# Consultation paper



Facilitating the use of private infrastructure to deliver telecommunications services

## Introduction

The Australian Government has committed to reducing excessive regulation by $1 billion per year to boost productivity and give businesses the flexibility to innovate in a globally competitive market. As part of this commitment, the Government is reviewing existing regulatory arrangements to identify areas in which regulation is ineffective, out of date, imposes significant costs on industry that are not justified by the benefits, or creates uncertainty over obligations.

Reducing regulatory barriers around the use of private telecommunications infrastructure to deliver services to the public is an area the Department of Communications has identified as offering potential productivity gains by enabling greater use of capacity existing in the hands of private owners.

The purpose of this consultation paper is to seek information on the extent of existing private telecommunications infrastructure within Australia. It then seeks views on a proposed Ministerial exemption (Attachment A) which would enable private infrastructure owners to provide carriers with more straightforward and timely access to their infrastructure on an agreed basis.

The paper has been prepared for consultation purposes only and should not be taken as indicating a Government preference for a particular course of action.

Information on how to make a submission can be found on page 5 and is also available on the consultation page of the Department’s website[[1]](#footnote-1). The Department welcomes comment on the proposed Ministerial exemption or suggestions on other alternative approaches. A series of questions to guide comments can be found at page 4. Submissions should be lodged by **Tuesday, 7 October 2014**.

The Ministerial exemption provisions under section 51 of the *Telecommunications Act 1997* (the Act) provide scope to develop a class exemption relatively quickly. Under the proposed exemption, private telecommunications network owners would be allowed to provide carriers with access to their network on a contractual basis without themselves being required to obtain a carrier licence or arrange for a carrier to obtain a nominated carrier declaration (NCD) in respect of the private network unit. The carrier would be responsible for the supply of carriage services to the public using the network unit and the obligations which attach to those supplies.

Importantly the proposal neither compels private owners to provide access or carriers to seek access. It simply seeks to make it easier for the network owners and carriers to enter into commercial arrangements.

## Regulatory Context

Carrier licence arrangements are set out in Part 3 of the Act.

Under the Act there are currently four ways in which an owner of telecommunications infrastructure can legally provide carriage services to the public. The owner may:

* apply to the Australian Communications and Media Authority (ACMA) for a carrier licence;
* enter into a nominated carrier declaration arrangement with a carrier;
* be covered by one of the statutory exemptions under Part 3 of the Act; or
* be covered by a specific Ministerial exemption.

Section 42 of the Act establishes a basic prohibition on the use of network units to supply carriage services to the public without a carrier licence or an NCD. An NCD enables a nominated telecommunications carrier to assume the responsibilities of the owner of the network units.

The Act regulates persons who supply, or propose to supply, carriage services to the public. Persons who provide carriage services to the public are then classified on the basis of whether they own network units (i.e. the telecommunications infrastructure) and/or provide carriage services to the public using a network unit.

Supplying a carriage service to the public means supplying carriage services to people outside the ‘immediate circle’ of the network unit owner, as defined in section 23 of the Act. A person’s immediate circle includes, for example, a person’s employee or partner.

Part 3 of the Act provides specific statutory exemptions (see sections 45 to 50) for private network operators in some market sectors with scope for incidental use of the network to be utilised by carriers. These statutory exemptions exist for defence organisations, intelligence organisations, Air Services Australia, transport authorities, electricity supply bodies, and broadcasting services and certain historical line link exemptions. In contrast, other sectors which may also be as likely to invest in private networks, such as gas utilities, mining, education, state and territory governments are not exempt and are required to have a licence or an NCD in place with a carrier if the infrastructure provides services to the ‘public’ (see sections 23 and 44 of the Act).

Conversely, people can own and operate network units without the requirement for a carrier licence or NCD where they supply carriage services only to people within their immediate circle; that is, to operate private networks. The operators of such private networks are not subject to carrier obligations and responsibilities such as interconnection or facilities access. Conversely, they are not able to access any of the benefits of being a carrier such as powers and immunities to install facilities on land and in buildings.

