

DRAFT FOR CONSULTATION PURPOSES

Draft Explanatory Notes

Telecommunications Act 1997

Telecommunications (Statutory Infrastructure Providers—Exempt Real Estate Development Projects and Building Redevelopment Projects) Instrument (No. 1) 2020

Authority

Subsections 360H(3A) and 360H(5A) of the *Telecommunications Act 1997* (the Act) enable the Minister, by legislative instrument, to exempt specified real estate development projects and building redevelopment projects (respectively) from the requirement for a carrier (other than an NBN corporation) to declare such projects as ‘provisional nominated service areas’ for the purposes of Part 19 of the Act.

Purpose

The purpose of the Telecommunications (Statutory Infrastructure Providers—Exempt Real Estate Development Projects and Building Redevelopment Projects) Instrument (No. 1) 2020 (the Instrument) is to exempt real estate development projects and building redevelopment projects in which carriers have installed networks, primarily to supply voice services, from the requirement to be declared as nominated service areas under the statutory infrastructure provider (SIP) regime. This in turn would exempt the carriers who have installed telecommunications networks in those developments from being required to meet SIP obligations (effectively, to connect premises to networks that allow retail providers to supply high-speed broadband). Such obligations may otherwise discourage or prevent the provision of voice networks where there is a need for them (for example, in small communities outside the fixed line network of NBN Co), to the disadvantage of affected consumers.

People living or working in exempt developments would still be able to access high-speed broadband as NBN Co, as the default SIP, would be required to supply this. The exemptions provide Telstra and other carriers with certainty that they can deploy networks that are primarily intended to be used to supply voice services in a cost effective manner where they are required.

The Instrument sets out four exemptions for real estate development projects and four exemptions for building redevelopment projects (together, ‘projects’), each relating to the following classes of networks:

- a) networks that Telstra installs using copper to supply Universal Service Obligation (USO) voice services to projects;
- b) extensions of hybrid-fibre coaxial (HFC) networks Telstra installs to service projects but then may transfer to NBN Co under the Definitive Agreements;
- c) mobile network extensions that carriers install, under contract with a developer, to provide mobile coverage to a project; and
- d) radiocommunications networks that carriers may install under a contract with a developer to supply fixed voice services (but not high-speed broadband) to a project.

The Instrument is a legislative instrument for the purposes of the *Legislation Act 2003*. The Instrument commences the day after it is registered.

Details of the Instrument are set out in [Attachment A](#).

Background

The SIP regime is set out in Part 19 of the Act and sets out a framework for all people in Australia to be able to receive high-speed broadband. Together with the USO, which provides a framework for ensuring all people in Australia can access voice services, it forms the Universal Service Guarantee for broadband and voice.

The SIP regime commences on 1 July 2020. Under the SIP regime, NBN Co will be the SIP for most areas in Australia, but other carriers will be SIPs for certain areas, such as where they have contracts to service new developments.

SIPs are required to connect premises in their service areas to their networks, and supply wholesale services, on reasonable request from a retail provider. The wholesale services must allow the retail provider to supply 'qualifying carriage services'—broadband services with peak download and upload speeds of at least 25/5 Mbps. On fixed-line or fixed wireless networks, the wholesale services SIPs supply must also enable retail providers to supply voice services.

Where a carrier (other than NBN Co) has a contract to install telecommunications network infrastructure in a project, then under the Act that carrier must declare that the project is a 'provisional nominated service area'. Carriers must provide the geographic coordinates of a nominated service area to the Australian Communications and Media Authority (ACMA), which places the nominated service area on a SIP register.

There are powers for the Minister to exempt carriers from the nomination requirements (subsections 360H(3A) and 360H(5A)). If a carrier is exempted from the nomination requirement, it is then in turn exempted from complying with SIP connection and supply obligations (sections 360P and 360Q), and with Ministerial standards and rules (sections 360U and 360V).

The 'nomination' requirements do not apply to NBN Co. From 1 July 2020 it is the SIP for all areas that it has declared 'ready for service' (the majority of Australia—section 360D). Once the National Broadband Network (NBN) is declared built and fully operational (as required under section 48 of the *National Broadband Network Companies Act 2011*), NBN Co will be default SIP for all of Australia (section 360G). Development areas serviced by other carriers are excluded from NBN Co's service area. This means that, if a carrier network in a development is exempted from nomination and SIP obligations, NBN Co remains the default SIP for the development (section 360F).

