EXPLANATORY STATEMENT

Telecommunications Act 1997

Telecommunications (Carrier Licence Exemption) Determination No. 1 of 2001
(Amendment No. 1 of 2005)

Issued by the authority of the Minister for Communications,
Information Technology and the Arts

Background

The Telecommunications Act 1997 (the Act) provides for the regulation of telecommunications services, including the operation of network units used to supply a carriage service to the public. Division 2 of Part 3 of the Act creates offences for a person to supply a carriage service to the public unless that person is the holder of a carrier licence, a nominated carrier declaration is in force (whereby another carrier becomes responsible for the person’s network units), or an exemption under the Act applies.

Under section 42 of the Act a person is required to hold a carrier licence if:

(a) that person is an owner or a part-owner of a “network unit” (ie a line link, designated radiocommunications facility or some other facility determined by the Minister); and
(b) that “network unit” is used to supply a carriage service to the public.

Paragraph 51(1)(c) of the Act provides that the Minister for Communications, Information Technology and the Arts may determine by written instrument that section 42 of the Act does not apply in relation to a specified use of a network unit. The Telecommunications (Carrier Licence Exemption) Determination No. 1 of 2001 (the original Determination) was made on 4 January 2001 in reliance on this provision. The original Determination clarifies the requirements associated with obtaining a datacasting licence by exempting datacasting licence holders from the requirement to obtain a carrier licence. This is because the specific exemptions in the Act that apply to broadcasting services (and ancillary services) do not apply to datacasting services provided on their own, including the services provided as part of the datacasting trial underway in Sydney, and it is also likely that they do not apply to a digital datacasting service that is multiplexed within a broadcasting service. The original Determination is expressed to cease on 30 June 2005.

Purpose

The purpose of the Telecommunications (Carrier Licence Exemption) Determination No. 1 of 2001 (Amendment No. 1 of 2005) (the Determination) is to extend the operation of the original Determination until 31 December 2006.

It is necessary to extend the operation of the original Determination until 31 December 2006 because the reasons for making the original Determination remain
unchanged, pending the outcome of decisions which may affect the provision of datacasting services after 2006.

The explanatory statement to the original Determination noted that:

“While a holder of a datacasting licence may, under certain circumstances, meet the criteria for the requirement to obtain a telecommunications carrier licence it is not yet apparent that it is appropriate that they be regulated as a provider of a carriage service. Until permanent datacasting operations commence it is difficult to know what type of services will be offered. Furthermore, it is less clear that datacasting services which closely resemble free-to-air broadcasting services will give rise to potential carrier status.”

Although datacasting services are currently being trialled and some broadcasters have provided services under a datacasting licence, permanent datacasting operations have not yet commenced. It therefore remains unclear as to whether the holder of a datacasting licence should be regulated as a provider of carriage services.

The accompanying Determination extends the operation of the original Determination until 31 December 2006. This date reflects the end of the moratorium on the issue of new commercial television broadcasting licences as provided by the Broadcasting Services Act 1992. The arrangements to apply after 31 December 2006 are currently the subject of a statutory review which is also relevant to the regulation of datacasting services beyond that date. The need to continue the exemption beyond 31 December 2006 will be a matter for consideration in the context of the broader decisions that are part of this review.

Consultation

Subsection 33(3) of the Acts Interpretation Act 1901 has the effect that the Minister’s power to make a determination under paragraph 51(1)(c) of the Act includes a power to amend a determination made under that paragraph, provided that this power is exercised in the like manner and subject to same conditions as the power in paragraph 51(1)(c). As a consequence of the commencement of the Legislative Instruments Act 2003 (LIA) and the repeal of section 46A of the Acts Interpretation Act 1901 on 1 January 2005, a determination made under paragraph 51(1)(c) of the Act is a legislative instrument for the purposes of the LIA (see LIA s.6(1)(d)). This means that the accompanying Determination is also a legislative instrument for the purposes of the LIA must therefore be tabled in the Parliament and is subject to Parliamentary disallowance.

Consultation on the accompanying Determination was considered unnecessary due to its minor and machinery nature (see paragraph 18(2)(a) of the LIA).

Details of the accompanying Determination are provided in the Attachment.
Clause 1 - Name of Determination

Clause 1 provides that the accompanying Determination is the Telecommunications (Carrier Licence Exemption) Determination No. 1 of 2001 (Amendment No. 1 of 2005).

Clause 2 - Commencement

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

Clause 3 – Amendment of the Telecommunications (Carrier Licence Exemption) Determination No. 1 of 2001

Clause 3 provides that Schedule 1 to the accompanying Determination amends the Telecommunications (Carrier Licence Exemption) Determination No. 1 of 2001.

Schedule 1 – Amendment

Item 1 of Schedule 1 to the accompanying Determination replaces clause 3 of the original Determination with new clause 3. New clause 3 extends the operation of the original Determination until 31 December 2006.