

CONSULTATION DRAFT

NOTE: This draft determination is provided for the purposes of consultation only.
The final terms of any determination made may vary from the text of this draft determination.

Telecommunications (Statutory Infrastructure Providers— Circumstances for Exceptions to Connection and Supply Obligations) Determination 2020

INTRODUCTION AND IMPORTANT NOTICE

On 1 July 2020, the new Statutory Infrastructure Provider (SIP) regime came into force under Part 19 of the Telecommunications Act 1997. The SIP regime requires designated SIPs within individual service areas to connect premises and supply wholesale services to carriage service providers (CSPs) on 'reasonable request'. Once the NBN is declared built and fully complete, NBN Co will be the default SIP, but there will also be areas that are the responsibility of other SIPs (such as where alternative providers have built infrastructure to connect/serve new developments).

The legislation does not define a 'reasonable request' for the purposes of the SIP regime. However, under s.360P(3) and s.360Q(4) of the Telecommunications Act 1997, the Minister for Communications (the Minister) could make an instrument to determine what would be considered a 'reasonable request' from a CSP to a SIP.

This draft Telecommunications (Statutory Infrastructure Providers—Circumstances for Exceptions to Connection and Supply Obligations) Determination 2020 is provided for comment. The Department is particularly interested in feedback on SIPs' existing approaches to assessing and managing connection and supply requests, including views on whether a Ministerial determination is necessary at this point. Stakeholders are also encouraged to provide feedback on the detail of the proposed drafting.

The primary objective of the Minister making an instrument would be to establish consistency by determining 'reasonableness' in the context of requests from CSPs to SIPs to connect premises and/or supply wholesale services. The proposed determination broadly provides that SIPs are expected to connect and supply wholesale services to private residences, businesses, schools, charities/not for profit organisations, places of worship and government premises. However, the instrument also sets out particular circumstances where it is not considered reasonable for SIPs to accept a request to connect or supply services to such premises. However, it should be noted the SIP may still choose to accept a request if it wishes to do so.

This draft determination draws on a number of concepts contained in the Telecommunications Universal Service Obligation (Standard Telephone Service—Requirements and Circumstances) Determination ([the USO instrument](#)). However, a more principles based approach has been taken to try to simplify this draft determination. The USO also involves consumers directly requesting retail voice services from the USO provider (Telstra), whereas SIP arrangements involve CSPs requesting connection and/or supply from the relevant SIP for an area on behalf of a consumer. As a result, the draft determination has necessarily adopted a different approach in certain key areas (i.e. consumer information requirements).

Note boxes like this provide context or explanation where considered useful to understanding the drafting. These note boxes will not be part of any final determination, but similar guidance may be included in the accompanying Explanatory Statement. A number of questions are in similar boxes.

Stakeholder responses are requested by Friday 18 December 2020. Any points of clarification or other queries on this consultation draft may be requested via email at USG@communications.gov.au



Telecommunications (Statutory Infrastructure Providers—Circumstances for Exceptions to Connection and Supply Obligations) Determination 2020

I, PAUL FLETCHER, Minister for Communications, Cyber Safety and the Arts, make the following Instrument.

Dated

PAUL FLETCHER **DRAFT ONLY—NOT FOR SIGNATURE**
Minister for Communications, Cyber Safety and the Arts

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Part 1 Introductory

1 Name

This Instrument is the *Telecommunications (Statutory Infrastructure Providers—Circumstances for Exceptions to Connection and Supply Obligations) Determination 2020*.

2 Commencement

This Instrument commences on the day after it is registered.

3 Authority

This Instrument is made under subsections 360P(3) and 360Q(4) of the *Telecommunications Act 1997*.

4 Definitions

- Note: A number of expressions used in this Instrument are defined in the Act, including the following:
- (a) carriage service provider (section 7);
 - (b) connected (section 7);
 - (c) eligible service (section 360A);
 - (d) qualifying carriage service (section 360A);
 - (e) qualifying telecommunications network (section 360A);
 - (f) relevant service area (section 360A);
 - (g) request (section 360A); and
 - (h) service area (section 360A).

In this Instrument:

Act means the *Telecommunications Act 1997*.

charity has the same meaning as given under section 5 of the *Charities Act 2013 (Cth)*.

Designated Private Residence means a distinct house, flat, apartment or other self-contained structure that is:

- (a) is capable of supporting continual or periodic independent private residency; and
- (b) situated at a location which has a street or physical mailing address (regardless of whether or not it is the primary premises at that location).

