

EXPLANATORY NOTE

Issued by the Authority of the Minister for Broadband, Communications
and the Digital Economy

Telecommunications Act 1997

*Telecommunications (Network Exemption—Telstra South Brisbane Network)
Instrument 2012*

Authority

Subsection 141A(1) of the *Telecommunications Act 1997* (the Act) confers power on the Minister for Broadband, Communications and the Digital Economy (Minister) 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.

The Act provides that the Minister must consult with the Australian Communications and Competition Commission (ACCC) and the Australian Communications and Media Authority (ACMA) before making exemption instruments (refer subsections 141A(5) and 144(5) of the Act).

This 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 exempt the South Brisbane FTTP network owned by Telstra Corporation Limited (Telstra) from the requirements of sections 141 and 143 of the Act.

Background

The *Telecommunications Legislation Amendment (National Broadband Network—Access Arrangements) Act 2011* (NBN Access Act) introduced open access, transparency and non-discrimination measures for National Broadband Network (NBN) corporations, under clear oversight by the ACCC.

Part 3 of Schedule 1 to the NBN Access Act (among other things), inserts into the Act, new Parts 7 and 8. These provisions require owners of superfast networks that are rolled out, upgraded or altered, to offer over their local access lines, a wholesale Layer 2 bitstream service on an open access and non-discriminatory basis. These arrangements, which are based on those applying to NBN Co, are known as ‘level-playing field rules’, and are designed to ensure that:

- end-users gain access to the same kinds of service outcomes available on the NBN, regardless of the network provider; and
- NBN Co Limited’s (NBN Co’s) ability to cross-subsidise rural and remote areas from high revenue metropolitan markets to offer uniform national prices is supported.

The new arrangements will commence on 12 April 2012 (being the day after the end of the 12-month period when the NBN Access Act received the Royal Assent). They will apply to fixed-line local access networks or a part of such networks that are built, upgraded, altered or extended after 1 January 2011 so that they are capable of providing carriage services where the download transmission speed is normally more than 25 megabits per second to residential or small business users.

On 15 September 2011, Telstra requested that it be granted exemptions for its fibre-to-the-premises (FTTP) network serving the South Brisbane exchange service area under sections 141A and 144 of the Act. The Minister has considered the requests, and decided to grant the exemptions, subject to certain conditions being satisfied.

In deciding to grant the exemptions, the Minister has assumed that there will be a final structural separation undertaking in force under Division 2 of Part 33 of the Act, at the time the level playing field arrangements commence. In the event that this is not the case, the exemptions would be reviewed and may be revoked or varied. Subsection 33(3) of the *Acts Interpretation Act 1901* provides that, where an Act confers a power to make, grant or issue any instrument (such as subsection 141A(1) of the Act), the power includes the power exercisable in the like manner and subject to the same conditions to revoke or vary the instrument.

The decision to grant these exemptions reflects a range of facts, including, but not limited to:

- the projects predate the enactment of the legislation, and Telstra asserts the requirement to comply with the level playing field rules in relation to those projects would result in it incurring significant unforeseen costs;
- the exemptions would not hinder the government's broader structural reform process;
- the extent of the networks, while not insignificant, is specific and limited in scope;
- any adverse impact on access seekers and end-users will be mitigated by Telstra offering an alternative wholesale service (i.e. the Fibre Access Broadband Service);
- 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;
- the exemptions would be of a limited duration, and access to the NBN is expected to be available in a reasonable timeframe; and
- should Telstra's structural separation undertaking (SSU) not come into force for some unexpected reason, the exemptions may be reviewed and could be revoked or varied.

Consultation

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 14 October 2011, to initiate the consultation. On 9 December 2011, both the ACCC and the ACMA provided their formal advice to the Minister regarding the proposal. The Department (on the Minister's behalf) also consulted directly with impacted telecommunications services access seekers and NBN Co.

Details of the accompanying Instrument are set out in the Attachment.

ATTACHMENT

Details of the Telecommunications (Network Exemption—Telstra South Brisbane Network) Instrument 2012

Clause 1—Name of Instrument

Clause 1 provides that the name of the Instrument is the *Telecommunications (Network Exemption—Telstra South Brisbane Network) Instrument 2012*.

Clause 2— Cessation

Subclause 2(1) provides that Instrument ceases to have effect on 31 December 2013. This date represents the time by when NBN Co is expected to have replaced Telstra as the operator of the South Brisbane Network.

In terms of the commencement date of the Instrument itself, a note is included at subclause 2(1) to remind readers that, by operation of sections 4(1)(a) and 4(2A) of the *Acts Interpretation Act 1901*, the Instrument will commence immediately on the commencement of Part 3 of Schedule 1 to the *Telecommunications Legislation Amendment (National Broadband Network Measures—Access Arrangements) Act 2011* (NBN Access Act), being 12 April 2012 or a date proclaimed before then.