The copper exemptions

Sections 5 and 9 of the Instrument set out exemptions for copper networks installed by Telstra in order to supply voice services under the USO. In many areas of Australia Telstra uses the NBN to supply USO voice services. However, where it is not able to use the NBN, it needs to provide the required infrastructure. This is typically outside NBN Co's fixed-line footprint, but may also be inside it where NBN Co is yet to install the infrastructure. Telstra may also enter into contracts with developers to supply infrastructure for the provision of USO services in such cases.

The proposed exemptions in sections 5 and 9 of the Instrument will allow Telstra to continue to install copper to meet its obligations as the primary universal service provider without having those networks captured by SIP requirements. If Telstra were subject to SIP requirements for these copper networks it would most likely have to cancel existing contracts, as the copper networks it installs do not support high-speed broadband (unless further enhanced with additional technology).

The HFC exemptions

The HFC exemptions at sections 6 and 10 of the Instrument deal with similar situations to the copper exemptions, but involving HFC rather than copper. While Telstra is transferring its HFC network to NBN Co under the Definitive Agreements, pending the completion of the NBN, Telstra may need to extend its HFC network to provide services. While such cases are expected to be very limited, this exemption will enable this to happen if needed.

The mobile exemption

The SIP regime applies to any contract that a developer may enter into with a carrier to service a development, regardless of the technology used. Carriers enter into contracts to provide mobile coverage in developments with developers who want to ensure this amenity is available in their developments, and these may be developments where another carrier is contracted to provide SIP services. The proposed exemptions in sections 7 and 11 of the Instrument allow this to occur. The exemptions would be available to any carrier who provides mobile coverage under such contracts.

The proposed exemptions are limited to contracts to supply mobile services that do not also require the carrier to supply wholesale broadband within the development.

Radiocommunications fixed voice services exemption

The exemptions at sections 8 and 12 of the Instrument enable carriers to contract to provide voice services in a cost-effective way, using radiocommunications platforms (mobile, fixed wireless, satellite), if they wish to do so, without having to fulfil broader SIP obligations.

Consultation

The Department of Infrastructure, Transport, Regional Development and Communications (the Department) provided industry stakeholders and consumer groups with a draft of the Instrument and sought comments on it. The Department also sought comments from ACMA, as the regulator responsible for administering the SIP regime.

The Office of Best Practice Regulation has confirmed that the preparation of a Regulation Impact Statement is not necessary.

Statement of compatibility with human rights

A statement of compatibility with human rights for the purposes of Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* is set out at [Attachment B](#).

Attachment A

Details of the Telecommunications (Statutory Infrastructure Providers—Exempt Real Estate Development Projects and Building Redevelopment Projects) Instrument (No. 1) 2020

Part 1—Introductory

This section provides that the name of the Instrument is the *Telecommunications (Statutory Infrastructure Providers—Exempt Real Estate Development Projects and Building Redevelopment Projects) Determination (No.1) 2020*.

Estate Development Projects and Building Redevelopment Projects) Determination (No.1) 2020.

Section 2—Commencement

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

Section 3—Authority

This section provides that the Instrument is made under subsections 360H(3A) and 360H(5A) of the *Telecommunications Act 1997* (the Act), and subsection 33(3A) of the *Acts Interpretation Act 1901*.

Section 4—Definitions

This section provides definitions of terms used in the Instrument.

The note in the section highlights that a number of terms used in the Instrument are defined in the Act, including building redevelopment project, carriage service, eligible service, hybrid fibre-coaxial network, NBN corporation, public mobile telecommunications service, qualifying carriage service, qualifying fixed-line carriage service, real estate development project, standard telephone service and Telstra. These terms have the same meaning in the Instrument as under the Act, pursuant to section 13 of the *Legislation Act 2003*.

Subsection 4(1) then sets out specific definitions used in the Instrument.