Note: The reference to ‘Continual or periodic’ private residency above is intended to reflect the premises is able to support permanent residence or residence on some form of ongoing basis (for example, a farm could have a separate residence that is used on a seasonal basis). The reference to ‘Independent private residency’ is included to reflect an expectation that a residential premises would enable a resident to manage their own care, including having access to sanitation and facilities for food preparation. While such facilities would need to be reasonably available, they would not necessarily need to be fully self-contained (e.g. a premises could have access to shared laundry or cooking facilities).

The definition of residential premises above is also intended to capture single residences at a site, but also recognises there may be additional premises (granny flats and other similar living quarters) at a site beyond the primary residence.

Question: Although the USO instrument specifically qualifies an eligible residence as having certain characteristics (i.e. ‘access to permanent sanitation facilities’), is the definition of residential premises in this draft instrument appropriate and sufficiently clear?

Educational Premises means the premises of:

- (a) a primary school; or
- (b) a secondary school; or
- (c) a higher education institution; or
- (d) a technical and further education institution; or
- (e) a vocational education and training body; or
- (f) any other registered training organisation registered with the Australian Skills Quality Authority or an equivalent State/Territory vocational education and training regulator or accreditation body.

Government Premises means a premises that is used for the purposes of the government of the Commonwealth, State, Territory or local government.

Pre-existing agreement means an agreement between a SIP and a carriage service provider setting out the terms and conditions on which the SIP will supply eligible services and/or connect premises to its qualifying telecommunications networks and which was entered into before 1 July 2020 and is in force at the relevant time.

SIP or statutory infrastructure provider means a statutory infrastructure provider within the meaning of section 360A of the Act.

Part 2 Circumstances

Division 1 Circumstances in which the obligation to connect premises to a qualifying telecommunications network does not arise

- Note 1: Subsection 360P(1) of the Act imposes the obligation of a statutory infrastructure provider for a service area to connect an end-user at a premises in the service area, on reasonable request by a carriage service provider on behalf of the end-user, to a qualifying telecommunications network.
- Note 2: Subsection 360P(2) of the Act provides that the obligation to connect a premises to a qualifying telecommunications network does not arise under subsection 360P(1) in the circumstances specified in a ministerial determination under subsection 360P(3).
- Note 3: Connection to a qualifying fixed-line telecommunications network is required unless it is not reasonable to do so, and where it is not reasonable to do so, connection must be to another type of qualifying telecommunications network, such as one which uses either a fixed-wireless or satellite technology platform: see paragraphs 360P(1)(a) and (b) of the Act.
- Note 4: A statutory infrastructure provider is not obliged under subsection 360P(1) of the Act to connect a premises in order that a carriage service provider can provide qualifying carriage services to an end-user, where those premises are not situated in the provider's service area.

Note: *The purpose of note 4 above is to highlight to readers that SIPs are not obliged under the Act to accept requests to connect premises outside their service areas.*

5 Determination of circumstances

Note: *The circumstances set out at (a)-(n) below largely draw on a similar range of circumstances set out in the USO instrument.*

Questions:

Are the above circumstance appropriate? Are there additional circumstances where it would be unreasonable for a SIP to accept a request to connect services?

- (1) For the purposes of subsection 360P(2) of the Act, the following circumstances are determined:
- (a) at the time of the request, the premises specified in the request:
- (i) is under construction and will not be at lock up stage of the construction by the day nominated by the carriage service provider for the connection to be undertaken;
 - (ii) is a permanent structure that does not comply with all applicable planning and development laws pertaining to structural safety and integrity;
 - (iii) is not one of the following types of premises:
 - A. a Designated Private Residence;

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- B. a place of worship;
 - C. an Educational Premises;
 - D. a Government Premises;
 - E. a business premises;
 - F. a premises of a charity;
 - G. a not-for-profit entity's premises;

Questions:

*Are there any additional types of premises that should be included (or not)?
Should there be some form of attestation that the end user has, or expects to, occupy or use a particular type of premises for a minimum duration?*

- (iv) is a moveable structure that is not reasonably expected to be continuously located at the particular site where the connection has been requested;

Note: *Most premises where a request is likely to be made under the SIP regime are expected to be permanent structures. However, (iv) above is provided to recognise there may be instances where 'moveable structures' such as caravans, motorhomes or tiny homes may be located on a relatively permanent basis at a given site.*

Question: *Would there be benefit in providing a minimum specific threshold to quantify what is intended by 'continuously located'?*

- (b) where the supply of a power source is required to adequately support the connection and this has not been supplied or arranged to be supplied;
- (c) where fulfilment of the connection obligation at the particular premises would constitute a contravention by the SIP of an applicable law of the Commonwealth, State, Territory or local government;

Note: *The provision at (c) above reflects that SIPs may need to consider and manage compliance with a range of legal requirements, including in relation to environmental, cultural or heritage issues.*