Specifically, paragraph 4(1)(a) provides that where a relevant Act has been enacted, but the Act does not come into operation immediately upon its enactment (as in the case of Part 3 of Schedule 1 to the NBN Access Act), and the Act confers power to make an instrument of a legislative or administrative character, then the power may be exercised, and anything may be done for the purpose of enabling the exercise of the power or of bringing the appointment or instrument into effect, before the Act concerned comes into operation as if it had come into operation. Subsection 4(2A) relevantly provides for the circumstance where, because of some or all of its provisions (an instrument is made under subsection (1), each relevant provision takes effect, as declared in the instrument on the date, or from the date and time, when the Act concerned comes into operation.

As noted above, in deciding to grant the exemptions, the Minister has assumed that there will be a final structural separation undertaking (SSU) in force under Division 2 of Part 33 of the Act, at the time the level playing field arrangements commence. While the exemptions are by their nature open to review, revocation and variation at anytime, should a final SSU not come into force in the expected timeframe, the Minister may reconsider the grant of the exemption and determine whether it should be revoked or varied. By way of background, structural separation is regarded, under paragraph 577A(1)(a), as being when Telstra, at all times after the designated day, ceases to supply fixed-line carriage services to retail customers in Australia using a telecommunications network over which Telstra is in a position to exercise control.

Clause 3—Definitions

Clause 3 sets out definitions of terms used in the Instrument.

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

The terms *access seeker* and *declared service* have the same meaning as in Part XIC of the *Competition and Consumer Act 2010* (CCA).

A comprehensive definition of *Fibre Access Broadband Service* is provided. Essentially, it is a carriage service that is offered to be supplied on a wholesale basis, which is supplied using an optical fibre line and which is offered to be supplied with certain upload/download transmission speeds. The definition also specifies the unique configuration elements of such a service. Section 7 of the Act defines optical fibre line.

Should Telstra choose to change the configuration elements of the Fibre Access Broadband Service, it can request the Minister to vary the instrument. Should the Minister consider such changes appropriate, the Minister can decide vary the instrument. Subsection 33(3) of the *Acts Interpretation Act 1901* provides that, where an Act confers a power to make, grant or issue any instrument, it also confers the power to vary the instrument. If Telstra chose to change the Fibre Access Broadband Service, such that it was no longer supplying the service as defined in clause 3 of the instrument, and the Minister decided not to vary the instrument then Telstra would no longer be exempt from the requirements of sections 141 and 143 of the Act.

Telstra South Brisbane Network is defined to means an optical fibre-based telecommunications network which is owned by Telstra and uses fibre-to-the-premises (FTTP) architecture. This network is situated in the South Brisbane suburbs of Highgate Hill, West End, Dutton Park and Fairfield as shown in the map at the Schedule to the Instrument) and also covers local access lines (located outside these areas) which are used necessary to supply services to premises in the listed South Brisbane suburbs.

A note is included at clause 3 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 4—Exemptions

Subclause 4(1) provides that the Telstra South Brisbane Network is exempted from the requirements of sections 141 and 143 of the Act, provided that all of the conditions in subclause 4(2) are satisfied.

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(1) and 144(1) of the Act. Note 1, which accompanies clause 4, reminds readers of this.

Subclause 4(2) sets out the conditions. These are designed to ensure that the Fibre Access Broadband Service that Telstra is proposing to supply over the South Brisbane Network is supplied to access seekers on request on an open and equitable basis, with sufficient oversight by the ACCC.

In order for the exemptions to apply, Telstra must, during all times that the Fibre Access Broadband Service is not a ‘declared service’:

- offer and supply on reasonable request to an access seeker, the Fibre Access Broadband Service, this makes the service open access. (It is intended that the basis upon which ‘reasonable’ would be assessed in this context by reference to subsection 152AR(4) of the CCA, for example, it may not be reasonable for Telstra to supply the service to an access seeker if it would deprive another person of a protected contractual right);
- 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 Fibre Access Broadband Service (this condition is intended to ensure that there is visibility in respect of 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 (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 are not satisfied, Telstra would be subjected to the requirements of section 141 and 143 of the Act. Any failure to comply with those requirements would result in Telstra committing an offence under sections 141(4) and 143(1) of the Act respectively.

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 CCA.

Schedule 1

The Schedule to the Instrument provides a map depicting of the limit of the area serviced by the Telstra South Brisbane Network. Note, this map does not show the local access lines (located outside these areas) which are used to supply services to end-user premises located in the listed South Brisbane suburbs.