

EXPLANATORY STATEMENT

Approved by the Australian Competition and Consumer Commission

Telecommunications Act 1997

Telecommunications (Superfast Broadband Network Class Exemption) Determination 2020

Authority

The Australian Competition and Consumer Commission (**the ACCC**) has made the *Telecommunications (Superfast Broadband Network Class Exemption) Determination 2020 (the Instrument)* under subsection 142BD(2) and subsections 143A(1) and (2) of the *Telecommunications Act 1997 (the Telecommunications Act)*.

Subsection 142BD(2) of the Telecommunications Act empowers the ACCC to specify, by legislative instrument, a carriage service as a designated carriage service for the purpose of Part 8 of the Telecommunications Act.

Under subsections 143A(1) and (2) of the Telecommunications Act, the ACCC may, by legislative instrument, determine class exemptions from sections 142C or 143 of the Telecommunications Act.

Purpose and operation of the Instrument

On 14 May 2020, the Parliament passed the *Telecommunications Legislation Amendment (Competition and Consumer) Act 2020*. This Act amends the Telecommunications Act and gives superfast fixed line network operators the option of operating on a functionally separated basis, rather than a structurally separated basis as had been required before the legislative reforms. This can be by way of an eligible network operator electing to be bound by a deemed functional separation undertaking or the network operator lodging a customised functional separation undertaking for the ACCC's approval.

Subsections 143A(1) and (2) of the Telecommunications Act provide that the ACCC may, by legislative instrument, make a determination exempting a particular class of persons from the separation requirements set out in sections 142C or 143 and that would otherwise apply. Once made, persons within the class specified in such a determination can then elect to be bound by the class exemption rather than be subject to the separation requirements.

Paragraphs 143A(1)(d) and 143A(2)(d) of the Telecommunications Act provide that the exemptions given by a determination made under subsections 143A(1) or (2) must be limited to persons, or associated groups, who have a maximum of 2,000 fixed-line residential customers, or if a higher number (not exceeding 12,000 residential customers) is specified in the regulations, that higher number. The class exemption will cease to apply once this specified threshold is exceeded. In those circumstances, affected persons will then be required to operate either on a functionally separated basis in a form approved by the ACCC, or on a wholesale-only basis. The Instrument includes an obligation on persons who have elected to be bound by it to report annually to the ACCC on whether they remain below the maximum threshold.

Persons who elect to be bound by the Instrument are required to offer either the Local Bitstream Access Service (**LBAS**) or the Superfast Broadband Access Service (**SBAS**) on a non-discriminatory basis.

Long Term Interests of End-users

In deciding whether to make a determination under subsections 143A(1) or (2) of the Telecommunications Act, pursuant to subsection 143A(8), the ACCC must have regard to whether a determination would promote the long-term interests of end-users (**LTIE**) of carriage services or of services supplied by means of carriage services.

Under section 152AB of the *Competition and Consumer Act 2010*, to determine whether something is in the LTIE, the ACCC must consider whether it is likely to:

- promote competition in markets for listed services;
- achieve any-to-any connectivity in relation to carriage services that involve communication between end-users; and
- encourage the economically efficient use of, and the economically efficient investment in, telecommunications infrastructure.

The ACCC is satisfied that the Instrument will promote competition through encouraging competitive entry of smaller superfast network operators and promote competition in retail and wholesale markets.

The ACCC does not consider that the Instrument would have any bearing on any-to-any connectivity.

The ACCC is satisfied that the Instrument will reduce the disproportionate regulatory cost burden on operators of smaller networks of being structurally or functionally separated when participating in superfast broadband markets, enabling them to further invest in competitive infrastructure through increasing the reach of their networks and improving the quality of services provided to end-users.

The ACCC considers that competition will continue to be safeguarded by:

- the legislated conditions in subsection 143A(3) of the Telecommunications Act and the limitations of the exemption;
- the requirement for new network operators to provide the declared LBAS, which allows the ACCC to set terms and conditions of access including wholesale price; and
- the ability for the Minister for Communications to make rules, standards and benchmarks in relation to Statutory Infrastructure Providers pursuant to sections 360U and 360V of the Telecommunications Act.

Further, the ongoing deployment of 5G mobile technology and the provision of high-speed fixed wireless broadband services will increasingly provide a competitive constraint on superfast fixed line broadband networks for some customer segments where these wireless networks are available.

