

Explanatory Note

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

Telecommunications Act 1997

Telecommunications (Local Access Lines Exemption—SmartFarmNet) Instrument 2020

Authority

Subsection 141A(2) of the *Telecommunications Act 1997* (the Act) confers power on the Minister for Communications, Cyber Safety and the Arts to exempt specified local access lines from the Layer 2 bitstream requirements of section 141 of the Act. Subsection 144(2) of the Act confers power on the Minister to exempt specified local access lines from the wholesale-only requirements of section 143 of the Act. Subsections 141A(4) and 144(4) provide 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 subsections 141A(6) and 144(6) of the Act).

Purpose

The purpose of this Instrument is to grant exemptions for Technomics International Pty Limited (ACN 085 129 915), with the registered business name SmartFarmNet, from the requirements of Parts 7 and 8 of the Act.¹

Background

Parts 7 and 8 affect local access lines that are:

- part of a network built after 1 January 2011 and used to supply superfast carriage services (that is, services that normally provide a download transmission speed of more than 25 Megabits per second) wholly or principally to residential and small business customers; or
- part of a network built before 1 January 2011 that is upgraded or altered after 1 January 2011 so that it became capable of being used to supply superfast carriage services to residential or small business customers.

¹ For convenience, these are referred to throughout as Part 7 and Part 8.

Under Part 7 and the associated provisions of the *Competition and Consumer Act 2010*, Layer 2 bitstream services must be made available on such networks on an open access and non-discriminatory basis. Under Part 8, a controller of such a network is required to operate it on a wholesale-only basis.

SmartFarmNet has requested exemptions from Part 7 and Part 8 of the Act for its proposed fibre-to-the-premises network in rural areas outside the NBN Co fixed-line footprint for a period of 30 years.

In accordance with subsections 141A(5) and 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 SmartFarmNet's request.

The ACCC and the ACMA each provided their formal advice to the Minister regarding the proposal.

The Minister has decided to grant exemptions until 12 March 2050 subject to certain conditions. The decision to grant these exemptions reflects that the deployment of SmartFarmNet infrastructure will:

- support higher quality and more reliable services becoming available to Australians in regional locations;
- promote competition and choice for Australians in regional locations; and
- not disrupt the Government's broader telecommunications reform processes, including deployment of the National Broadband Network (NBN), because the exempted areas will be limited in scope.

Details

Clause 1—Name of Exemption Instrument

Clause 1 provides that the name of the Instrument is the *Telecommunications (Local Access Lines Exemption — SmartFarmNet) Instrument 2020*.

Clause 2—Commencement

The Instrument takes effect on the day it is signed by the Minister for Communications, Cyber Safety and the Arts. A copy of the instrument will be published online.

Clause 3—Cessation

The instrument ceases to have effect on 12 March 2050. This cessation date for the instrument is designed to provide SmartFarmNet with sufficient commercial certainty to invest in network infrastructure.

Clause 4—Definitions

Clause 4 sets out definitions of terms used in the instrument.

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

The term 'access seeker' has the same meaning as in Part XIC of the *Competition and Consumer Act 2010* (Cth).

The term 'associated entity' has the same meaning as in section 50AAA of the *Corporations Act 2001* (Cth)

The term 'dark optical fibre' refers to an unlit strand of optical fibre terminated on an optical distribution frame. The term is used in the definition of 'SmartFarmNet Dark Fibre Service' (see below).

The term 'designated real estate development project' is defined to mean subdivisions of land in Australia into lots and either or both: making those lots available for constructing building units for sale or lease, where it is reasonable to expect that building units will subsequently be built on those lots and sold or leased; or the construction of one or more building units on any of those lots and the making available of any of those building units for sale or lease.

The term 'NBN Co' refers to the NBN Co Limited, which is the company responsible for deploying the national broadband network.

The term 'national broadband network' is defined in the same way as in section 5 of the *National Broadband Network Companies Act 2011* (Cth).

The term 'optical distribution frame' is defined as a piece of equipment capable of providing cable interconnections between communications facilities. This is to enable access seekers to interconnect their own network equipment with SmartFarmNet's dark optical fibre, which itself is terminated on an optical distribution frame (see notes on subclause 5(2) below).

