

Explanatory Note

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

Telecommunications Act 1997
Telecommunications (Network Exemption—Specified TransACT Networks)
Instrument 2012

Authority

Subsection 141A(1) of the *Telecommunications Act 1997* (the Act) confers power on the Minister for Broadband, Communications and the Digital Economy (the minister) to exempt specified superfast carriage networks from the Layer 2 bitstream requirements of section 141 of the Act.

Subsection 144(1) of the Act confers power on the minister to exempt specified superfast carriage networks from the wholesale only requirements of section 143 of the Act.

Unless exempted by the minister under subsection 141A(1) and 144(1), operators of designated superfast carriage networks are required to comply with the category A standard access obligations (SAOs) insofar as they relate to the Layer 2 bitstream service declaration made by the Australian Communications and Competition Commission (ACCC) on 24 February 2012, and any related access determination applying to that service under Part XIC of the *Competition and Consumer Act 2010* (CCA).

The Act provides that the minister must consult with the ACCC and the Australian Communications and Media Authority (ACMA) before making exemption instruments (refer subsections 141A(5) and 144(5) of the Act).

This instrument is not a legislative instrument for the purposes of the *Legislative Instruments Act 2003* (see subsections 141A(6) and 144(6) of the Act).

Purpose

The purpose of this instrument is to exempt from the requirements of sections 141 and 143 of the Act certain fibre networks which TransACT Capital Communications Pty Ltd (TransACT) has been contracted to construct

Background

The *Telecommunications Legislation Amendment (National Broadband Network Measures—Access Arrangements) Act 2011* (NBN Access Act) introduced open access, transparency and non-discrimination measures for National Broadband Network (NBN) corporations, under clear oversight by the ACCC.

Part 3 of Schedule 1 to the NBN Access Act inserted new Parts 7 and 8 into the Act. These provisions require owners of superfast networks that are rolled out, upgraded or altered after 1 January 2011, to offer over their local access lines a wholesale Layer 2 bitstream service on an open access and non-discriminatory basis. These arrangements, which are based on those applying to NBN Co, are known as 'level-playing field rules', and are designed to ensure that:

- end-users gain access to the same kinds of service outcomes available on the NBN, regardless of the network provider particularly by ensuring that new networks operate on a similar basis, and
- NBN Co Limited's (NBN Co's) ability to cross-subsidise rural and remote areas from high revenue metropolitan markets in order to offer uniform national prices is supported.

The new arrangements will commence on 12 April 2012 (being the day after the end of the 12-month period when the NBN Access Act received the Royal Assent). They will apply to fixed-line local access networks or a part of such networks that are built, upgraded, altered or extended after 1 January 2011 so that they are capable of providing carriage services where the download transmission speed is normally more than 25 megabits per second to residential or small business users.

As noted above, the minister has the power to grant exemptions to certain networks (refer subsections 141A(1) and 144(1) of the Act). The Supplementary Explanatory Memorandum to the Telecommunications Legislation Amendment (National Broadband Network Measures—Access Arrangements) Bill 2011 states that the exemptions powers were intended to allow the minister to remove the obligations in circumstances in which their application could have unforeseen, inefficient or disproportionate consequences.

On 9 September 2011, TransACT requested it be granted exemptions for its fibre-to-the-premises (FTTP) networks to serve various new real estate developments in the ACT under sections 141A and 144 of the Act. The minister has considered the requests, and decided to grant some of the exemptions, subject to certain conditions being satisfied.

The decision to grant these exemptions reflects a range of factors, including, but not limited to, the following:

- the projects predated the enactment of the legislation and as the projects are subject to contracts, not giving them exemptions could impact negatively on the contracting parties
- the requirement to comply with the level playing field rules in relation to those projects would unduly impact on TransACT's business operations
- the extent of the networks is specified and considered to be limited in scope
- any adverse impact on access seekers and end-users will be mitigated to some extent by TransACT offering an alternative wholesale model
- as a matter of course, the networks can be regulated by the ACCC under the general provisions of the telecommunications access regime in Part XIC of the CCA, and
- given the advanced nature of these projects, NBN Co is unlikely to be the provider of last resort in these areas.

Consultation

In accordance with subsections 141A(5) and 144(5) of the Act, the minister wrote to the chairs of the ACCC and the ACMA and they provided formal advice to the minister regarding the proposal.

In addition to consulting with the ACCC, ACMA and TransACT, the department (on the minister's behalf) also consulted directly with NBN Co and a range of carriers and carriage service providers, developers and other entities potentially affected by the exemption requests.