- (d) where civil works (such as trenching or conduit) to support underground facilities (such as lead-in cabling) or necessary above-ground facilities (such as poles) is required to adequately support the connection, and this has not been supplied or arranged to be supplied;
- (e) where a SIP has already received a request for connection at the same premises, and the SIP is either processing the request or has already connected the premises;

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- (f) where the premises is connected to another qualifying telecommunications network (*third party network*) and the SIP is satisfied, based on documentation obtained from the requesting CSP or other information, that at the time of the request either:
- (i) the end user at the premises is being supplied with a qualifying carriage service using the third party network and the end-user has not been advised by the provider that the service is to be withdrawn within a specified timeframe; or
 - (ii) the end user at the premises is being supplied with a qualifying carriage service using the third party network and the end-user has not requested or does not intend to request the cancellation of the service within a reasonable timeframe;

Note: *The drafting at (f) above reflects that there may be alternative networks in competition with SIP networks. Broadly, it is envisaged a SIP would not be obliged to arrange a new network connection to a premises where a qualifying carriage service is already being supplied. However, the drafting also recognises that an end user could cancel a service provided over a third party network (e.g. due to concerns over price, quality or customer service) or a service could be withdrawn by the provider. It is envisaged that if a third party service is being withdrawn by a provider due to a breach of its terms and conditions by the end-user, this would not absolve a SIP of the need to consider a request, but it could consider the circumstance in doing so.*

Question: *Does the proposed drafting above appropriately balance the interests of SIPs, carriers operating third party networks, and consumers?*

- (g) where the installation of equipment necessary for the connection would put the SIP's employees, contractors or agents or members of the public at unreasonable risk of being exposed to health or safety hazards;
- (h) where, in order for the SIP to carry out or complete any part of the connection or install facilities necessary for the connection, the SIP requires access to land, premises or areas within a premises (including without limitation, common areas) owned or occupied by a party which are not publicly accessible, and:
- (i) where the installation was being undertaken in accordance with Schedule 3 to the Act—such access has not been facilitated within the applicable statutory timeframe (if any) or such other reasonable timeframe requested by the SIP; or
 - (ii) where the installation is not being undertaken in accordance with Schedule 3 to the Act—the consent of that third party for such access has not been obtained within the reasonable timeframe requested by the SIP;

Note: Schedule 3 of the Telecommunications Act 1997 deals with the [powers and immunities regime](#) and outlines obligations and requirements around the installation of telecommunications facilities and infrastructure. Items (h)(i) and (ii) above are included to reflect that there may be cases where a SIP cannot undertake installation of facilities under the powers and immunities arrangements, although in most cases, it is anticipated SIPs would be able to exercise the powers and immunities regime when making connections.

- (i) where, in order for the SIP to complete the connection, the SIP requires the consent of a person to attach or install equipment (such as customer premises equipment) to, or within, the premises, and the consent of the person has not been obtained within the reasonable timeframe requested by the SIP;

Note: The provision at (i) above is intended to recognise that consent of landlords, body corporates, strata bodies or the like may be needed.

- (j) in cases where the terms and conditions on which the SIP's connection of the premises are not set out in a pre-existing agreement between the carriage service provider and the SIP, the carriage service provider has not accepted the SIP's terms and conditions for the connection of premises, provided those terms and conditions are not inconsistent with this Instrument;

Note: Subsection 360W(1) of the Act requires each SIP to publish on its website the price and non-price terms and conditions on which it offers to connect premises in the relevant service area.

Note: The provision at (j) above reflects that SIP arrangements commenced from 1 July 2020, and therefore CSPs may have pre-existing agreements in place rather than relying on terms and conditions published under s360W(1). If no pre-existing agreement is in place, it would not be reasonable to require the SIP to connect a premises if the CSPs declines to accept terms and conditions (provided also that those terms and conditions are not inconsistent with this Ministerial determination).

- (k) where the request for a connection is made by a carriage service provider on behalf of an end-user who is a natural person and that person:
 - (i) is under 18 years of age at the time of the request; and
 - (ii) is not the owner or a lessee of the premises specified in the request; and
 - (iii) has not obtained either the owner's consent or lessee's consent to make the connection request;
- (l) where the request for a connection is made by a carriage service provider on behalf of an end-user who is a natural person, and the SIP has a reasonable need to identify the end-user, and adequate information is not available to enable the SIP to identify that end-user;

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- (m) where the SIP believes, on reasonable grounds, that the request to connect the premises is fraudulent;
 - (n) where the SIP believes, on reasonable grounds, that the end-user to whom the request to connect the premises to a qualifying telecommunications network relates does not have the legal right to occupy the premises specified in the request.

