

## **EXPLANATORY STATEMENT**

### ***Telecommunications Act 1997***

#### **Telecommunications (National Broadband Network) Determination under subsection 531H(4) 2008 (No. 1)**

Issued by the authority of the Minister for Infrastructure, Transport, Regional Development and Local Government, on behalf of the Minister for Broadband, Communications and the Digital Economy in accordance with an authorisation under section 18C of the *Acts Interpretation Act 1901*

The *Telecommunications (National Broadband Network) Determination under subsection 531H(4) 2008 (No. 1)* (the Determination) is made by the Minister for Infrastructure, Transport, Regional Development and Local Government under subsection 531H(4) of the *Telecommunications Act 1997* (the Act). Subsection 531H(4) of the Act is contained in Part 27A of the Act, which was inserted into the Act by the *Telecommunications Legislation Amendment (National Broadband Network) Act 2008*.

#### **Background and legislative basis**

##### **Part 27A of the Act**

Part 27A of the Act sets out a scheme for specified information to be provided by specified telecommunications carriers to the Commonwealth and for such information to be provided to companies that are considering making or intending to make a submission in response to a request for proposals issued by the Commonwealth for the creation or development of a new open access, high speed broadband network (known as the National Broadband Network). A Request for Proposals in respect of the National Broadband Network was released by the Commonwealth on 11 April 2008.

Under section 531C of the Act, the Minister has the power to make a disallowable non-legislative instrument specifying particular information to be provided by specified carriers to ‘authorised information officers.’ The term ‘authorised information officer’ is defined in the Act to mean the Secretary of the Department, a Deputy Secretary of the Department, an SES employee of the Department whose duties relate to the National Broadband Network Taskforce or a person appointed by the Minister under section 531M of the Act to be an authorised information officer. Section 531F of the Act requires a specified carrier to provide the specified information within the period specified in the instrument made by the Minister under section 531C.

Information provided by carriers in compliance with section 531F is ‘protected carrier information’ for the purposes of Part 27A. Division 3 of Part 27A imposes on recipients of protected carrier information express prohibitions in relation to the disclosure and use of protected carrier information, except as permitted by the provisions in Part 27A.

Under subsection 531H(1) of the Act, an authorised information officer may disclose protected carrier information to persons who are ‘entrusted company officers’ of companies that are considering making or intending to make a submission in response to the Request for Proposals issued by the Commonwealth for the creation of the National Broadband Network (which is a ‘designated requested for proposal notice’ for the purposes of Part 27A of the Act). Under subsection 531K(2) of the Act, an entrusted company officer may disclose protected carrier information to another entrusted company officer for certain permitted purposes, including for the purpose of deciding whether to make a submission in response of a designated request for proposal notice or to prepare such a submission.

#### **Determination under 531H(4)**

The Determination specifies a number of conditions for the purposes of paragraph 531H(1)(d) of the Act. Paragraph 531H(1)(d) requires an authorised information officer to be satisfied that any conditions specified in a determination made under subsection 531H(4) have been met before the authorised information officer may disclose protected carrier information to an entrusted company officer (assuming that the other requirements in subsection 531H(1) have been met).

#### **Consultation**

The Determination is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*. Specific consultation on a draft of the Determination has not occurred because the consultation that occurred in relation to a draft of the *Telecommunications (National Broadband Network—Restricted Recipients and Storage, Handling and Destruction of Protected Carrier Information) Rules 2008 (No. 1)* (the Rules) was considered adequate in light of the nature of the conditions specified in the Determination. The condition specified in paragraph 4(1)(a) of the Determination was included in the draft Rules in subclause 4(1). The condition has been modified to include a requirement that notification be given of the premises at which protected carrier information initially disclosed under subsection 531H(1) would be stored. This is to ensure consistency with the record-keeping requirements in relation to storage of protected carrier information in subclause 5(1) and paragraph 7(3)(b) of the Rules. The condition in paragraph 4(1)(b) is intended to ensure that a receiving officer of a company is subject to the same requirements that apply to authorised entrusted company officers under subclause 4(2) of the Rules. The condition in paragraph 4(1)(c) does not impose any additional obligations on a relevant company in relation to the storage, handling or destruction of protected carrier information. The purpose of the condition is to require the company, through its receiving officer, to provide assurance that it has taken steps to ensure that its entrusted company officers will comply with the Rules prior to protected carrier information being disclosed by an authorised information officer.

Details of the consultation process that occurred in relation to a draft of the Rules are set out in the explanatory statement to the Rules.

#### **Details of the Determination**

Details of the accompanying Determination are set out in the [Attachment](#).

## ATTACHMENT

### **Details of the Telecommunications (National Broadband Network) Determination under subsection 531H(4) 2008 (No. 1)**

#### Clause 1 – Name of Determination

Clause 1 provides that the title of the Determination is the *Telecommunications (National Broadband Network) Determination under subsection 531H(4) 2008 (No. 1)*.

#### Clause 2 – Commencement

Clause 2 sets out the date on which the Determination commences. The Determination commences on the day after it is registered on the Federal Register of Legislative Instruments.

