a service area.

Item 10 – Schedule 12 – (heading)

Item 10 repeals the current heading of Schedule 12 to the Principal Determination and substitutes a new heading so that, instead of referring to Opticomm Ltd, the heading now refers to Opticomm Pty Ltd. This is consequential to item 4.

Item 11 – Schedule 12 – (table heading)

Item 11 repeals the heading in the table in Schedule 12, and substitutes a new heading that refers to Opticomm Pty Ltd rather than Opticomm Ltd. This is consequential to item 4.

Item 12 – Schedule 16A – (heading)

Item 12 repeals the current heading of Schedule 16A, which refers to Telstra Corporation Limited, and substitutes a new heading that refers to both Telstra and Opticomm Pty Ltd, subject to the Transition Period. The item, together with item 9, establishes that both carriers are the SIPs for the designated service areas in Schedule 16A. The reference to this being subject to the Transition Period clarifies that they are both the SIPs only during the Transition Period, and, in accordance with proposed new subsection 5(3), Opticomm will be the sole SIP for the designated service areas on and from the Transition End Date.

Item 13 – Schedule 16A – (table heading)

Item 13 repeals the table heading in Schedule 16A, which currently refers to Telstra alone, and substitutes a new table heading that refers to both Telstra and Opticomm Pty Ltd. This is consequential to item 12.

Item 14 – Schedule 16A (after table item 48)

Item 14 inserts two new designated service areas in Schedule 16A, as items 48A and 48B. These are two stages of a development at Freeman’s Ridge, Carnes Hill, New South Wales. Earlier stages of the development were designated in 2020, as item 48 of Schedule 16A.

The two areas were the subject of provisional nominated service area declarations made by Telstra in 2021 and therefore are already SIP service areas. These areas are being designated so that they can be incorporated into the framework for the transfer of SIP obligations. Otherwise, the areas would need to be dealt with separately by a Ministerial instrument under subsection 360K(2) of the Act, which allows the Minister to change the SIP for a nominated service area. Such an instrument would need to specify similar matters to those in the Amending Declaration and the Exceptions Determination, so to reduce regulatory complexity the areas are being designated and included in the Amending Declaration.

There is no need to revoke the provisional nominated service area declarations made by Telstra as the designation of the areas will automatically invalidate those declarations. This is a consequence of subsection 360H(1) of the Act, which provides that the whole or a part of a

provisional nominated service area that is also a designated service area cannot be a nominated service area.

Item 15 – Schedule 16A (item 1)

Item 16 – Schedule 16A (after item 1)

Item 15 repeals the existing item 1 in Schedule 16A and replaces it with a new designated service area at 24 Halesworth Parade in Butler, Western Australia. Like the areas being designated under item 14, this area has been specified in a provisional nominated service area by Telstra and is being incorporated into Schedule 16A to make it subject to the transfer process and reduce regulatory complexity. Item 16 then reinserts the previous item 1 (150 Clarendon Street in East Melbourne, Victoria) in Schedule 16A as a new item 1A. It is included as item 1A because designated service areas are listed in numerical order first, and so 24 Halesworth Parade must precede 150 Clarendon Street.

Schedule 2 – Repeals

Item 1 of Schedule 2 repeals the whole of the *Telecommunications (Designated Service Area and Statutory Infrastructure Provider) Amendment Declaration (No. 1) 2022*. As discussed in relation to item 5 of Schedule 1, this instrument is being repealed because it has not yet taken effect and there could be inconsistencies between the amendments to Schedule 16A to the Principal Declaration contained in the Amending Declaration and the First Amending Declaration.

Statement of Compatibility with Human Rights

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

**Telecommunications (Designated Service Area and Statutory Infrastructure Provider)
Amendment Declaration (No. 5) 2022**

Overview

The purpose of the *Telecommunications (Designated Service Area and Statutory Infrastructure Provider) Amendment Declaration (No. 5) 2022* (the Amending Declaration) is to amend the *Telecommunications (Designated Service Area and Statutory Infrastructure Provider) Declaration (No. 1) 2020* to provide a framework for the phased transfer of statutory infrastructure provider (SIP) responsibilities from Telstra to Opticomm in relation to Telstra's service areas. It does this together with another instrument being made at the same time, the *Telecommunications (Exceptions to Statutory Infrastructure Provider Obligations – Telstra and Opticomm Pty Ltd) Determination 2022* (the Exceptions Determination).

Telstra is the SIP for 130 service areas, known as the Velocity estates, including Telstra's fibre-to-the-premises (FTTP) network in South Brisbane. On 24 December 2020, Telstra announced that it had sold the networks in the Velocity estates to Uniti. Uniti's subsidiary, Opticomm, has entered into a commercial arrangement with Telstra which will see a phased transfer of the networks. Telstra will disconnect its equipment at premises and Opticomm will then connect its equipment. This process will commence shortly.

The Amending Declaration provides that Telstra and Opticomm will both be SIPs for the Velocity estates, until such time as all Telstra equipment has been disconnected, or 1 July 2025 (whichever is the earlier). After that time, Opticomm alone will be the SIP. The Exceptions Determination sets out when Telstra and Opticomm respectively are required (or not required) to fulfil their SIP obligations in the Velocity estates during the transition period.

Together, the instruments provide for a smooth and streamlined transfer of SIP responsibilities while preserving continuity of service for people at premises in the Velocity estates. This will support ongoing access to telecommunications, which is important for social, economic, cultural and political participation.

Human rights implications

The Amending Declaration is compatible with the rights and freedoms recognised or declared by the international instruments listed in subsection 3(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* as they apply to Australia. The Amending Declaration does not engage any of the applicable rights or freedoms.

Conclusion

The Amending Declaration is compatible with human rights as it does not raise any human rights issues.