

# Explanatory Note

Issued by the Authority of the Minister for Communications, Cyber Safety and the Arts

*Telecommunications Act 1997*

## *Telecommunications (Network Exemption—TransACT Upgraded VDSL Networks) Instrument 2012 (Amendment No.1 of 2020)*

### **Authority**

Subsection 141A(1) of the *Telecommunications Act 1997* (the Act) conferred power on the Minister to exempt specified local access networks from the wholesale Layer 2 bitstream requirements of section 141 of the Act. The *Telecommunications Legislation Amendment (Competition and Consumer) Act 2020* repealed Part 7 of the Act containing s141. However, subitem 27(1) of Schedule 1 to the *Telecommunications Legislation Amendment (Competition and Consumer) Act 2020* (TLA Act) provides for existing exemption instruments, including their associated conditions, granted under s141A(1) of Part 7 of the Act, to continue to have effect as if they had been made under subsection 144(1) of the Act.

Subsection 144(1) of the Act confers power on the Minister to exempt specified local access networks from the wholesale-only requirements of section 143 of the Act.

Subsection 144(4) provides that the related exemption instrument may be unconditional or subject to such conditions (if any) as are specified in the instrument.

This Instrument is not a legislative instrument for the purposes of the *Legislation Act 2003* (see subsection 144(6) of the Act).

### **Purpose**

The purpose of this amendment is to provide an extension to the exemptions granted through the *Telecommunications (Network Exemption—TransACT Upgraded VDSL Networks) Instrument 2012* to TPG Telecom Ltd (ACN 093 058 069) for its VDSL2 network in the Australian Capital Territory now owned by TPG Telecom Limited (TPG).

### **Background**

TransACT first requested exemptions from Part 7 and Part 8 of the Act for its VDSL networks in September 2011. The original request was granted by the then Minister for Communications on 10 April 2012 through the *Telecommunications (Network Exemption—TransACT Upgraded VDSL Networks) Instrument 2012*, taking effect from 12 April 2012 until the ‘Designated Day’ – which was then 1 July 2018 under s577A of the Act. At present, the ‘Designated Day’ is set to 1 July 2020.

On 8 April 2020, TPG Telecom Ltd<sup>1</sup> (TPG) requested an extension to the Parts 7 and 8 exemptions. In accordance with subsection 144(5) of the Act, the Minister wrote to the Chairs of the Australian Competition and Consumer Commission (ACCC) and the Australian Communications and Media Authority (ACMA) to seek their comments on TPG's extension request. On 2 June 2020, the ACCC and the ACMA separately provided advice regarding TPG's request. Neither the ACCC nor the ACMA opposed the extension.

The Department of Infrastructure, Transport, Regional Development and Communications consulted (on behalf of the Minister) on the extension request with the public through a request for submissions through the Department's website. Response to the consultation was limited, with no parties opposing the extension up until a functional separation for the networks being accepted by the ACCC. In its response, ACMA noted there was no technical regulation considerations preventing extension. In the intervening period, the *Telecommunications Legislation Amendment (Competition and Consumer) Act 2020* (TLA Act) received the Royal Assent on 25 May 2020.

The Minister subsequently decided to extend the exemptions until the earlier of the day immediately after a functional separation undertaking or a deemed standard functional separation undertaking relating to local access lines forming part of a TransACT Upgraded VDSL Network first comes into force for the purposes of Part 8 of the Act; and the second anniversary of the day on which the TLA Act received the Royal Assent (which occurred on 25 May 2020).

As a result of the Minister's decision, in effect, TPG will have approximately two years to agree with the ACCC a functional separation undertaking in relation to the local access lines forming part of the exempted networks before the exemption expires.

#### **Clause 1 – Name of Exemption Instrument**

Clause 1 provides that the name of the Instrument is the *Telecommunications (Network Exemption—TransACT Upgraded VDSL Networks) Instrument 2012 (Amendment No.1 of 2020)*.

#### **Clause 2 – Commencement**

Clause 2 provides that the instrument will commence on the day that it is signed by the Minister.

---

<sup>1</sup> TransACT was acquired by iiNet in 2011. Subsequently, iiNet (and TransACT as its subsidiary) was acquired by TPG telecom in 2015.

### **Clause 3 – Amendments**

Clause 3 notes that the *Telecommunications (Network Exemption—TransACT Upgraded VDSL Networks) Instrument 2012 (Amendment No.1 of 2020)* (incorporating amendments up to 30 May 2012) is amended as set out in the Schedule to the Instrument.

### **Schedule – Amendments**

Item 1 of the Schedule replaces the cessation date of the *Telecommunications (Network Exemption—TransACT Upgraded VDSL Networks) Instrument 2012*, which had previously been the designated day, with a replacement cessation provision. The new cessation provision provides that the exemption instrument ceases on the earlier of two days occurring in the future. The first reference day being the date either a functional separation undertaking; or a deemed standard functional separation undertaking covering local access lines forming part of a TransACT upgraded VDSL network, first comes into force for the purposes of Part 8 of the Act. The second reference day is the second anniversary of the day on which the TLA Act received the Royal Assent (which was on 25 May 2020).

Item 2 of the Schedule introduces definitions for new terms introduced into the *Telecommunications (Network Exemption –TransACT Upgraded VDSL Networks) Instrument 2012*.

Specifically, the definition of *'deemed standard functional separation undertaking'* is defined to mean a functional separation undertaking covered by a determination under subsection 151B(1) of the Act, as amended by Schedule 2 to the TLA Act. These are standardised undertakings accepted by the ACCC that are expressed to apply to specified classes of network operators and if an operator chooses to comply with a deemed undertaking, the undertaking would apply as though the operator had submitted its own functional separation undertaking and the ACCC had approved it.

The definition of a *'functional separation undertaking'* has the same meaning as in section 142A of the Act, as inserted by Schedule 2 to the TLA Act. In summary, a standard functional separation undertaking is an undertaking given by an entity to the ACCC under section 151A or a joint functional separation undertakings given to the ACCC by two or more corporations under section 151C. These are special types of written undertaking given to the ACCC in relation to their supply of services over specified local access lines and includes key requirements such as functional separation (i.e. arrangements for how the entity will separate its wholesale and retail operations into separate companies or business units, while retaining ultimate control of both) and non-discrimination relating to the supply of local access line services.