Section 51 of the Act provides that the Minister may, by written instrument, determine that the licensing requirement under section 42 does not apply to a specified network unit, a specified person or a specified use of a network unit. At present there are seven Ministerial exemptions made in reliance of section 51 which are in force. These can be accessed on the department’s [website](http://www.communications.gov.au/policy_and_legislation/acts_regulations_and_legislative_instruments)[[2]](#footnote-2).

## Proposed Regulatory Change

The Government is interested in whether it can foster more efficient use of private telecommunications infrastructure by reducing regulatory barriers to access.

While the Government is aware of a number of different private networks, to better inform its decision making it is seeking future information on the nature and extent of private networks operators.

Where private networks already exist (or are proposed for particular purposes) and have capacity available, enabling easier access by carriers could reduce costs, improve timely provision of services and improve the business case for providing services to the public.

Carriers are obliged by the Act to provide other carriers with access to certain facilities such as ducts and towers on a regulated basis in order to improve service delivery and promote competition. Enabling access to existing private infrastructure in a straightforward and timely fashion could provide additional opportunities to provide more cost effective services in areas where commercial returns on investment are lower than normal.

Access can be facilitated by one-off Ministerial exemptions. However, the process to develop, consult publicly on, and finalise an exemption, can be time-consuming. Development of a class exemption would streamline this process.

If a private network owner chooses to enter into an NCD arrangement with a carrier, the carrier must apply to the ACMA for approval and register the agreement. In consenting to the NCD, the ACMA must be satisfied that the applicant carrier would be in a position to comply with all the obligations imposed on the applicant in its capacity as the nominated carrier (section 81). A practical consequence of this requirement is that carriers must have a high degree of control over the operation and maintenance of the network. This may not always be consistent with the operational requirements of the network owner and can serve as a disincentive to entering into NCD arrangements.

### The proposal

A draft exemption instrument is at Attachment A for comment.

The approach proposed is that a Ministerial class exemption be made under subsection 51(c) of the Act to enable any owner of private telecommunications infrastructure to provide access to that infrastructure to carriers, removing the need for the private network owner to hold an NCD or a carrier licence.

Clause 3 of the draft exemption is modelled on existing statutory exemptions applying to electricity and transport operators (see sections 47 and 49 of the Act). This approach has been adopted for simplicity and consistency with the broader licensing regime and the regulatory approach to the use of secondary telecommunications capacity in particular.

The draft exemption provides that if an owner of a private telecommunications network has spare capacity and chooses to provide carriers with access to that capacity, it could contract for access to the infrastructure on a commercial basis, to enable the carrier to supply carriage services to the public.

The proposed exemption would not expressly or indirectly impose any obligation on private network owners to identify spare capacity or provide access. As the infrastructure is not owned by a carrier, terms and conditions of access and use would be purely a commercial matter between the contracting parties and outside the scope of telecommunications specific processes under Part XIC of the *Competition and Consumer Act 2010*.

The intent is to remove regulatory constraints on the use of private telecommunications infrastructure and potentially provide carriers and the market with the option of using underutilised private network capacity. Given private network infrastructure is developed for a specific purpose, in general, it is expected that any use by a carrier would be to meet a specific localised need, for example in a regional area where a private network link may exist but carrier infrastructure is limited or unavailable.

Making this exemption may involve risks and uncertainty for carriers. For example, private owners may operate and maintain their infrastructure to a different standard than that required by a carrier leading to issues with service quality, reliability and long-term continuity of services. Residual private capacity may also be limited or the private owner not be willing to treat all access seekers equally, leading to one carrier gaining first mover or a preferential advantage. It is also possible that encouraging access to private networks could discourage carriers from investing in their own infrastructure.

These risks are matters that a carrier would be expected to consider when it makes a decision to use private infrastructure rather than invest directly. Carriers would need to have regard to their ongoing statutory obligations and to any reputational risk that might arise from difficulties associated with the use of private networks to deliver services.

**Questions**

In addition to considering the draft exemption instrument, the Department is seeking stakeholders’ views on the following issues.