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

The term **contractual arrangement** is defined inclusively and means a deed, contract, undertaking or any other form of legally binding arrangement. The term is intentionally broad to capture different legally binding arrangements that may exist in relation to installing telecommunications network infrastructure in real estate development projects or building redevelopment projects.

The term **mobile network** is defined to mean a telecommunications network that is used principally to supply public mobile telecommunications services. This term is used in sections 7 and 11 of the Instrument, where it serves to define the type of network that may be installed under a contractual arrangement to provide mobile coverage to a project area.

The term **project area** is defined to mean either of the following:

- a) for a building redevelopment project—the same meaning as in section 360A of the Act; and
- b) for a real estate development project—the same meaning as in subsection 372Q(6) of the Act.

Section 360A of the Act directs the reader to section 360Y of the Act. Section 360Y states that, for the purposes of Part 19 of the Act, the area or areas occupied by the building or buildings are the project area for the building redevelopment project.

Subsection 372Q(6) specifies that an area of land, on which one or more building units are constructed, is the project area for a real estate development project.

The term, *radiocommunications fixed voice call* is defined to mean a voice call provided using a carriage service:

- a) supplied by means of a telecommunications network other than a fixed-line telecommunications network; and
- b) marketed to customers, or potential customers as a carriage service that enables end-users to make and receive voice calls at premises occupied or used by the end-users.

This term is used in sections 8 and 12 to specify the types of networks that are subject to the exemptions set out at those provisions.

Start Date is defined to mean the day upon which Part 1, Division 2 of Schedule 3 to the Telecommunications Legislation Amendment (Competition and Consumer) Act 2020 comes into effect. Schedule 3 of the Telecommunications Legislation Amendment (Competition and Consumer) Act 2020 contains the SIP provisions. The Start Date in effect is 1 July 2020 (default day) as no proclamation will be made for the commencement of the Part.

Subsection 4(2) serves to define the meaning of proximity as used in sections 7, 8, 11 and 12. It establishes that telecommunications network infrastructure forming part of a mobile network will be in proximity to a project area where, once fully deployed and operational, the infrastructure is technically capable of being used to supply carriage services within the whole of the project area.

Part 2—Exempt Real Estate Development Projects

Two notes are provided at the beginning of Part 2 of the Instrument. Note 1 explains how carriers are required to declare real estate development projects as nominated services areas under subsection 360H(2) of the Act. Note 1 also clarifies for the reader that the carrier that declared the nominated service area becomes the SIP for the relevant area.

Note 2 informs the reader that the Minister may, by legislative instrument, exempt a specified real estate development project from subsection 360H(2), and notes that the project area would remain a general service area of NBN Co until such time (if at all) that area became a nominated service area by declaration made by a carrier.

Section 5—Exempt Real Estate Development Projects (to be served by Telstra copper networks)

Section 5 sets out an exemption for real estate development projects to be served by Telstra copper networks. Whether a project will be exempt from subsection 360H(2) of the Act depends on whether five conditions are met. A real estate development project will be exempt from subsection 360H(2) of the Act if:

- a) there is telecommunications network infrastructure installed within any part of the project area that will enable the supply of eligible services to premises in the whole of the project area (paragraph 5(a));
- b) the infrastructure was fully installed on or after the Start Date (subparagraph 5(b)(i));
- c) the infrastructure was installed in accordance with a contractual arrangement entered into by Telstra and the person responsible for the real estate development project, and the contractual arrangement does not require Telstra to supply qualifying carriage services within all or any part of the project area (subparagraph 5(b)(ii));

- d) at the time of installation, the infrastructure formed part of a fixed-line telecommunications network owned and operated by Telstra, and
- i. is not technically capable of being used to supply qualifying fixed-line carriage services (sub-subparagraph 5(b)(iii)(A)); and
 - ii. is used to supply standard telephone services in fulfilment of the obligation referred to in paragraph 9(1)(a) of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (TCPSS Act) (sub-subparagraph 5(b)(iii)(B)).

In summary, section 5 exempts real estate development projects where there are fixed-line networks installed by Telstra under contracts with developers and the networks are used to supply universal service obligation (USO) services.

