**REPLACEMENT EXPLANATORY STATEMENT**

**This Explanatory Statement replaces the Explanatory Statement registered on 12 March 2019 for the *Telecommunications (Carrier Licence Exemption – Trial Network Units) Determination 2019* [F2019L00317] to respond to suggestions from the Senate Standing Committee for the Scrutiny of Delegated Legislation.**

*Telecommunications Act 1997*

***Telecommunications* *(Carrier Licence Exemption – Trial Network Units) Determination 2019***

**Authority**

The *Telecommunications* *(Carrier Licence Exemption – Trial Network Units) Determination 2019* (the Determination) is made by the Minister for Communications and the Arts under paragraph 51(1)(c) and subsection 51(2) of the *Telecommunications Act 1997* (the Tel Act).

Subsection 33(3) of the *Acts Interpretation Act 1901* relevantly provides that where an Act confers a power to make an instrument of a legislative character, the power shall be construed as including a power exercisable in like manner and subject to the like conditions to repeal any such instrument. This instrument is a legislative instrument for the purposes of section 8 of the *Legislation Act 2003*.

**Purpose and operation**

The Determination repeals and remakes the *Determination under subsection 51(1), No.1 of 1998*, which is due to sunset on 1 April 2019. The 1998 Determination was operating effectively, and is remade in substantially the same form.

Section 51(1) of the Tel Act provides flexibility to the regulatory framework by allowing exemptions from carrier licence obligations to be made. Business models and technology in the telecommunications industry are rapidly changing, and the use of Ministerial determinations under the Act continues to be an appropriate mechanism to deal with carrier licensing matters.

Section 42 of the Tel Act prohibits the owner of a network unit from using the unit to supply a carriage service to the public without a carrier licence or a nominated carrier declaration being in force in relation to the unit. Section 44 of the Tel Act in effect provides that a network unit is being used to supply carriage services to the public if an end-user is outside the network unit owner’s immediate circle. Section 23 of the Tel Act sets out those who are considered to be part of a network unit owner's immediate circle. Visitors using a network unit do not form part of a network unit owner’s ‘immediate circle’. Paragraph 51(1)(c) of the Tel Act provides that the Minister may determine that section 42 does not apply in relation to the specified use of a network unit. Subsection 51(2) of the Tel Act provides that a determination may be subject to such conditions as are specified in the determination.

The Determination provides that the carrier licensing requirement does not apply where the Australian Communications and Media Authority (ACMA) has issued a Trial Certificate to the network unit owner. The Determination provides that, in deciding whether to issue a Trial Certificate, the ACMA may have regard to a range of matters, as detailed in the determination.

Setting out these matters in the Determination allows them to be adjusted, if new technology or business models indicate that doing so is necessary. The Determination also provides some flexibility as to the entity considering such trial certificates; although the ACMA is the responsible entity under the current instrument, in the future it may be desirable to involve others.

Flexibility in making this category of instrument through the determination process fosters innovation, development and growth in the Australian telecommunications industry and supports the long term interests of end-users.

In the absence of this exemption, persons undertaking trials of carriage services would require a carrier licence. However, to require a carrier licence in those circumstances could hinder innovation within the telecommunications sector. The Determination promotes research and development that contributes to the growth of Australia’s telecommunications industry, while ensuring competition within that industry. The Determination includes provisions (including time limits and factors that the ACMA may have regard to in deciding whether to issue a Trial Certificate) to ensure that the exemption cannot be used to gain an unfair competitive advantage over other carriers.

**Consultation**

The ACMA and the Communications Alliance were consulted on the remaking of this instrument. Both parties agreed that the instrument should be remade by way of a determination.

**Regulatory impact assessment**

The Office of Best Practice Regulation (OBPR) has advised that, as the new Determination will make minor drafting amendments with minimal impact, a Regulatory Impact Statement is not required. The OBPR reference number is 25072.

Detailed notes on the Determination 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 in Attachment B.

**Attachment A**

**Notes on the *Telecommunications* *(Carrier Licence Exemption – Trial Network Units) Determination 2019***

**Section 1 Name**

Section 1 provides that the name of the instrument is the *Telecommunications (Carrier Licence Exemption – Trial Network Units) Determination 2019.*

**Section 2 Commencement**

Section 2 provides that the instrument commences the day after it is registered on the Federal Register of Legislation.

**Section 3 Authority**

Section 3 provides that the authority for the making of the Determination is in paragraph 51(1)(c) and subsection 51(2) of the *Telecommunications Act 1997* (the Tel Act).