#### Clause 3 – Definitions

Clause 3 sets out definitions of terms used in the Determination.

The term Act is defined to mean the *Telecommunications Act 1997*.

The term ‘relevant company’ means a company which has given a notice to an authorised information officer under paragraph 531H(1)(b) of the Act. The giving of a written notice by a company to an authorised information officer to the effect that the company is considering or intending to make a submission in response to a designated request for proposals notice (i.e. a proposal in response to the National Broadband Network request for proposals issued on 11 April 2008) is a pre-condition that must be satisfied before an authorised information officer may disclose protected carrier information to an entrusted company officer of the company<sup>1</sup>.

The term ‘receiving officer’ is defined to mean an entrusted company officer of a relevant company nominated for the purposes of paragraph 4(1)(a) of the Determination.

The term ‘Rules’ is defined to mean the *Telecommunications (National Broadband Network – Restricted Recipients and Storage, Handling and Destruction of Protected Carrier Information) Rules 2008 (No. 1)*.

Note 1 to clause 3 highlights that the terms ‘authorised information officer’ and ‘entrusted company officer’ have the same meaning in the Determination as in the Act (see section 531B of the Act).

#### Clause 4 – Conditions for the purposes of paragraph 531H(1)(d) of the Act

Clause 4 specifies a number of conditions for the purposes of paragraph 531H(1)(d) of the Act. Paragraph 531H(1)(d) requires an authorised information officer to be

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<sup>1</sup> The effect of subclause 4(1) of the Rules is that an authorised information officer may only disclose protected carrier information under subsection 531H(1) to a ‘receiving officer’ of a company as defined in the Rules.

satisfied that any conditions specified in a determination made under subsection 531H(4) have been met before the authorised information officer may disclose protected carrier information to an entrusted company officer (assuming that the other requirements in subsection 531H(1) have been met).

The first condition is that a relevant company has (a) given a written notice to an authorised information officer that nominates a receiving officer to receive protected carrier information under subsection 531H(1) of the Act and that specifies the premises where protected carrier information received under subsection 531H(1) would be stored and (b) has certified that the duties of the receiving officer are directly relevant to the exceptions to the prohibition on use of protected carrier information as set out in subsection 531K(2A) of the Act (paragraph 4(1)(a)). The purpose of this condition is to ensure that a company has a receiving officer so that information may be disclosed to the company through that officer in compliance with the restricted recipient rules in subclause 4(1) of the Rules. The condition is also intended to ensure consistency between the requirements applying at the time of initial disclosure of protected carrier information and the requirements in the Rules that restrict disclosure of protected carrier information by a receiving officer to an authorised entrusted company officer whose duties are directly relevant to the exceptions to the prohibition on use of protected carrier information as set out in subsection 531K(2A) of the Act (paragraph 4(1)(a) of the Rules) and that require records to be kept of the premises at which protected carrier information is stored (see subclause 5(1) and paragraph 7(3)(b) of the Rules).

A note to subclause 4(1) explains that where a proposal in response to the National Broadband Network request for proposals is intended to be made by a company jointly with one or more other companies or entities as a consortium, the intention is that there be one receiving officer for the consortium in order to facilitate consistent and comprehensive record-keeping in compliance with the Rules.

The second condition is that a receiving officer has given an authorised information officer a signed copy of an undertaking in substantially the form specified in Schedule 1 (paragraph 4(1)(b)). The form of undertaking specified in Schedule 1 is the same as the undertaking specified in Schedule 1 to the Rules which must be signed by an entrusted company officer before a receiving officer or another entrusted company officer is able to disclose protected carrier information to that officer (see subclause 4(2) of the Rules). The purpose of this condition is to ensure that all entrusted company officers who have access to protected carrier information have signed a similar undertaking.

The third condition is that the receiving officer has certified to an authorised information officer that the relevant company has appropriate systems, equipment, procedures and other arrangements in place to ensure that its entrusted company officers comply with the Rules (paragraph 4(1)(c)). The certification must be in the form of a statutory declaration made under the *Statutory Declarations Act 1959* (subclause 4(4)). A declaration must be in the prescribed form and be made before a prescribed person (see the *Statutory Declarations Regulations 1993*). The purpose of the condition in paragraph 4(1)(c) is to require the company, through its receiving officer, to provide assurance that it has taken steps to ensure that its entrusted

company officers will comply with the Rules prior to protected carrier information being disclosed by an authorised information officer.

The effect of subclause 4(2) is that a receiving officer must be a director or employee of the company that gave the notice under paragraph 531H(1)(b). The purpose of this restriction is to ensure that an entrusted company officer with knowledge of the company's arrangements for compliance with the Rules (and those of its engaged advisers and, if it is part of a consortium, those of other companies and/or bodies politic forming part of that consortium) gives the certification required under paragraph 4(1)(c).

#### Schedule 1

Schedule 1 specifies the form of undertaking for the purposes of paragraph 4(2)(b) of the Determination.