

Explanatory Note

Issued by the Authority of the Minister for Communications

Telecommunications Act 1997

Acts Interpretation Act 1901

Telecommunications (Network Exemption—Telstra South Brisbane Network) Instrument 2012 (Amendment No. 1 of 2015)

Authority

Subsection 141A(1) of the *Telecommunications Act 1997* (the Act) confers power on the Minister for Communications to exempt specified networks from the Layer 2 bitstream requirements of section 141 of the Act. Subsection 144(1) of the Act confers power on the Minister to exempt specified networks from the wholesale-only requirements of section 143 of the Act.

Section 33(3) of the *Acts Interpretation Act 1901* provides, among other things, that a power to make an instrument shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

This Amending Instrument is not a legislative instrument for the purposes of the *Legislative Instruments Act 2003* (see subsections 141A(6) and 144(6) of the Act).

Purpose

The purpose of this Instrument is to further amend the *Telecommunications (Network Exemption – Telstra South Brisbane Network) Instrument 2012* as currently in force (the Original Instrument) in order to extend its duration and to remove spent provisions.

Background

Parts 7 and 8 of the Act¹ affect local access lines that are:

- part of a network built after 1 January 2011 and used to supply superfast carriage services 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 associated provisions of the *Competition and Consumer Act 2010* (CCA), 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.

Telstra first requested exemptions from Part 7 and Part 8 of the Act for its FTTP network in the South Brisbane Exchange service area (South Brisbane network) in 2011. Its original request was granted by the then Minister for Broadband, Communications and the Digital Economy on 9 January 2012, taking effect from 12 April 2012 until 31 December 2013. On 18 December 2013, the then Minister for Communications extended Telstra's original exemptions from Parts 7 and 8 of the Act until 31 December 2015.

On 11 September 2015, Telstra wrote to the then Minister of Communications requesting that the cessation date applying to its existing exemptions in relation to its South Brisbane network be extended.

In accordance with subsections 141A(5) and 144(5) of the Act, the Minister wrote to the Chairs of the ACCC and the ACMA respectively on 15 October 2015 to seek their comments on Telstra's request. The Department of Communications and the Arts also consulted carriers and relevant industry organisations on the request (including the Competitive Carriers' Coalition and the Australian Communications Consumer Action Network).

On 5 November, the ACMA provided its formal advice to the Minister regarding the proposal. The ACCC provided its advice on 25 November 2015. Submissions on the request were received from two stakeholders.

The Minister noted that submissions raised concerns regarding the state of competition over the South Brisbane network and the potential for adverse consumer outcomes.

The South Brisbane network has always been open to access regulation by the ACCC. The ACCC has recently made a draft decision to declare a Superfast Broadband Access Service (SBAS) that would need to be supplied by Telstra to access seekers on the South Brisbane network. Access to the declared service would be available to access seekers on regulated terms and conditions.

The Minister considers that the declaration of SBAS and the application of regulated terms and conditions to the South Brisbane network would address the competition and consumer concerns raised during consultation on Telstra's request to extend its exemptions. Accordingly, he has decided to extend the exemptions as follows:

1. Until 1 July 2018, if the ACCC declares SBAS, and the ACCC makes an interim or final access determination on or before 31 December 2016, with both the SBAS declaration and the determination applying to Telstra's South Brisbane network; ; or

2. Until 1 July 2017, if the ACCC does not declare SBAS and make an interim or final access as set out above on or before 31 December 2016.

Details

Clause 1 – Name of Exemption Instrument

Clause 1 provides that the name of the Instrument is the *Telecommunications (Network Exemption – Telstra South Brisbane Network Instrument 2012 (Amendment No.1 of 2015))*.

Clause 2 – Commencement

The Instrument takes effect on the day it is signed by the Minister for Communications. A copy of the Instrument will be published on the Department of Communications and the Arts' website.

Clause 3 - Variation

The Original Instrument, as previously varied on 18 December 2013, is further varied as set out in the Schedule to the Instrument.

Schedule – Detail of Amendments

Item 1

Item 1 of the Schedule to the Instrument amends the cessation date of the Original Instrument from 31 December 2015 to either:

- a) 1 July 2018, if both the following conditions are met:
 - (i) a declaration is made on or before 31 December 2016 under subsection 152AL(3) of the CCA that relates to a superfast carriage service, including one supplied using the Telstra South Brisbane network, and
 - (ii) a determination has been made on or before 31 December 2016 under subsection 152BCG(2) of the CCA or under subsection 152BC(1) of the CCA;
or
- b) 1 July 2017, if the conditions at paragraph (a) are not met.

Item 2

Item 2 of the Schedule removes paragraph 4(2)(b) of the Original Instrument, removing the price-related terms and price conditions upon which Telstra was required to offer and supply the FABS (as defined in the Original Instrument) on the exempted network. These terms and conditions expired on 30 September 2014 and the clause is therefore spent.

Item 3

Item 3 of the Schedule amends paragraph 4(2)(c) so that it will apply from 1 October 2014 until 1 July 2018. This is aligned with the later date for the cessation of the Original Instrument (1 July 2018), as set out at Item 1 above. If the earlier date for cessation of the Original Instrument applies (1 July 2017), the conditions in paragraph 4(2)(c) will effectively only apply until that date.

The paragraph specifies that Telstra must supply the FABS in accordance with a reference offer on its website. The continuation of these conditions will ensure that while the FABS is not a declared service, it will continue to be supplied by Telstra over the exempted South Brisbane network to access seekers on request and on an open and equitable basis, with sufficient oversight by the ACCC.

Item 4

Item 4 of the Schedule removes Schedule 2. Schedule 2 set out the specific price-related terms and price conditions upon which Telstra was required to offer and supply the FABS on the exempted network. These specific terms and conditions expired on 30 September 2014. Accordingly, Schedule 2 is now spent.