The ACCC is satisfied that any extension of the thresholds mentioned in paragraphs 143A(1)(d) and 143A(2)(d) of the Telecommunications Act to a maximum of 12,000 fixed-line residential customers would promote the LTIE on a similar basis as for the application of the exemption for networks with up to 2,000 fixed-line residential customers. The ACCC notes that the higher of these thresholds is the same number as the exemption threshold for small networks set out in the ACCC's Final Access Determination for the SBAS made under section 152BC of the *Competition and Consumer Act 2010* on 24 May 2017. The ACCC's analysis in that context indicated that 12,000 services was the minimum level of services required to profitably offer a wholesale service and therefore represented a low risk upper bound for the exemption. Requiring functional separation in addition to wholesale access that must be offered under the terms of the exemption would be a further burden for such businesses.

A provision-by-provision description of the Instrument is set out in the notes at **Attachment A**.

The Instrument is a disallowable legislative instrument for the purposes of the *Legislation Act 2003*.

Documents incorporated by reference

The Instrument incorporates the following Acts as in force from time to time, as permitted by subsection 589(1) of the Telecommunications Act (including by the adoption of definitions), or otherwise refers to them:

- the *Acts Interpretation Act 1901*;
- the *Competition and Consumer Act 2010*;
- the *Legislation Act 2003*;
- the Telecommunications Act; and
- the *Telecommunications Legislation Amendment (Competition and Consumer) Act 2020*

These Acts are available free of charge at www.legislation.gov.au.

The Determination also incorporates regulations made for the purpose of subparagraphs 143A(1)(d)(ii) or 143A(1)(e)(ii) of the Telecommunications Act as in force from time to time and notwithstanding that such regulations do not exist at the time the Instrument was made (as permitted by subsection 589(2) of the Telecommunications Act).

The Determination also incorporates declarations made by the ACCC under subsection 152AL(3) of the *Competition and Consumer Act 2010* in respect of the LBAS and the SBAS, as in force from time to time (as permitted by subsection 589(2) of the Telecommunications Act). These may be accessed free of charge from the ACCC's website at www.accc.gov.au. At the time the Instrument was made, there were such declarations in force (the LBAS Declaration was made by the ACCC on 24 February 2012, and the SBAS Declaration was made by the ACCC on 29 July 2016).

Consultation

Before the Instrument was made, the ACCC was satisfied that consultation was undertaken to the extent appropriate and reasonably practicable, in accordance with section 17 of the *Legislation Act 2003*.

On 5 June 2020, the ACCC sought feedback on a draft version of the Instrument included in an accompanying consultation paper. Interested stakeholders were invited to make submissions to the ACCC by 17 July 2020 including in respect of the draft instrument. The ACCC received 13 submissions in total from small network operators, larger carriers and the Australian Communications Consumer Action Network. The consultation paper and all public submissions to the consultation process are available on the ACCC's website.

The ACCC also hosted two industry briefings for network operators by videoconference on 17 and 18 June 2020 that discussed the class exemption among other regulatory matters.

One submission suggested the addition of an annual reporting condition for carriers against the class exemption threshold, which the ACCC has incorporated into the Instrument. The majority of submissions supported a mechanism in the instrument to allow the threshold to increase to a maximum of 12,000 residential customers if this is specified in any regulations. The ACCC has also

incorporated this into the Instrument. The ACCC had regard to all submissions received before making the Instrument.

Regulatory impact assessment

A preliminary assessment of the proposal to make the Instrument was conducted by the Office of Best Practice Regulation (**OBPR**), for the purposes of determining whether a Regulation Impact Statement (**RIS**) would be required. OBPR advised that a RIS would not be required as the Instrument is machinery in nature (OBPR ID: 23957).

Statement of compatibility with human rights

This section of the explanatory statement is prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Instrument

This Instrument has been made by the ACCC under subsections 143A(1) and (2) and subsection 142BD(2) of the *Telecommunications Act 1997* to reduce the cost burden on smaller networks in participating in superfast broadband markets and to encourage investment in new broadband infrastructure. The Instrument specifies as a designated carriage service the SBAS and/or LBAS for the purposes of Part 8 of the *Telecommunications Act 1997*. The specification of a designated carriage service is applicable to particular conditions or limitations set out in section 8 of the Instrument.

