

EXPLANATORY STATEMENT

Approved by the Australian Competition and Consumer Commission

Telecommunications Act 1997

Telecommunications (Superfast Broadband Network Class Exemption) Amendment Determination 2021 (No. 1)

Authority

The Australian Competition and Consumer Commission (**the ACCC**) has made the *Telecommunications (Superfast Broadband Network Class Exemption) Amendment Determination 2021 (No. 1)* (**the instrument**) under subsections 143A(1) and 143A(2) of the *Telecommunications Act 1997* (**the Telecommunications Act**) and in accordance with subsection 33(3) of the *Acts Interpretation Act 1901* (**the AIA**).

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

Subsection 33(3) of the AIA relevantly provides that where an Act confers a power to make a legislative instrument, the power 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.

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 143A(2) of the Telecommunications Act provide that the ACCC may, by legislative instrument, make a determination exempting a particular class of person 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.

In August 2020, pursuant to subsections 143A(1) and 143A(2) of the Telecommunications Act, the ACCC made the *Telecommunications (Superfast Broadband Network Class Exemption) Determination 2020* (**the Class Exemption**), being satisfied that the Class Exemption will promote the long-term interests of end-users of carriage services or of services supplied by means of carriage services by:

- encouraging entry of smaller superfast network operators and promoting competition in retail and wholesale markets; and
- reducing 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.

In November 2020, the Senate Standing Committee for the Scrutiny of Delegated Legislation (**the Committee**) wrote to the Minister for Communications, Cyber Safety and the Arts (**the Minister**) expressing a concern that the Class Exemption was to remain in force for at least 10 years (until it sunsets under the *Legislation Act 2003*). The Committee stated its longstanding view that provisions which modify or exempt persons or entities from the operation of primary legislation (as is the case with the Class Exemption) should cease to operate no more than three years after they commence so as to ensure a minimum degree of regular parliamentary oversight.

Following an exchange of correspondence between the Minister and the Committee, the Committee indicated it would be amenable to the Class Exemption being amended to specify that it ceases to operate five years after its commencement. The instrument amends the Class Exemption to this effect. Copies of the correspondence exchanged between the Committee and the Minister are available from the Committee's homepage at:

https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation.

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 does not incorporate any document by reference.

Consultation

The ACCC consulted widely on a draft version of the Class Exemption included in an accompanying consultation paper before making the Class Exemption such that 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*.

Relevantly, of the six small network operators supplying less than the Class Exemption threshold of 2,000 residential services that provided submissions to the ACCC's previous consultation, the majority indicated they expected to exceed the specified threshold within a period of five years.

Having regard to the consultation previously conducted in relation to the Class Exemption, the views of the Committee in respect of the duration of the Class Exemption and the nature of the amendment made by the instrument, the ACCC determined there was unlikely to be any benefit from conducting additional public consultation in respect of the instrument before it was made. However, the ACCC has advised those persons who have elected to be bound by the class exemption of the amendment to the Class Exemption specifying that it ceases to operate five years after its commencement.

Regulatory impact assessment

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

Statement of compatibility with human rights

Subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* requires the rule-maker in relation to a legislative instrument to which section 42 (disallowance) of the *Legislation Act 2003*

applies to cause a statement of compatibility with human rights to be prepared in respect of that legislative instrument.

The statement of compatibility set out below has been prepared to meet that requirement.

Overview of the instrument

Subsections 143A(1) and 143A(2) of the Telecommunications Act provide that the ACCC may, by legislative instrument, make a determination exempting a particular class of person from the separation requirements set out in sections 142C or 143. 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.

In August 2020, pursuant to subsections 143A(1) and 143A(2) of the Telecommunications Act, the ACCC made such a determination - the *Telecommunications (Superfast Broadband Network Class Exemption) Determination 2020 (the Class Exemption)*. As drafted, the Class Exemption was to remain in force for at least 10 years (until it sunsets under the *Legislation Act 2003*)

The *Telecommunications (Superfast Broadband Network Class Exemption) Amendment Determination 2021 (No. 1) (the instrument)* amends the Class Exemption such that it ceases to operate five years after its commencement.

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) Amendment Determination 2021 (No. 1)*

Section 1 Name

This section provides for the instrument to be cited as the *Telecommunications (Superfast Broadband Network Class Exemption) Amendment Determination 2021 (No. 1)*.

Section 2 Commencement

This section provides for the instrument to commence at the start of the day after the day it is registered on the Federal Register of Legislation.

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

Section 3 Authority

This section identifies the provisions that authorise the making of the instrument, namely subsections 143A(1) and 143A(2) of the *Telecommunications Act 1997*.

Section 4 Amendment

Section 4 provides that the instrument specified in Schedule 1 is amended as set out in the item in that Schedule.

Schedule 1 – Amendment

Schedule 1 amends the *Telecommunications (Superfast Broadband Network Class Exemption) Determination 2020* such that it expires five years after its commencement.