TransACT
an iinet company

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The Hon Paul Fletcher MP
Minister for Communications

Email: **minister@communications.gov.au; InfrastructureAndAccess@communications.gov.au**

Dear Minister

Extension of TransACT Network Exemption Instruments

As you will be aware, the *Telecommunications (Designated Day) Instrument 2019* (the **Designated Day Instrument**) specified that 1 July 2020 is now the designated day for the purposes of section 577A of the *Telecommunications Act 1997* (**the Act**). As a consequence, three TransACT network exemption instruments will cease to have effect on 1 July 2020 unless extended by the Minister. TransACT Capital Communications Pty Ltd and TransACT Victoria Communications Pty Ltd (together, **TransACT**) are subsidiaries of TPG that TPG acquired when we acquired TransACT's then owner iiNet. We request that you extend these instruments for the reasons outlined in this letter.

1. The instruments

The instruments that we ask you to extend are:

- *Telecommunications (Network Exemption – Specified TransACT Networks) Instrument 2012*
- *Telecommunications (Network Exemption – TransACT Upgraded VDSL Networks) Instrument 2012*
- *Telecommunications (Network Exemption – TransACT Very Small Scale Networks) Instrument 2012*

Each of these instruments provides a ministerial exemption from sections 141 and 143 of the Act in regard to the networks that are specified in the instruments. This allows TransACT to provide retail broadband services to residential customers connected to the networks. The exemptions are subject to conditions relating to the provision of wholesale services and standard telephone services.

2. The Specified FTTP exemption instrument

The *Telecommunications (Network Exemption – Specified TransACT Networks) Instrument 2012* provides an exemption in relation to TransACT FTTP networks constructed in three Canberra real estate development projects pursuant to contracts in force prior to 26 March 2011.

The explanatory note that accompanied this instrument stated that the decision to grant these exemptions reflected a range of factors, including, but not limited to, the following:

- the projects predated the enactment of the legislation and as the projects are subject to contracts, not giving them exemptions could impact negatively on the contracting parties

- the requirement to comply with the level playing field rules in relation to those projects would unduly impact on TransACT's business operations

- the extent of the networks is specified and considered to be limited in scope

- any adverse impact on access seekers and end-users will be mitigated to some extent by TransACT offering an alternative wholesale model

- 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, and

- given the advanced nature of these projects, NBN Co is unlikely to be the provider of last resort in these areas.

3. The upgraded VDSL networks exemption instrument

The *Telecommunications (Network Exemption – TransACT Upgraded VDSL Networks) Instrument 2012* provides an exemption to in relation to TransACT VDSL networks in Canberra that were in existence prior to 2011 but were upgraded after 1 January 2011, becoming capable of supplying superfast services to residential or small business customers.

The explanatory note that accompanied this instrument stated that the decision to grant these exemptions reflected a range of factors, including, but not limited to, the following:

- 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.

4. The very small scale networks exemption instrument

The *Telecommunications (Network Exemption – TransACT Very Small Scale Networks) Instrument 2012* provides an exemption to TransACT's extension of networks located in Canberra, Ballarat, Geelong and Mildura connecting no more than 100 premises in real estate developments.

The explanatory note that accompanied this instrument stated that the decision to grant these exemptions reflected a range of factors, including, but not limited to, the following:

- provision of a superfast network by TransACT in these localities could provide users with ready access to superfast broadband services pending the rollout of the NBN given TransACT has networks in situ which can be readily extended

- the exemptions need not hinder the government's broader structural reform process

- other small providers can compete to provide such networks if they wish, in compliance with the level playing field rules (it is also open for such providers to make a request to the minister for an exemption—such requests would be considered on their own merits)

- the extent of the networks is expected to be limited in number and size

- any adverse impact on access seekers and end users will be mitigated to some extent by TransACT generally offering an alternative wholesale model, and

- as a matter of course, the networks may be regulated by the ACCC under the general provisions of the telecommunications access regime in Part XIC of the Competition and Consumer Act 2010 (CCA).

