

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Broadband, Communications
and the Digital Economy

Telecommunications Act 1997

Determination under subsection 23(2) (No. 1) 1998
(Amendment No. 1 of 2012)

Authority

Subsection 23(2) of the *Telecommunications Act 1997* (the Act) authorises the Minister to make a written determination specifying persons for the purposes of paragraph 23(1)(n) of the Act, thereby modifying the ‘immediate circle’ concept.

Section 33(3) of the *Acts Interpretation Act 1901* provides, among other things, that a power to make an instrument shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

This Determination (the Amending Determination) amends the definition of ‘specified joint venture’ in the *Determination under subsection 23(2) (No. 1) 1998* (the Existing Determination) which was made on 21 August 1998.

The Determination commences on the day after it is registered on the Federal Register of Legislative Instruments.

Purpose

The purpose of this Amending Determination is to amend the definition of specified joint venture in the Existing Determination to include associations of persons engaging in a common undertaking for product, as well as for profit as is currently provided.

This change will mean the Existing Determination will better reflect the practical operation of joint ventures in those sectors where joint ventures that share product are used as well as joint ventures for sharing profit. As such it will give better effect to the policy intent of the Existing Determination that joint ventures as commonly understood and structured in the mining sector are covered.

To the extent the Existing Determination is intended to provide joint ventures with the flexibility to install their own infrastructure, if it is effective and efficient for them to do so, it follows that they should not be limited by distinctions as to whether they are for profit or product. Moreover, in circumstances where a private network is installed by a joint venture, for it to be effective and efficient, the parties involved in the joint venture must be able to use the infrastructure, regardless of how the joint venture is constituted.

The amendment will also ensure there is no inequitable treatment of joint venture entities structured for the common undertaking for product compared to those for profit.

BACKGROUND

Under the Act an owner of a network unit must have a carrier licence or a nominated carrier declaration if the network unit is used to supply a carriage service to the public, unless an exemption applies.

Supplying a carriage service to the public means supplying carriage services to people outside the 'immediate' circle of the network unit owner, as defined in section 23 of the Act. A person's immediate circle includes, for example, a person's employee or partner. Section 23(2) of the Act allows the Minister to determine that a person falls within another person's immediate circle.

The Existing Determination extends the immediate circle of a network unit owner to include joint venture partners and contractors, thus enabling network unit owners to supply carriage services to those persons in certain circumstances without being required to hold a carrier licence. The supply of carriage services must not be the common undertaking of the joint venture and must be no more than incidental to the common undertaking of the joint venture.

The Existing Determination provides joint ventures with the flexibility to install their own infrastructure for their own use if it is effective and efficient for them to do so, rather than having to use a licensed carrier.

The definition of specified joint venture in the Existing Determination requires that persons engage in a 'common undertaking for profit'. Concern has been raised that this definition does not reflect the practical reality of joint ventures, particularly in the mining sector where joint venture arrangements commonly involve an association of parties 'for the common undertaking for product'. These are arrangements where the products of the operation are shared between the joint venture members who then market and sell them independently, as opposed to sharing a post-sale profit. This outcome is inconsistent with the view expressed in the Explanatory Statement to the Existing Determination which indicated mining sector joint venture arrangements were expected to be covered by the Existing Determination.

The Amending Determination therefore changes the definition of 'specified joint venture' to include the circumstance where persons engage in a 'common undertaking for product' as well as a 'common undertaking for profit'. This new definition better reflects commercial practice for the establishment of joint ventures, particularly those in the mining sector.

CONSULTATION

On 6 July 2011, the Department of Broadband, Communications and the Digital Economy (the Department) published the draft amendment on its website for public comment. The department also contacted key stakeholders in the telecommunications and resources sectors and consulted with the Australian Communications and Media Authority and the Australian Competition and Consumer Commission.

Three submissions were received. Two submissions supported the proposed amendment. The other submission was not supportive of the Existing Determination nor the amendment.

The Amending Determination is a legislative instrument for the purposes of the *Legislative Instruments Act 2003* (LIA) (see paragraph 6(a) of the LIA).

Details of the Amending Determination are set out in the Attachment.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

Determination under subsection 23(2) (No. 1) 1998 (Amendment No. 1 of 2012)

This Amending Determination 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 legislative instrument

The *Determination under subsection 23(2) (No. 1) 1998* (the Existing Determination) extended the ‘immediate circle’ of a network unit owner to include (i) joint venture partners (engaged in a common undertaking for profit) and (ii) contractors, thus enabling network unit owners to supply carriage services to those types of persons without being required to hold a carrier licence under the *Telecommunications Act 1997*.

The purpose of this Amending Determination is to amend the definition of ‘specified joint venture’ under the Existing Determination to also include joint ventures engaged in a ‘common undertaking for product’ as well as a ‘common undertaking for profit’.

Human rights implications

This Amending Determination does not engage any of the applicable rights or freedoms.

Conclusion

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

ATTACHMENT

NOTES ON CLAUSES

Clause 1 – Name of Determination

Clause 1 provides that the name of the Amending Determination is the *Determination under subsection 23(2) (No. 1) 1998 (Amendment No. 1 of 2012)*.

Clause 2 - Commencement

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

Clause 3 – Variation

Clause 3 provides that the *Determination under subsection 23(2) (No. 1) 1998* (the Existing Determination) is amended as set out in the Schedule to the Amending Determination.

Schedule

Clause 1 of the Schedule amends the definition of ‘specified joint venture’ in the Existing Determination by inserting the words ‘or product’ immediately after the word ‘profit’.

A joint venture where the product is shared and each party to the joint venture markets and sells its share of the product separately is an example of a common undertaking for product. Such arrangements are common in the mining sector. The inclusion of these types of joint venture in the definition is consistent with the policy position set out in the Explanatory Statement to the Existing Determination which indicated mining sector joint ventures were expected to be covered by the Existing Determination.

The amendment will ensure that joint venturers engaged in a common undertaking – whether for *profit* or *product* – can benefit from the flexibility to install infrastructure offered by the Determination and are treated consistently under the carrier licensing framework.