

Explanatory Statement

Telecommunications Act 1997

Telecommunications (Carrier Licence Conditions) Amendment (Networks supplying Superfast Carriage Services to Residential Customers) Instrument 2022

Issued by the Authority of the Minister for Communications

Purpose and operation of the Instrument

The purpose of the *Telecommunications (Carrier Licence Conditions) Amendment (Networks supplying Superfast Carriage Services to Residential Customers) Instrument 2022* (the ‘Amending Instrument’) is to amend the *Carrier Licence Conditions (Networks Supplying Superfast Carriage Services to Residential Customers) Declaration 2014* as currently in force (the Declaration).

The Amending Instrument is made by the Minister for Communications (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(2)).

The purpose of the amendments is to allow associates of a carrier that do not supply retail or wholesale superfast carriage services or specified broadband services to residential customers to be included in a Functional Separation Undertaking (FSU) for the purposes of the Declaration.

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 or specified broadband services to residential customers, but were not subject to similar obligations in Parts 7 and 8 of the Act.

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.

Paragraph 5(1)(c) of the Declaration allows the Declaration to fall away if a FSU given by a carrier is in force. However, Paragraph 151C(2)(a) of the Act only allows entities that could be classified as a ‘retailer’ or a ‘wholesaler’ to give a FSU to the Australian Competition and Consumer Commission (ACCC).

Amendments to the Declaration to cover associates of the carrier are required to allow the Declaration to fall away in its entirety if a FSU was accepted by the ACCC. If not, a carrier could be in the position where it could be regulated under both the FSU and the Declaration which would duplicate reporting and regulatory effort by both the carrier and the ACCC.

The Amending Instrument aligns the language between the Declaration and amendments to the Act made by the *Telecommunications Legislation Amendment (Competition and Consumer) Act 2020* (TLA Act) that provide detail on the submission and assessment of FSUs made by the controllers of superfast broadband networks.

The Amending Instrument broadens the scope of the Declaration from the ‘carrier’ to the ‘carrier or any of its associates’. The change means that, in effect, the Declaration will not apply if an undertaking is given to the ACCC by not only a carrier, but also its associates.

Details of the accompanying amendments are set out in **Attachment A**.

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.

On 17 December 2021, TPG requested the former Minister for Communications make amendments to the Declaration. On 13 September 2022 the Minister wrote to TPG seeking its views on the Amended Instrument. The Department of Infrastructure, Transport, Regional Development, Communications and the Arts (the Department), on the Minister’s behalf, also undertook public consultation between 13 September 2022 and 13 October 2022 via the Department’s website. The Department also contacted the Australian Communications and Media Authority (ACMA), the ACCC, NBN Co and Communications Alliance and invited submissions. The ACMA, ACCC and NBN Co responded in support of the Amending Instrument.

Impact Analysis

The Office of Impact Analysis (OIA) has advised an Impact Analysis is not required (OBPR22-03825).

Statement of Compatibility with Human Rights

Subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* requires the rule-maker in relation to a legislative instrument to which section 42 (disallowance) of the *Legislation Act 2003* applies to cause a statement of compatibility with human rights to be prepared in respect of that legislative instrument.

The statement of compatibility set out below has been prepared to meet that requirement.

The Declaration imposes carrier licence conditions in respect of certain 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.

In 2020, the TLA Act amended the Act to allow controllers of superfast broadband networks to obtain FSUs from the ACCC and operate at both the wholesale and retail levels. It is advantageous for entities to be regulated under the FSU rather than the Declaration because a FSU can be tailored to each entity’s specific circumstances. The Declaration can fall away if a FSU given by a carrier is in force. However, Paragraph 151C(2)(a) of the Act only allows entities that could be classified as a ‘retailer’ or a ‘wholesaler’ to give a FSU to the ACCC.

The Amending Instrument allows associates of a carrier that do not provide retail or wholesale services to be included in a FSU for the purposes of the Declaration. This amendment removes the potential for duplicative reporting and regulatory obligations on carriers captured by the Declaration and unnecessary enforcement costs for the ACCC.

Human rights implications

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

Conclusion

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

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 2022* (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 one Schedule to the Amending Instrument.

Schedule 1 to the Amending Instrument

Item 1

Item 1 omits paragraph 5(1)(c) of the Declaration and replaces it with a new paragraph. The change will allow associates of a carrier that do not provide retail or wholesale services to be included in a Functional Separation Undertaking (FSU) for the purposes of the Declaration. If this occurs, the licence conditions provided for under Part 6 of the Declaration do not apply to either a specified carrier or any of its associates, removing the potential for duplicative reporting and regulatory obligations on carriers captured by the Declaration.

Item 2

Item 2 omits subsection 5(2) of the Declaration and replaces it with a new paragraph. This represents a consequential change stemming from the insertion of new paragraph 5(1)(c) of the Declaration. It extends the application of subsection 5(2) of the Declaration to an associate of a specified carrier, as well as to the specified carrier itself. Subsection 5(2) allows FSUs to be given alone or jointly with other persons.