The obligation referred to in paragraph 9(1)(a) of the TCPSS Act is the Universal Service Obligation ‘to ensure that standard telephone services are reasonably accessible to all people in Australia on an equitable basis, wherever they reside or carry on business’. The USO currently applies only to Telstra.

‘Qualifying carriage services’ are defined at section 360A of the Act and are either a qualifying fixed-line carriage service, a qualifying fixed wireless carriage service or a qualifying satellite carriage service. ‘Qualifying fixed-line carriage service’ is also defined at section 360A of the Act and means a carriage service that enables end-users to download communications, is supplied using a line to premises occupied or used by an end-user, and has peak download transmission speeds of at least 25 megabits per second and peak upload transmission speeds of at least 5 megabits per second. This could be described as a ‘high-speed broadband service’.

Under section 360Q of the Act, a SIP for a service area must, on reasonable request by a carriage service provider (CSP), supply an eligible service to the CSP in order that the CSP can provide qualifying carriage services to end-users at premises in the service area. Accordingly, the exemption in section 5 is dependent on the contract that Telstra enters into with the developer not requiring Telstra to supply a ‘high-speed broadband service’. However, given that many fixed-line network technologies can be used to supply ‘high-speed broadband services’, section 5 also provides that the network must not be technically capable of being used to qualifying fixed-line carriage services. The phrase ‘technically capable’ is intended to refer to the technology used in the network, and in particular whether that technology would, as configured, normally be capable of being used to supply high-speed broadband.

Section 6—Exempt Real Estate Development Projects (to be served by Telstra HFC networks)

Section 6 sets out an exemption for real estate development projects to be served by Telstra HFC networks. Whether a project will be exempt from subsection 360H(2) of the Act depends on whether five conditions are met. A real estate development project will be exempt from subsection 360H(2) of the Act if:

- a) there is telecommunications network infrastructure installed within any part of the project area that will enable the supply of eligible services to premises in the whole of the project area (paragraph 6(a));
- b) the infrastructure was fully installed on or after the Start Date (subparagraph 6(b)(i)) ;
- c) the infrastructure was installed in accordance with a contractual arrangement entered into by Telstra and the person responsible for the real estate development project (subparagraph 6(b)(ii));
- d) the infrastructure forms part of a HFC telecommunications network that:
 - i. was, at the time immediately after the installation of the network was completed, owned by Telstra (sub-subparagraph 6(b)(iii)(A)); and
 - ii. is the subject of a legally enforceable agreement covered by a determination made under subsection 577BA(9) of the Act, and the agreement provides for the transfer of ownership or control of the network from Telstra to an NBN corporation (sub-subparagraph 6(b)(iii)(B)).

In summary, section 6 exempts real estate development projects where HFC networks have been installed by Telstra under a contract with a developer and those networks are to be transferred by Telstra to an NBN corporation under a contract, arrangement or understanding specified in a determination made by the Minister under subsection 577BA(9). The *Telecommunications (Agreements for Compliance with Structural Separation Undertaking) Determination 2014*, made in accordance with subsection 577BA(9) currently lists Definitive Agreements entered into by Telstra and NBN Co that arrange for the transfer of ownership or control of Telstra's HFC networks to NBN Co.

Accordingly, the effect of sub-subparagraph 6(b)(iii)(B) is that, if Telstra builds an HFC network in a project area after 1 July 2020, provided all other conditions of the exemption continue to be met, Telstra would not be required to declare the project area as a provisional nominated service area for the purposes of the SIP regime, as long as the HFC network is subject to an agreement with NBN Co that is in force and that requires Telstra to transfer the network to NBN Co.

Section 7—Exempt Real Estate Development Projects (to be supplied with public mobile telecommunications services)

Section 7 sets out an exemption for real estate development projects to be supplied with public mobile telecommunications services. This exemption is intended to cover contracts that carriers may enter into with developers to provide mobile coverage to a project area.