1. What large private infrastructure networks exist?
2. What benefits may accrue from facilitating greater infrastructure sharing along the lines proposed?
3. Is the proposed exemption a practical and useful approach?
4. If not, are there alternatives to the exemption model outlined that should be considered?
5. What risks may arise from the proposed exemption?
6. Would inclusion of an open access condition mitigate risk for carriers?
7. Should the proposed exemption be limited, for example by inclusion of a competition test or geographic limitation?

## How to make a submission

The Department of Communications welcomes submissions on the proposed amendments. Submissions should be made:

By email: telcolicensing@communications.gov.au

By mail: Assistant Manager
Licensing Policy
Market Structure Branch
Department of Communications
GPO Box 2154
CANBERRA ACT 2615

Submissions should be lodged by **Tuesday, 7 October 2014.**

Submissions should also identify:

* the name of the party making the submission
* the organisation represented (if applicable)
* contact details, including telephone number, postal and email address.

### Publication of submissions

In general, the Department publishes submissions it receives. The Department will not publish a submission or part of a submission if the Department considers such material to be defamatory or otherwise unlawful or to be unsuitable for any other reason.

The Department prefers to receive submissions that are not claimed to be confidential. However, the Department accepts that a submitter may sometimes wish to provide information in confidence. In these circumstances, submitters are asked to identify the material over which confidentiality is claimed and provide a written explanation for the claim.

The Department will consider each confidentiality claim on a case-by-case basis. If the Department accepts a claim, it will not publish the confidential information unless authorised or required by law to do so.

The Department will not acknowledge submissions.

### Release of submissions where authorised or required by law

Any submissions provided to the Department may be released under the *Freedom of Information Act 1982* (unless an exemption applies) or shared with other Commonwealth Government agencies or certain other bodies. The Department may also be required to release submissions for other reasons including for the purpose of parliamentary processes or where otherwise required by law (for example, under a court subpoena). While the Department seeks to consult submitters of confidential information before that information is provided to another party, the Department cannot guarantee that confidential information will not be released through these or other legal means.

### Contact us

For further information about the carrier licensing regime or to discuss any elements of this Consultation Paper, please contact the Department of Communications using the email address above or by phoning 6271 1000.

NOTE: This draft instrument is provided for the purposes of consultation only. The decision to grant an exemption and the final terms of any instrument will be subject to the discretion of the Minister.

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**Commonwealth of Australia**

*Telecommunications Act 1997*

## Telecommunications (Carrier Licence Exemption —Residual Use of Private Networks) Determination 2014 (No.1)

I, MALCOLM BLIGH TURNBULL, Minister for Communications make the following Determination under paragraph 51(1)(c) of the *Telecommunications Act 1997*.

Dated.

**[DRAFT- NOT FOR SIGNATURE]**

MALCOLM BLIGH TURNBULL
MINISTER FOR COMMUNICATIONS

**1 Name of Determination**

This Determination is the *Telecommunications (Carrier Licence Exemption —Residual Use of Private Networks) Determination 2014 (No. 1).*

**2 Commencement**

This Determination commences on the day after it is registered on the Federal Register of Legislative Instruments.

*Note:* Several other words and expressions used in this Determination have the meaning given by section 7 of the Act (see subsection 13(1) of the *Legislative Instruments Act 2003*). For example:

* carriage service;
* content service; and
* network unit.

**3 Exemption**

(1) Section 42 of the Act does not apply in relation to the use of a network unit where:

(a) the principal use of the network unit is by a person who is the owner of the network (***network owner***) to carry communications necessary or desirable for the purposes of activities of the person’s enterprise or business undertaking that do not comprise the supply of carriage services or content services to the public; and

(b) the remaining use of the unit is use by one or more carriers to supply carriage services or content services to the public.

1. See: <http://www.communications.gov.au/consultation_and_submissions> [↑](#footnote-ref-1)
2. Section 51 Ministerial exemptions are listed at [http://www.communications.gov.au/policy\_and\_legislation/
acts\_regulations\_and\_legislative\_instruments](http://www.communications.gov.au/policy_and_legislation/acts_regulations_and_legislative_instruments) [↑](#footnote-ref-2)