The term 'SmartFarmNet' refers to the Technomics International Pty Limited (ACN 085 129 915). As the time the instrument is made, the company uses the registered business name 'SmartFarmNet'.

The term 'SmartFarmNet Dark Fibre Service' specifies the characteristics of the service that must be offered and supplied by SmartFarmNet upon the request of an access seeker (see the notes on subclause 5(2) below).

The term ‘SmartFarmNet Lines’ is central to the exemption as it describes the optical fibre local access lines that are exempted by the Instrument from Parts 7 and 8 of the Act subject to the conditions under subclause 5(1). Local access lines will only fall within the definition to the extent that they are owned and operated by SmartFarmNet.

Further, SmartFarmNet Lines will not be exempted if they are located or proposed to be located within the footprint of a third party superfast fixed-line network in existence immediately before the commencement of the instrument; or in any area within the planned fixed-line footprint of NBN Co or a third party provider (as published on NBN Co’s website from time-to-time); or in an area of land within a new real estate development (to the extent that civil works associated with the development began to be carried out any time after the commencement of the exemption instrument).

Where a local access line is necessary for the provision of carriage services to an area where SmartFarmNet can receive the exemptions, its exempted local access lines can pass through areas where it cannot receive the exemptions.

The approach adopted in determining the permitted areas for exempted SmartFarmNet optical fibre local access lines has been designed to minimise overlap between SmartFarmNet’s lines with existing networks and real estate developments that may occur be at any time in the future. It is expected that SmartFarmNet’s exemption will generally apply to areas serviced by NBN Co’s loss making fixed-wireless and satellite networks.

If SmartFarmNet deploys local access lines in an area that is not an excluded area at the time of the original deployment and at a later point in time, the area becomes part of a project area of a real estate development project, as soon as the civil works for that project commence (e.g. trenching works begin) those line will no longer receive the benefit of the exemption. SmartFarmNet is expected to closely monitor the state of affairs in those areas where it deploys exempted local access lines for any changes. This will protect against anti-competitive outcomes, while incentivising service provision in those locations.

The term ‘third party superfast fixed-line network’ means a fixed-line network that is or is capable of providing superfast carriage services and is owned by an entity other than SmartFarmNet and its associates.

Note 1 is included at clause 4 to remind 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*.

Clause 5—Exemptions

Subclause 5(1) provides that the SmartFarmNet Fibre Lines are exempt from the requirements of sections 141 and 143 of the Act, contained in Parts 7 and 8 respectively, provided that all of the conditions in subclause 5(2) are satisfied.

Subclause 5(2) sets out the conditions to the exemptions.

Paragraph 5(2)(a) makes it a condition of the exemptions that SmartFarmNet must provide the ACCC with an estimate of the number of end-users supplied with services over their networks that include the exempted SmartFarmNet Fibre Lines within 14 days after the commissioning of telecommunications networks. In addition to assisting with compliance, this additional information will assist the ACCC to determine the extent of SmartFarmNet's deployment and whether threshold associated with the ACCC's Superfast Broadband Access Service access determination of 12,000 end-users has been met.

Paragraph 5(2)(b) makes it a condition of the exemption that SmartFarmNet must offer the use of unused optical fibre that is part of SmartFarmNet's infrastructure deployment on an open and equitable basis for the purposes of supplying telecommunications services. Further, provision is given for sufficient oversight by the ACCC. Specifically, in order for the exemptions to apply, SmartFarmNet must:

- within 14 days of offering its first carriage service over using a SmartFarmNet Fibre Lines, 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 SmartFarmNet Dark Fibre Service (this condition is intended to ensure that there is visibility with respect to 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, as well as the identity of the parties (this condition ensures that the ACCC can maintain oversight over differences); and
- 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).

If at any time the conditions in subclause 5(2) are not satisfied, SmartFarmNet would be subject to the requirements of section 141 and 143 of the Act with respect to the telecommunications network that comprise local access lines, including the offence provisions at subsections 141(4) and 143(3).

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 *Competition and Consumer Act 2010* (Cth).

Notes 1 and 2 to clause 5 remind readers that 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(2) and 144(2) of the Act.