**Section 4 Definitions**

Section 4 defines expressions that are used in the Determination.

The note at the beginning of section 4 provides that a number of expressions used in the instrument are defined in the Tel Act, and by virtue of paragraph 13(1)(b) of the *Legislation Act 2003* will have the same meaning as in the enabling legislation, as in force from time to time. Those expressions include ‘network unit’ and ‘ACMA’.

Under the Tel Act, ***network unit*** has the same definition as given in Division 2 of Part 2 of the Tel Act.

Under the Tel Act, ***ACMA*** means the Australian Communications and Media Authority.

The expression ***Act*** in the Determination means the *Telecommunications* *Act* *1997*.

A ***Trial Certificate*** is a written document prepared by the ACMA that states, in the ACMA’s opinion, the network unit is being solely operated on a trial basis. In issuing, or extending, a Trial Certificate, the ACMA must comply with the conditions and requirements set out in section 7.

**Section 5 Schedules**

Section 5 provides that each instrument that is specified in a Schedule to the Determination is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to the Determination has effect according to its terms. There is one Schedule to the Determination.

**Section 6 Exemption for network units solely being used for a trial**

Section 6 provides that section 42 of the Tel Actdoes not apply in relation to a network unit for which there has been a Trial Certificate issued by the ACMA.

**Section 7 Requirements of, and conditions for, the issuance of Trial Certificates**

Section 7 provides that the ACMA, in deciding whether to issue a Trial Certificate, or to extend the duration of an existing Trial Certificate, may have regard to the following:

* the duration of the trial, (including any proposed extension of the trial’s duration);
* any previous trials for a similar carriage service;
* the reasons for the trial, including whether it is for the evaluation of technical feasibility or commercial prospects;
* the effects of the trial on competition within the telecommunications industry or a sector of the telecommunications industry;
* any charges to end-users participating in the trial;
* whether the size of the trial would unreasonably affect the revenue of a carrier; and
* any other matters the ACMA considers relevant.

A Trial Certificate must include a period of up to 6 months during which it remains in force.

The ACMA may issue a certificate extending the period of the original Trial Certificate for up to an additional 6 months from the original Trial Certificate’s expiry date. The extension may be granted at any time prior to the expiration of the original Trial Certificate.

The ACMA is limited to issuing up to two Trial Certificates in respect of the same network unit, in effect allowing a total of two years (including extensions) for a trial to take place.

**Schedule 1—Repeals**

Schedule 1 to the Determination repeals the *Determination under subsection 51(1), No.1 of 1998*

**Attachment B**

## Statement of Compatibility with Human Rights

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

**Telecommunications (Carrier Licence Exemption – Trial Network Units) Determination 2019**

This 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

The Determination repeals and remakes the *Determination under subsection 51(1), No.1 of 1998*, which is due to sunset on 1 April 2019. The 1998 Determination was operating effectively, and is remade in substantially the same form.

Section 42 of the Tel Act prohibits the owner of a network unit from using the unit to supply a carriage service to the public without a carrier licence or a nominated carrier declaration being in force in relation to the unit. Section 44 of the Tel Act in effect provides that a network unit is being used to supply carriage services to the public if an end-user is outside the network unit owner’s immediate circle. Section 23 of the Tel Act sets out those who are considered to be part of a network unit owner's immediate circle. Visitors using a network unit do not form part of a network unit owner’s ‘immediate circle’. Paragraph 51(1)(c) of the Tel Act provides that the Minister may determine that section 42 does not apply in relation to the specified use of a network unit. Subsection 51(2) of the Tel Act provides that a determination may be subject to such conditions as are specified in the determination.

The Determination provides that the carrier licensing requirement does not apply where the ACMA has issued a Trial Certificate to the network unit owner. The Determination provides that, in deciding whether to issue a Trial Certificate, the ACMA may have regard to a range of matters, as detailed in the determination.

In the absence of this exemption, persons undertaking trials of carriage services would require a carrier licence. However, to require a carrier licence in those circumstances could hinder innovation within the telecommunications sector. The Determination promotes research and development that contributes to the growth of Australia’s telecommunications industry, while ensuring competition within that industry. The Determination includes provisions (including time limits and factors that the ACMA may have regard to in deciding whether to issue a Trial Certificate) to ensure that the exemption cannot be used to gain an unfair competitive advantage over other carriers.

### Human rights implications

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

### Conclusion

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