

EXPLANATORY NOTE

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

Telecommunications Act 1997

Telecommunications (Network Exemption—TransACT Very Small Scale Networks)

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 superfast carriage 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 superfast carriage networks from the wholesale only requirements of section 143 of the Act.

Unless exempted by the minister under subsection 141A(1) and 144(1), operators of designated superfast carriage networks are required to comply with the Australian Communications and Competition Commission's (ACCC's) Layer 2 bitstream service declaration made by the ACCC on 24 February 2012, and any related access determinations and Category A Standard Access Obligations (SAOs) applying to the services. Also, by operation of subsections 141B(2) and 156(2), a part of a network that is extended after 1 January 2011 to be capable of providing superfast services is taken to be a network in its own right. However, this deeming rule is subject to certain exceptions, including where the network extension is 1 kilometre or less in distance from an existing network footprint.

The Act provides that the minister must consult with the ACCC and the Australian Communications and Media Authority (ACMA) before making exemption instruments (see 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 from the requirements under sections 141 and 143 of the Act, certain very small scale network extensions of fewer than 100 lots owned by:

- TransACT Communications Pty Ltd (TransACT) in the ACT, and
- TransACT Victoria Communications Pty Ltd (a wholly owned subsidiary of TransACT) in Victoria.

Under the Fibre in New Developments Policy, developers may choose whatever carrier they wish to service their developments. In general terms, if a developer does not wish to use another carrier, NBN Co is the fibre provider of last resort in developments of 100 or more lots or premises and Telstra is the provider of last resort in smaller developments, pending the rollout of the NBN. In the absence of this exemption, developers of small developments within the areas concerned may not have the choice of using TransACT, even though it has established networks that could be readily extended and could do so, to the benefit of consumers, without necessarily hindering the government's broader structural reform process.

Background

The *Telecommunications Legislation Amendment (National Broadband Network Measures—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 inserted new Parts 7 and 8 into the Act. 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 particularly by ensuring that new networks operate on a similar basis, 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 commenced 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 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.

As noted above, the minister has the power to grant exemptions to certain networks (see subsections 141A(1) and 144(1) of the Act). The Supplementary Explanatory Memorandum to the Telecommunications Legislation Amendment (National Broadband Network Measures—Access Arrangements) Bill 2011 states that the exemptions powers are given to remove the obligations in circumstances in which their application could have unforeseen inefficient or disproportionate consequences.

On 9 September 2011, TransACT requested it be granted exemptions for real estate developments of fewer than 100 premises or not within NBN Co's long-term fibre footprint under sections 141A and 144 of the Act.

The minister has considered the request, and decided to grant exemptions for network extensions of fewer than 100 premises that may be built within TransACT's and TransACT Victoria's specified network footprints, subject to certain conditions being satisfied.

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

- 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).

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 and they provided formal advice to the minister regarding

the proposal. In addition to consulting with the ACCC, ACMA and TransACT, the department (on the minister's behalf) also consulted directly with NBN Co and a range of carriers and carriage service providers, developers and other entities potentially affected by the exemption requests.

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

ATTACHMENT

Details of the Telecommunications (Network Exemption—TransACT Small Scale Networks) Instrument 2012

Clause 1—Name of instrument

Clause 1 provides that the name of the instrument is the Telecommunications (Network Exemption—TransACT Very Small Scale Network) Instrument 2012.

Clause 2—Commencement and Cessation

Clause 2 provides that the instrument is deemed to have commenced on 12 April 2012, and ceases to have effect on the ‘designated day’.

The date of 12 April 2012 is relevant because this is the date upon which Part 3 of Schedule 1 to the *Telecommunications Legislation Amendment (National Broadband Network Measures—Access Arrangements) Act 2011* (the NBN Access Act), which inserted new Parts 7 and 8 of the Act, came into operation.

The ‘designated day’ is defined in clause 3 as having the same meaning as in section 577A of the Act, which is 1 July 2018, or another day specified by the minister in a non-legislative instrument under paragraph 577A(10)(b) of the Act. This date has been selected as the cessation date because it represents the day by which Telstra will have completed the structural separation of its fixed-line networks, and therefore represents the date by which the government’s structural reform of the telecommunications industry will be completed. As such it is an appropriate date for TransACT exemptions to cease, to allow alignment with wider industry arrangements. Prior to the cessation date, it would be open to TransACT to request that the minister consider extending the exemption.

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 CCA.

ACT Very Small Scale Network covers two categories of telecommunications networks which are exempted, for networks owned by TransACT Capital Communications Pty Ltd (TransACT). The first category relates to extensions of greater than 1 kilometre to a relevant network (that is, a FTTP, HFC or VDSL network) on or after 1 January 2011, where such network extensions service an ACT-based real estate development project of fewer than a total of 100 premises within TransACT’s network footprint for that type of network.

It is noted that extensions to pre-1 January 2011 networks which are 1 kilometre or less in distance are not 'deemed networks' and therefore, not subject to the level playing field rules (see subsections 141B(4) and 156(4) of the Act).