Whether a project will be exempt from subsection 360H(2) of the Act depends on whether four conditions are met. A real estate development project will be exempt from subsection 360H(2) of the Act if:

- a) there is telecommunications network infrastructure installed within any part of, or in proximity to, the project area that will enable the supply of eligible services to premises in the whole of the project area (paragraph 7(a));
- b) the infrastructure was fully installed on or after the Start Date (subparagraph 7(b)(i));
- c) the infrastructure was installed in accordance with a contractual arrangement entered into by a carrier and the person responsible for the real estate development project, and that contractual arrangement does not require the carrier to supply qualifying carriage services within all or any part of the project area (subparagraph 7(b)(ii)); and
- d) at the time of installation, the infrastructure formed part of a mobile network owned or operated by the carrier (paragraph 7(b)(iii)).

As noted at the discussion under section 4, **mobile network** is defined to mean a telecommunications network that is used principally to supply public mobile telecommunications services. As a result, the main reason for the installation of the network would be to provide mobile coverage for the real estate development project. As noted at the discussion under section 5, a 'qualifying carriage service' is essentially a retail service that provides peak download speeds of at least 25 Mbps and peak upload speeds of at least 5 Mbps.

In summary, section 7 exempts real estate development projects where mobile networks have been installed by carriers within, or in proximity to, project areas of the real estate development project, where those networks have been installed under a contract with a developer and the contract does not require the carrier to supply qualifying carriage services in any or all parts of the project area.

Section 8—Exempt Real Estate Development Projects (to be served by radiocommunications fixed voice calls)

Section 8 sets out an exemption for real estate development projects to be served by radiocommunications fixed voice calls. This exemption is intended to cover contracts that carriers may enter into with developers to supply voice services in a project area using a radiocommunications platform (for example, mobile, fixed wireless or satellite). Such contracts would be expected to be

offered largely in rural and regional areas, where it may be more cost effective to deploy a radiocommunications network than a fixed-line network to supply voice services.

Whether a project will be exempt from subsection 360H(2) of the Act will depend on whether four conditions are met. A real estate development project will be exempt from subsection 360H(2) of the Act if:

- a) there is telecommunications network infrastructure installed within any part of, or in proximity to, the project area that will enable the supply of eligible services to premises in the whole of the project area (paragraph 8(a));
- b) the infrastructure was fully installed on or after the Start Date (subparagraph 8(b)(i));
- c) the infrastructure was installed in accordance with a contractual arrangement entered into by a carrier and the person responsible for the real estate development project, and that contractual arrangement does not require the carrier to supply qualifying carriage services within all or any part of the project area (subparagraph 8(b)(ii)); and
- d) the infrastructure is capable of being used to supply, to end-users at premises in the project area, carriage services that enable those end-users to make and receive radiocommunications fixed voice calls (subparagraph 8(b)(iii)).

In summary, section 8 exempts radiocommunications networks installed by carriers within, or in proximity to, project areas, if those networks have been installed under a contract with a developer and the contract does not require the carrier to supply qualifying carriage services.

As noted at the discussion under section 4, a ***radiocommunications fixed voice call*** must meet two key criteria. First, the voice call provided using a carriage service must be supplied by means of a telecommunications network other than a fixed-line telecommunications network. Second, it must be marketed as a carriage service that enables end-users to make and receive voice calls at premises occupied or used by the end-users. This is what makes the voice call ‘fixed’; while it may be supplied using a network that is designed for the supply of mobile services, for example, the end-user would receive a service that is intended to be used within the premises and/or the specific features for the supply of such a fixed voice call service, such as boosters, antennas or handsets may need to be incorporated by the particular carrier.

Part 3—Exempt Building Redevelopment Projects

Two notes are provided at the beginning of Part 3 of the Instrument. Note 1 explains how carriers are required to declare building redevelopment projects as nominated services areas under subsection 360H(4) of the Act. Note 1 also clarifies for the reader that the carrier that declared the nominated service area becomes the SIP for the relevant area.

Note 2 informs the reader that the Minister may, by legislative instrument, exempt a specified real estate development project from subsection 360H(4), and notes that the project area would remain a general service area of NBN Co until such time (if at all) that area became a nominated service area by declaration made by a carrier.

Section 9—Exempt Building Redevelopment Projects (to be served by Telstra copper networks)

Section 9 of the Instrument sets out an exemption for building redevelopment projects to be served by Telstra copper networks. This exemption is in the same terms as set out in section 5 but pertains to building redevelopment projects, and whether a project will be exempt from subsection 360H(4) of the Act depends on whether the same five conditions are met.