Human rights implications

The ACCC has assessed whether the Instrument is compatible with human rights, being the rights and freedoms recognised or declared by the international instruments listed in subsection 3(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* as they apply to Australia.

Having considered the likely impact of the Instrument and the nature of the applicable rights and freedoms, the ACCC has formed the view that the Instrument does not engage any of those rights or freedoms.

Conclusion

The Instrument is compatible with human rights as it does not raise any human rights issues.

Notes to the *Telecommunications (Superfast Broadband Network Class Exemption) Determination 2020*

Section 1 – Name

This section provides for the Instrument to be cited as the *Telecommunications (Superfast Broadband Network Class Exemption) Determination 2020*.

Section 2 – Commencement

This section provides for the Instrument to commence on the later of the day after it is registered on the Federal Register of Legislation or 25 August 2020, being the day on which Schedule 2 to the *Telecommunications Legislation Amendment (Competition and Consumer) Act 2020* commences. Note 2 clarifies that both of these events must occur before the Instrument commences.

The Federal Register of Legislation may be accessed free of charge at www.legislation.gov.au.

Section 3 – Authority

This section provides that the Instrument is made under subsections 142BD(2), 143A(1) and 143A(2) of the *Telecommunications Act 1997*.

Section 4 – Definitions

This section defines key terms used in the Instrument, and indicates where other key terms are defined. A number of other terms used in the Instrument are defined in the *Telecommunications Act 1997*.

Section 5 – References to other instruments

This section provides that in the Instrument, unless the contrary intention appears:

- a reference to any other legislative instrument is a reference to that other legislative instrument as in force from time to time; and
- a reference to any other kind of instrument is a reference to that other instrument as in force from time to time.

Section 6 - Specification of designated carriage service

Subsection 142BD(2) of the *Telecommunications Act* empowers the ACCC to specify, by legislative instrument, a carriage service as a designated carriage service for the purpose of Part 8 of the *Telecommunications Act 1997*.

This section provides that the SBAS and LBAS are designated carriage services for the purposes of Part 8 of the *Telecommunications Act 1997*.

Section 7 – Exemption

This section is largely based on subsections 143A(1) and 143A(2) of the *Telecommunications Act 1997*, which specify the criteria that a person must meet to be exempt from the separation requirements under section 142C or 143 of the *Telecommunications Act 1997*.

This section also provides for an automatic extension of the maximum class exemption threshold of fixed-line carriage services to a higher number of residential customers (not exceeding 12,000) if specified in regulations made for the purpose of subparagraphs 143A(1)(d)(ii) or 143A(1)(e)(ii) of the *Telecommunications Act 1997*, and as in force from time to time.

Section 8 – Conditions and Limitations

This section largely replicates subsection 143A(3) of the *Telecommunications Act 1997* and sets out the conditions and limitations that apply where a person has elected to be bound by the Instrument and therefore exempt from the separation requirements under section 142C or 143 of the *Telecommunications Act 1997*.

Paragraphs 8(a) to (c) of the Instrument replicate subsections 143A(3)(a) to (c) of the *Telecommunications Act 1997* and provide that a person who elects to be bound by the Instrument must ensure that the LBAS and/or SBAS is available for supply to wholesale customers or prospective wholesale customers, that the person must not discriminate between the person's wholesale customers or prospective wholesale customers and must not discriminate in favour of itself in relation to the supply of the LBAS and/or SBAS.

Paragraph 8(d) of the Instrument replicates subsection 143A(3)(d) of the *Telecommunications Act 1997* and specifies the activities where the person subject to the exemption must not discriminate between wholesale customers or prospective wholesale customers.

Paragraph 8(e) of the Instrument replicates subsection 143A(3)(e) of the *Telecommunications Act 1997* and specifies the activities where the person subject to the exemption must not discriminate in favour of itself.

Paragraphs 8(f) to (i) of the Instrument specify a number of other conditions pursuant to subsection 143A(3)(f) of the *Telecommunications Act 1997*. Paragraphs 8(f) and (g) of the Instrument provide for annual compliance reporting in respect of the number of residential customers of a person who elects to be bound by the Instrument. Paragraphs 8(h) and (i) of the Instrument require a person to whom the Instrument applies to notify the ACCC in writing within 14 days if the class exemption threshold set out in paragraphs 7(a) or (b) has been exceeded.