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

Attachment

Details of the Telecommunications (Network Exemption—Specified TransACT Networks) Instrument 2012

Clause 1—Name of instrument

Clause 1 provides that the name of the instrument is the Telecommunications (Network Exemption—Specified TransACT Networks) Instrument 2012.

Clause 2—Cessation

Clause 2 provides that the instrument ceases to have effect on the ‘designated day’. This day is defined in clause 3 as having the same meaning as in section 577A of the *Telecommunications Act 1997* (the Act), which is 1 July 2018, or another day specified by the minister in a non-legislative instrument under paragraph 577A(10)(b) of the Act.

This date has been selected as it represents the day by which Telstra will have completed the structural separation of its fixed-line networks, and therefore represents the date by which the government’s structural reform of the telecommunications industry will be completed. As such it is an appropriate date for TransACT exemptions to cease, to allow alignment with wider industry arrangements. Prior to the cessation date, it would be open to TransACT to request that the minister consider extending the exemption.

Note 1 is included at subclause 2(1) to remind readers that, by operation of sections 4(1)(a) and 4(2A) of the *Acts Interpretation Act 1901*, the instrument will commence immediately on the commencement of Part 3 of Schedule 1 to the *Telecommunications Legislation Amendment (National Broadband Network Measures—Access Arrangements) Act 2011* (NBN Access Act), being 12 April 2012 or a date proclaimed before then.

Specifically, paragraph 4(1)(a) of the Acts Interpretations Act provides that where a relevant Act has been enacted, but the Act does not come into operation immediately upon its enactment (as in the case of Part 3 of Schedule 1 to the NBN Access Act), and the Act confers power to make an instrument of a legislative or administrative character, then the power may be exercised, and anything may be done for the purpose of enabling the exercise of the power or of bringing the appointment or instrument into effect, before the Act concerned comes into operation as if it had come into operation. Subsection 4(2A) relevantly provides for the circumstance where, because of some or all of its provisions an instrument is made under subsection (1), each relevant provision takes effect, as declared in the instrument on the date, or from the date and time, when the Act concerned comes into operation.

Clause 3—Definitions

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

All references in the instrument to 'Act' are to the *Telecommunications Act 1997*.

The terms **access seeker** and **declared service** have the same meaning as in Part XIC of the *Competition and Consumer Act 2010* (CCA).

The terms, 'Layer 2' and 'Layer 3' have the same meanings as in the Open System Interconnection (OSI) Reference Model for data exchange. The model is widely known and used in the telecommunications industry; it provides a framework for both designing networking systems and for explaining how fibre networks work.

The term **Specified TransACT Network** means each of TransACT's optical fibre-based telecommunications networks which use FTTP architecture and are located in one of the real estate development projects listed in Schedule 1 to the determination, namely Coombs, Wright (which together largely comprise Molonglo, Stage 1), Harrison 4 and the Fyshwick Section 26 Commercial Precinct, and depicted in the respective maps at Annexure A to Schedule 1 of the instrument. The term also includes local access lines and parts of those lines located outside these project areas which are necessary to supply services to end users in the developments.

The definition expressly refers to ownership of the relevant networks by TransACT. If a situation arose in which TransACT was no longer the owner of any or all of these new networks (e.g. if TransACT were to sell such a network), the exemption would no longer apply to the network(s), and the network(s) would become subject to the level playing field rules. In such a case, it would be open to the new (or prospective) network owners to seek that a new exemption be granted to it, and any such exemption request would be considered by the minister on its own merits.

In order to meet this definition, such a network needs to have been built by TransACT in accordance with an agreement that was in legal force prior to 26 March 2011. This day represents the time by when TransACT had in place legally enforceable agreements with persons to construct and deploy FTTP infrastructure in the specified project areas.

A comprehensive definition of **TransACT FTTP Layer 3 Wholesale Interconnection Service** is provided. Essentially, it is a carriage service that provides interconnection with the TransACT network and provides the aggregation of traffic from, and termination of traffic to, a service provider's end-user customers. It is supplied on a wholesale basis using an optical fibre line, and which is offered to be supplied with certain specified upload/download transmission speeds. The definition also specifies the key configuration elements of such a service. Section 7 of the Act defines optical fibre line as a line that consists of, or encloses, optical fibre.