Section 10—Exempt Building Redevelopment Projects (to be served by Telstra HFC networks)

Section 10 of the Instrument sets out an exemption for building redevelopment projects to be served by Telstra HFC networks. This exemption is in the same terms as set out in section 6 but pertains to building redevelopment projects, and whether a project will be exempt from subsection 360H(4) of the Act depends on whether the same five conditions are met

Section 11—Exempt Building Redevelopment Projects (to be supplied with public mobile telecommunications services)

Section 11 of the Instrument sets out an exemption for building redevelopment projects to be supplied with public mobile telecommunications services. This exemption is in the same terms as set out in section 7 but pertains to building redevelopment projects, and whether a project will be exempt from subsection 360H(4) of the Act depends on whether the same four conditions are met.

Section 12—Exempt Building Redevelopment Projects (to be served by radiocommunications fixed voice calls)

Section 12 of the Instrument sets out an exemption for building redevelopment projects to be supplied with radiocommunications fixed voice services. This exemption is in the same terms as set out in section 8 but pertains to building redevelopment projects, and whether a project will be exempt from subsection 360H(4) of the Act depends on whether the same four conditions are met.

Attachment B

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Telecommunications (Statutory Infrastructure Providers—Exempt Real Estate Development Projects and Building Redevelopment Projects) Instrument (No. 1) 2020

Overview

The purpose of the Telecommunications (Statutory Infrastructure Providers—Exempt Real Estate Development Projects and Building Redevelopment Projects) Instrument (No. 1) 2020 (the Instrument) is to exempt two types of developments (known as real estate development projects and building redevelopment projects), in which carriers have installed telecommunications networks, primarily to supply voice services, from the requirement to be declared as nominated service areas under the statutory infrastructure provider (SIP) regime. This in turn would exempt the carriers who have installed telecommunications networks in those developments from being required to meet SIP obligations (effectively, to connect premises to networks that allow retail providers to supply high-speed broadband).

The SIP regime is set out in Part 19 of the *Telecommunications Act 1997* (the Act) and sets out a framework for all people in Australia to be able to receive high-speed broadband. Together with the Universal Service Obligation, which provides a framework for ensuring all people in Australia can access voice services, it forms the Universal Service Guarantee for broadband and voice.

The SIP regime commences on 1 July 2020. Under the SIP regime, NBN Co will be the SIP for most areas in Australia, but other carriers will be SIPs for certain areas, such as where they have contracts to service new developments.

SIPs are required to connect premises in their service areas to their networks, and supply wholesale services, on reasonable request from a retail provider. The wholesale services must allow the retail provider to supply 'qualifying carriage services'—broadband services with peak download and upload speeds of at least 25/5 Mbps. On fixed-line or fixed wireless networks, the wholesale services SIPs supply must also allow retail providers to supply voice services.

Where a carrier (other than NBN Co) has a contract to install telecommunications network infrastructure in a project, then under the Act that carrier must declare that the project is a 'provisional nominated service area'. Carriers must provide the geographic coordinates of a nominated service area to the Australian Communications and Media Authority (ACMA), which places the nominated service area on a SIP register.

The Instrument sets out four exemptions for real estate development projects and four exemptions for building redevelopment projects (together, 'projects'), each relating to the following classes of networks:

- a) networks that Telstra installs using copper to supply Universal Service Obligation voice services to projects;
- b) extensions of hybrid-fibre coaxial (HFC) networks Telstra installs to service projects but then may transfer to NBN Co under the Definitive Agreements;
- c) mobile network extensions that carriers install, under contract with a developer, to provide mobile coverage to a project; and
- d) radiocommunications networks that carriers may install under a contract with a developer to supply fixed voice services (but not high-speed broadband) to a project.

People living or working in exempt developments would still be able to access high-speed broadband as NBN Co, as the default SIP, would be required to supply this. The exemptions provide Telstra and other carriers with certainty that they can deploy networks that are primarily intended to be used to supply voice services in a cost effective manner.

Human rights implications

The Instrument is compatible with 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.

The Instrument does not engage any of the applicable rights or freedoms.

Conclusion

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