

Explanatory Note

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

Telecommunications Act 1997

*Telecommunications (Network Exemption—TransACT Upgraded VDSL Networks)
Instrument 2012*

Authority

Subsection 141A(1) of the *Telecommunications Act 1997* (the Act) confers power on 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 Australian Communications and Competition Commission's (ACCC's) Layer 2 bitstream service declaration made by the ACCC on 24 February 2012, and any related access determinations and category A standard access obligations (SAOs) applying to the services 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 VDSL network upgraded by TransACT Communications Pty Ltd (TransACT) from the requirements under sections 141 and 143 of the Act.

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 into the Act, new Parts 7 and 8. These provisions require owners of superfast networks that are rolled out, upgraded or altered, 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 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 are given 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 deployments, upgrades and extensions under sections 141A and 144 of the Act. On 13 February 2012, TransACT submitted a supplementary request for exemption for the VDSL network that it has upgraded since 1 January 2011 and is continuing to upgrade. The minister has considered the request, and decided to grant this exemption, subject to certain conditions being satisfied.

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

- the VDSL network predated the enactment of the legislation and its upgrade to VDSL2 or next generation of VDSL technology is an integral part of the ongoing operation of the network
- provision of a superfast network by TransACT in these localities could provide users with ready access to superfast broadband services
- the requirement to comply with the level playing field rules in relation to the upgrades would unduly impact on TransACT’s business operations
- the extent of the network, while significant, is defined in scope
- any adverse impact on access seekers and end-users will be mitigated to some extent by TransACT offering an alternative wholesale model. and
- 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.

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—TransACT Upgraded VDSL Networks) Instrument 2012

Clause 1—Name of instrument

Clause 1 provides that the name of the instrument is the *Telecommunications (Network Exemption—TransACT Upgraded VDSL 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** are used in the service description. They are given the same respective 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. In simple terms, Layer 2 is the data link layer, which is primarily concerned with moving data between points. Layer 3 is the network layer, which is primarily concerned with end to end addressing—that is, routing data to a particular destination.

TransACT refers to the company, TransACT Capital Communications Pty Ltd (ACN 093 966 888), which is a company incorporated in the Australian Capital Territory. This is the company which owns the networks which are the subject of the exemption instrument.

The term **TransACT Upgraded VDSL Network** refers, in effect, to a part of TransACT's very fast digital subscriber line (VDSL) based telecommunications network that was in existence on 31 December 2010 and is located in the areas depicted in the map at in Schedule 1 to the Determination, and which as a result of a network upgrade or alteration, becomes a network capable of supplying superfast carriage services (as defined in section 142A of the Act).

Under subsection 141B of the Act, parts of a network that are altered or upgraded on or after 1 January 2011 are taken to be networks in their own right. TransACT has been and is upgrading its existing VDSL network so that it can deliver greater download speeds of more than 25 Mbps. The exemption envisages upgrades to VDSL2 or other latter generation technologies. It is the upgraded parts of the existing VDSL network that will in effect be networks in their own right for the purposes of the level playing field regime and which are receiving exemption from Parts 7 and 8 of the Act. As such it is these networks (which in practice are parts of a wider VDSL and VDSL2 network) to which the conditions of the exemption will apply.

Ownership by TransACT is intended as an ongoing requirement in order for a network to fall within this definition. As a consequence, if a situation arose in which TransACT no longer owned any of the networks otherwise covered by this definition (e.g. if TransACT were to sell such a network), the exemption granted by way of the instrument would no longer apply to the network, and the network would become subject to the level playing field rules. In such a case, it would be open for the new owner to request that the minister consider granting a new exemption; such a request would be considered on its own merits).

A definition of the **TransACT VDSL 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 a copper line and offers certain specified upload and download transmission speeds. The definition also specifies the key configuration elements of such a service.

Should TransACT choose to change the configuration elements of the defined services, which it supplies over its upgraded VDSL networks, it may request the minister to vary the instrument. Should the minister consider such changes appropriate, the minister may, in his discretion, decide to vary the instrument. If the minister decided not to vary the instrument to reflect the requested changes and TransACT proceeded to change the elements of the service such that it was no longer supplying the service as defined in the instrument, then TransACT 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:

- alteration
- carriage service
- local access line
- superfast carriage service
- telecommunications network, and
- upgrade.

Clause 4—Exemptions

Subclause 4(1) provides that each TransACT Upgraded VDSL Network is exempted from the requirements of sections 141 and 143 of the Act, provided that the condition in subclause 4(2) is 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.

Subclause 4(2) sets out the condition, which is designed to ensure that the TransACT VDSL Layer 3 Wholesale Interconnection Service that TransACT proposes to supply over the upgraded VDSL networks (captured as defined in clause 2) is supplied to access seekers on request on an open and equitable basis, with sufficient oversight by the ACCC.

In order for the exemption to apply, TransACT must, during all times that the service is not a 'declared service' for the purposes of Part XIC of the CCA, comply with the following obligations:

- Offer and supply on reasonable request to an access seeker, the TransACT VDSL Layer 3 Wholesale Interconnection Service. This reflects 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 the wholesale section of its website, a reference offer, with both price and non-price terms and conditions upon which it offers to supply the TransACT

VDSL Layer 3 Wholesale Interconnection Service. This obligation 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 non-discrimination 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.
- Provide to the ACMA and the ACCC (within specified timeframes) details of each TransACT VDSL network that has undergone a significant alteration or upgrade prior to, and after, the commencement of the instrument.
- Electronically publish on its website within specified timeframes, details of each TransACT VDSL network that has undergone a significant upgrade or alteration from commencement of the instrument (being 12 April 2012) and onwards.

As noted above, in practice, these conditions apply to those parts of TransACT's pre-existing VDSL network that are upgraded to VDSL2 (or some latter technology) and, as such, become, in effect, networks in their own right for the purposes of the level playing field arrangements. To illustrate this point, TransACT's existing VDSL network would not be able to provide a TransACT VDSL Layer 3 Wholesale Interconnection Service with the maximum download transmission speed specified, but the service can be provided on a TransACT Upgraded VDSL Network; that is, the upgraded part of the pre-existing network.

These conditions cease to apply if the TransACT VDSL Layer 3 Wholesale Interconnection Service offered and supplied by TransACT 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 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.

If at any time the conditions are 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.

The supply of services over the infrastructure would, as a matter of course, also be open to regulation by the ACCC under the telecommunications access regime in Part XIC of the CCA.

Schedule 1

The schedule to the instrument provides a map of the locations in which the TransACT Upgraded VDSL Networks may exist. Note, this map does not show the local access lines (located outside the area) which are also used to supply services to end user premises in the relevant areas.