Should TransACT choose to change the configuration elements of the TransACT FTTP Layer 3 Wholesale Interconnection Service and wish to retain the exemption, it would need to request that the minister to vary the instrument accordingly before the change took place. It would be a matter for the minister to consider the request on its merits. If the minister decided not to vary the instrument to accommodate the change and TransACT proceeded to change the elements of the service such that it was no longer supplying the service as defined in the instrument, the specified networks would no longer be exempt from the requirements of sections 141 and 143 of the Act.

A note is included at clause 3 to advise readers that certain expressions used in the instrument have the same meaning as in the Act. This is by virtue of paragraph 46(1)(b) of the *Acts Interpretation Act 1901*. Some of the expressions used include:

- carriage service;
- local access line;
- optical fibre line;
- standard telephone service; and
- telecommunications network.

Clause 4—Exemptions

Subclause 4(1) provides that each of the Specified TransACT Networks is exempted from the requirements of sections 141 and 143 of the Act, provided that the conditions in subclauses 4(2) and (3) are satisfied.

Paragraphs 141A(4)(b) and 144(4)(b) confer power upon the minister to impose conditions on the grant of exemptions pursuant to sections 141A(1) and 144(1) of the Act.

The condition set out in subclause 4(2) is designed to ensure that TransACT supplies the TransACT FTTP Layer 3 Wholesale Interconnection Service over each of the networks on an open, transparent and equitable basis. The condition requires TransACT at all times that the service is not a ‘declared service’ for the purposes of Part XIC of the CCA, to:

- Offer and supply on reasonable request to an access seeker, the TransACT FTTP Layer 3 Wholesale Interconnection Service. This approximates the open access requirement under the level playing field rules. It is intended that the basis upon which ‘reasonable’ would be assessed in this context by reference to the Standard Access Obligations in subsection 152AR(4) of the CCA, for example, it may not be reasonable for TransACT to supply the service to an access seeker if it would deprive another person of a protected contractual right.
- Electronically publish, and maintain on its website, a reference offer, with both price and non-price terms and conditions upon which it offers to supply the TransACT FTTP Layer 3 Wholesale Interconnection Service. This condition is intended to ensure that there is transparency in respect of the terms and conditions of the offer.
- Notify the ACCC within 14 days of any difference in the terms and conditions negotiated with an individual access seeker from those in the reference offer. This condition replicates the notification requirement under the level playing field rules.
- Notify the ACCC within 14 days of the nature and date of any material change to the reference offer, including to the product specification. This condition further ensures that the ACCC can maintain oversight over the product and the terms and conditions of supply.
- Make available (upon request) to the ACCC or ACMA copies of the contracts with the developers for the construction of the networks which are the subject of the exemption.

These conditions cease to apply if the TransACT FTTP Layer 3 Wholesale Interconnection Service becomes a 'declared service' (for the purposes of Part XIC of the CCA). This is because if the service is declared, TransACT (and any other carrier or carriage service provider supplying the declared service) will have to comply with the Category A SAO requirements under Part XIC of the CCA and the other forms of regulation by the ACCC under the telecommunications access regime in Part XIC of the CCA. This reflects the view that such generic regulation should apply as the norm.

The other condition of the exemption (at subclause 4(3)) is that TransACT must offer and supply to end users, upon reasonable request, a standard telephone service over each Specified TransACT network. This condition ensures that end users have access to a standard telephone service, noting that TransACT may provide the sole fixed line network in the areas concerned for a time.

The obligation to supply the STS only applies in respect of 'reasonable request'. Examples of circumstances where a request would not be considered reasonable may include where:

- the end customer does not agree to the TransACT's standard terms and conditions for the installation and supply of the standard telephone service
- the person making the request does not provide identification
- the installation or supply of a standard telephone service at the end customer's proposed location would put TransACT's employees or contractors at risk of exposure to unreasonable health or safety risks
- the consent or authority of any person other than the person making the request is required before TransACT is authorised to perform the works necessary to install the standard telephone service and consent or authority is not provided.

If at any time either of the conditions is not satisfied, TransACT would be subjected to the requirements of section 141 and 143 of the Act with respect to the relevant networks. Any failure to comply with those requirements would result in TransACT committing an offence under sections 141(4) and 143(1) of the Act respectively.

Schedule 1

The schedule to the instrument provides a list of the real estate development projects serviced by Specified TransACT Networks.

The specified projects are situated in the ACT suburbs of Coombs and Wright (Molonglo, Stage 1), Harrison (Precinct 4) and the Fyshwick (being Commercial Precinct 26). The maps at Schedule 1 of the instrument depict the respective limits of the areas serviced by these networks. Note, these maps do not show the local access lines (located outside these areas) which are used to supply services to end user premises in the project areas.