5. Reasons for extensions to the instruments

We consider that the reasons for originally granting each of the three exemptions are still valid. In addition, in assessing our extension request we ask that the Minister consider the following further reasons:

- TransACT's continued operation of its networks provides facilities-based competition, even though in limited geographic areas. This is in accordance with government policy to encourage competition in broadband markets. Agreeing to extend the instruments is beneficial to end-users connected to TransACT's networks and promotes competition. A refusal to extend the exemptions would be detrimental to competition and to the end-users that are connected to the networks. Millions of dollars have been invested in TransACT's networks, predominantly prior to the creation of the NBN and the implementation of legislation to protect NBN Co's market share. It is poor policy to interpret or implement legislation in a manner that results in this very considerable investment and valuable asset being stranded or impaired, particularly when the existence of non-NBN infrastructure is in line with the Government's policy of holding NBN Co to account via facilities-based competition and, unlike Telstra and Optus, there has been no compensation offered to TransACT for the loss in value that would occur if TransACT was required to divest itself of the networks. The NBN is installed and is already competing with the TransACT networks. We therefore consider it is appropriate that the status quo be maintained and the exemption instruments be extended indefinitely or for a reasonably long period, such as 5 years.

- However, if the Minister is unwilling to do this and requires a nearer term expiration date in the exemption extensions, we ask that the time frames for extension outlined below are implemented.

- Since at least the publication of the Vertigan Review and the Government's subsequent response in late 2014, TransACT has conducted its business in the belief that Government policy would allow it to continue using its network assets on an ongoing basis if the networks were operated pursuant to an acceptable form of functional separation. This expectation was strongly supported by the functional separation undertaking provisions in the *Telecommunications Legislation Amendment (Competition and Consumer) Bill 2019* (**the TLA Bill**) and its 2017 predecessor. The considerable and repeated delays in the passage of the TLA Bill means that a presumably unintended consequence of the Minister's decision in November 2019 to make the Designated Day Instrument is that TransACT's three exemption instruments will expire before TransACT has any ability to obtain ACCC approval of a functional separation undertaking. There is less than four months before the designated day and the expiry of each of the instruments. This is insufficient time to put in place alternative arrangements that would be necessary to ensure that TransACT is not in breach of section 143 of the Act (and section 141 if the TLA Bill is not passed and in force by that date). Alternative arrangements would require all retail residential (and possibly small business) services currently provided to end-users by TransACT be transferred away from TransACT to another retail service provider, for TransACT to sell its networks or for end-user services to be terminated. This would require considerable negotiation in order to reach suitable agreements and processes to ensure that the commercial objectives of TransACT are not unduly compromised and that end-users do not lose access to broadband and phone services and are provided with acceptable alternative services. We do not consider that there is sufficient time for this to occur before 1 July 2020.

- The TLA Bill provides that upon the ACCC's acceptance of a functional separation undertaking, network operators may supply superfast retail services to residential customers. This will be relevant to TransACT's ongoing operation of the currently exempt networks. Though passage of the Bill appears imminent, given the ACCC has not published precedent functional separation undertaking documents or provided guidance on what it will require in an undertaking and is likely to have to consider undertaking applications from multiple carriers, we consider it will be some months at least after the Bill's passage before suitable frameworks for functional separation are in place and before an undertaking by TransACT is accepted by the ACCC and in force. We consider that once a functional separation undertaking by TransACT is operational, there will be no continued requirement for the exemptions. We consider that unless the exemptions are extended indefinitely, the appropriate mechanism is for the exemptions to continue until a functional separation undertaking by TransACT (or a related entity that assumes control of TransACT's networks) has been accepted by the ACCC. Though it is TransACT's position that the exemption undertaking should be extended indefinitely, if the Minister requires termination dates in the extended undertakings, . we consider that the termination dates should be the earliest of the following to occur:

    i. The ACCC's acceptance of a functional separation undertaking by TransACT (or a related entity that assumes control of TransACT's networks) and any necessary steps for the implementation of that undertaking are put in place;

    ii. Six months after the ACCC's rejection of a functional separation undertaking by TransACT (or a related entity that assumes control of TransACT's networks); and

    iii. two years after the enactment of the TLA Bill.

The continuation of the exemption instruments is vital to TransACT's operations and we require certainty as to how the networks will be operated in the very near future. We also note that the proposed new section 144(7) in the TLA Bill prohibits the Minister making an exemption instrument under subsections 144(1), (2) or (3) after the designated commencement date. We therefore ask that the Minister provide us with his response to this letter at as early a date as possible.

Please contact Tony Moffatt ( ) if you would like to discuss any part of this letter or if additional information is required.

Yours faithfully

DAVID TEOH
CEO
TPG Telecom Limited group