Division 2 Circumstances in which the obligation to supply eligible services does not arise

Note: *Division 2 of this draft instrument covers the supply of services. It largely mirrors Division 1, but with amendments to reflect a focus on ‘supply’ rather than the ‘connection’ of services. For this reason, the notes and questions from Division 1 are not repeated below, but they can generally be assumed to apply.*

- Note 1: Paragraph 360Q(1)(a) of the Act imposes the obligation of a statutory infrastructure provider for a service area to supply, on reasonable request by a carriage service provider on behalf of the end-user, an eligible service to the provider in order that the provider can provide qualifying carriage services to the end-user at a premises in the service area.
- Note 2: Subsection 360Q(3) of the Act provides that the obligation to supply an eligible service does not arise under subsection 360Q(1) in the circumstances specified in a ministerial determination under subsection 360Q(4).
- Note 3: A statutory infrastructure provider is not obliged under subsection 360Q(1) of the Act to supply eligible services in order that a carriage service provider can provide qualifying carriage services to an end-user at a premises, where those premises are not situated in the provider’s service area.

Note: *purpose of note 3 above is to highlight to readers that SIPs are not obliged under the Act to accept requests for supply of eligible services to any premises outside its service area(s). This is similar to note 4 in Division 1.*

6 Determination of circumstances

- (1) For the purposes of subsection 360Q(3) of the Act, the following circumstances are determined:
- (a) where, at the time of the request, the premises specified in the request:
- (i) is not connected to the SIP’s qualifying telecommunications network and the SIP is not required under subsection 360P(1) of the Act to connect the premises;

Note: *The provision at (i) above is a consequence of supply and connection obligations being separate under the SIP regime. This clarifies for avoidance of doubt, that a SIP is not expected to accept a request for supply, if the SIP cannot first reasonably connect the premises.*

- (ii) is under construction, and the construction was not completed by the day nominated by the carriage service provider for the commencement of the supply;
- (iii) is a permanent structure that does not comply with all applicable planning and development laws pertaining to structural safety and integrity;
- (iv) is not one of the following types of premises:

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- A. a Designated Private Residence;
 - B. a place of worship;
 - C. an Educational Premises;
 - D. a Government Premises;
 - E. a business premises;
 - F. a premises of a charity;
 - G. a not-for-profit entity's premises;

- (v) is a moveable structure that is not reasonably expected to be continuously located at the particular site where the supply of the eligible service has been requested;
- (b) where the supply of a power source is required to adequately support the ongoing supply of the eligible service and this has not been supplied or arranged to be supplied;
- (c) where fulfilment of the supply obligation at the particular premises would constitute a contravention by the SIP of an applicable law of the Commonwealth, State, Territory or local government;
- (d) where a SIP has already received a request for supply of an eligible service to a carriage service provider in respect of the same premises, and the SIP is either processing the request or has already commenced the supply of an eligible service to the carriage service provider in respect of that premises;
- (e) where the installation of equipment necessary for the supply of the eligible service would put the SIP's employees, contractors or agents or members of the public at unreasonable risk of being exposed to health or safety hazards;
- (f) where, in order for the SIP to commence the supply of an eligible service, the SIP requires the consent of a person to attach or install equipment (such as customer premises equipment) to, or within, the premises, and the consent of the person has not been obtained within the reasonable timeframe requested by the SIP;
- (g) in cases where the terms and conditions on which the SIP's supply of eligible services to the carriage service provider are not set out in a pre-existing agreement between the carriage service provider and the SIP, the carriage service provider has not accepted the SIP's terms and conditions for the supply and those terms and conditions are not inconsistent with this Instrument;

Note: Subsection 360X(1) of the Act requires each SIP to publish on its website the price and non-price terms and conditions on which it offers to supply eligible services in the relevant service area

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- (h) where the request for the supply of an eligible service is made by a carriage service provider on behalf of an end-user who is a natural person and that person:
 - (i) is under 18 years of age at the time of the request; and
 - (ii) is not the owner or a lessee of the premises specified in the request; and
 - (iii) has not obtained either the owner's consent or lessee's consent to make the request for supply;
 - (i) where the request for a connection is made by a carriage service provider on behalf of an end-user who is a natural person, and the SIP has a reasonable need to identify the end-user, and adequate information is not available to enable the SIP to identify that end-user;
 - (j) where the SIP believes, on reasonable grounds, that the request to supply the eligible service to an end-user is fraudulent; and
 - (k) where the SIP believes, on reasonable grounds, that the end-user to whom the request for an eligible service relates does not have the legal right to occupy the premises specified in the request.