EXPLANATORY STATEMENT

Telecommunications Act 1997

Telecommunications (Carrier Licence Exemption) Determination No. 1 of 2001
(Amendment No. 1 of 2006)

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 under paragraph 51(1)(c) of the Act. 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 services provided in the Sydney datacasting trial, and it is also likely that they do not apply to a digital datacasting service that is multiplexed together with a broadcasting service. The original Determination was expressed to cease on 30 June 2005.

The original Determination was extended by the Telecommunications (Carrier Licence Exemption) Determination No. 1 of 2001 (Amendment No. 1 of 2005) on 21 June 2005 to 31 December 2006 because the reasons for making the original Determination remained unchanged, pending the outcome of statutory reviews dealing with issues related to the provision of datacasting services after 2006.
Purpose

The purpose of the Telecommunications (Carrier Licence Exemption) Determination No. 1 of 2001 (Amendment No. 1 of 2006) (the Determination) is to extend the operation of the original Determination until the earliest digital television switch-over day, the earliest day on which a simulcast period within the meaning of Schedule 4 to the Broadcasting Services Act 1992 (BSA) ends. It is necessary to extend the operation of the original Determination until this date because the reasons for making the original Determination continue to apply.

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, some broadcasters have provided services under a datacasting licence and new services may be provided from 1 January 2007, 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 carrier.

The accompanying Determination extends the operation of the original Determination to the earliest digital television switch-over day, the earliest day on which a simulcast period within the meaning of Schedule 4 to the BSA ends.

The end of the simulcast period will be a time at which there will be potential for a range of new services to emerge, thus affecting the competitive environment in which operators providing datacasting services may operate. It is appropriate therefore to extend the exemption only for that period to allow the Government to re-evaluate the need for the exemption in the new environment from the end of the simulcast period, and in the light of services which have emerged in the intervening period.

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 only if that power is exercised in a like manner and subject to the same conditions as the power in paragraph 51(1)(c).

A determination made under paragraph 51(1)(c) of the Act is a legislative instrument for the purposes of the Legislative Instruments Act 2003 (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 extension of the Determination was undertaken in the context of the release by the Australian Communications and Media Authority of a discussion paper on Future Use of Unassigned Television Channels in March 2006.

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 2006).

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 provides that the Determination will cease to have effect on the earliest digital television switch-over day, as defined in section 6 of the Broadcasting Services Act 1992.

Item 2 of Schedule 1 inserts a definition of ‘earliest digital television switch-over day’ in clause 4 of the original Determination. The definition provides that earliest digital television switch-over day means the earliest day on which a simulcast period (within the meaning of Schedule 4 of the Broadcasting Services Act 1992) ends.