The second category of networks cover new HFC, FTTP or VDSL networks constructed on or after 1 January 2011, where such network extensions service a real estate development project of fewer than a total of 100 premises within TransACT network footprint for that particular type of network.

The definition expressly refers to ownership of the relevant networks by TransACT. If a situation arose in which TransACT was no longer the owner of any or all of these new networks (for example, if TransACT was to sell such a network), the exemption would no longer apply to the network(s), and the network(s) would become subject to the level playing field rules. In such a case, it would be open to the new (or prospective) network owners to seek that a new exemption be granted to it, and any such exemption request would be considered by the minister on its own merits.

The term **Victorian Very Small Scale Network** is defined in a similar manner, except for the ownership entity being TransACT Victoria Communications Pty Ltd, and the location of the networks being in the State of Victoria rather than the ACT.

The network footprints of the specified relevant networks are shown in the relevant maps at Annexure A to Schedule 1, as identified in column 2 of the table. The maps indicate the network footprints and may not necessarily depict the extent of the networks themselves. Map 2 of Schedule 1 includes networks existing before 1 January 2011, networks constructed after 1 January 2011 that TransACT maintains are statutorily exempt from the level playing field rules and networks for which TransACT received ministerial exemptions under the *Telecommunications (Network Exemption—Specified TransACT Networks) Instrument 2012* (made by the minister on 10 April 2012). This instrument provided exemptions from the level playing field rules for new TransACT networks in the developments of Molonglo Valley Stage 1 (the suburbs of Wright and Coombs) and in Harrison 4 and the Fyshwick Section 26 Commercial Precinct. Column 1 of the table at Schedule 1 sets out TransACT's and TransACT Victoria's network footprint specified relevant networks (see subclause 3(1)).

The terms, **Layer 2** and **Layer 3** are used in the 'TransACT Layer 3 Wholesale Interconnection Service' definition. They are given the same respective meanings as in the Open System Interconnection (OSI) Reference Model for data exchange. The model is widely known and used in the telecommunications industry; it provides a framework for both designing networking systems and for explaining how certain networks operate.

FTTP network means a fibre-to-the premises network.

HFC network means a telecommunications network the line component of which consists of optical-fibre lines to connecting nodes, supplemented by coaxial cable connections from the nodes to end user premises.

The term **relevant network** is used in the definition of **ACT Very Small Scale Network** and **Victorian Very Small Scale Network**, and describes the three types of networks which fall within the classes of these exempted networks.

TransACT refers to the company, TransACT Capital Communications Pty Ltd (ACN 093 966 888), which is a company incorporated in the Australian Capital Territory. This is the company which would own and operate the Very Small Scale 100 Networks situated in the Australian Capital Territory (these are referred to as a **ACT Very Small Scale Network**).

TransACT Victoria means TransACT Victoria Communications Pty Ltd. This is the company which would own and operate the networks (which are the subject of the exemption) situated in the State of Victoria (these are referred to as a **Victorian Very Small Scale Network**). It is a wholly-owned subsidiary of TransACT Capital Communications Pty Ltd.

A definition of the **TransACT Layer 3 Wholesale Interconnection Service** is provided. Essentially, it is a carriage service that provides interconnection with TransACT's FTTP or VDSL networks and provides the aggregation of traffic from, and termination of traffic to, a service provider's end user customers. It is supplied on a wholesale basis, using either an optical-fibre line or a copper line and offers certain specified upload and download transmission speeds (depending on whether a VDSL or FTTP network is used). The definition also specifies the key configuration elements of such a service.

VDSL network means a very high speed digital subscriber line network.

A note is included at clause 3 to advise 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*. Some of the expressions used include:

- carriage service
- optical fibre line
- real estate development project
- superfast carriage service
- telecommunications network
- Telstra.

Clause 4—Exemptions

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.

Subclause 4(1) sets out the conditions which apply in respect of each ACT Very Small Scale Network, and each Victorian Very Small Scale Network that are either FTTP and VDSL networks.

Subclause 4(2) sets out the conditions which apply to the Victorian Very Small Scale Networks that are HFC networks.

Subclause 4(3)—Conditions

The first set of conditions in subsection 4(3), which apply to the ACT Very Small Scale Networks and to the Victorian Very Small Scale Networks that are FTTP and VDSL networks, are designed to ensure that the TransACT Layer 3 Wholesale Interconnection Service is supplied in the ACT, and over the VDSL and FTTP networks in Victoria, on an open and equitable basis, with sufficient oversight by the ACCC. TransACT must, during all times that the service is not a 'declared service' for the purposes of Part XIC of the CCA, comply with the following obligations:

- Offer, and supply on reasonable request to an access seeker, the TransACT Layer 3 Wholesale Interconnection Service over each ACT Very Small Scale Network and each Victorian Very Small Scale Network that is either a FTTP or a VDSL network. This reflects the open-access requirement under the level playing field rules. (It is intended that the basis upon which 'reasonable' would be assessed in this context by reference to the Standard Access Obligations in subsection 152AR(4) of the CCA; for example, it may not be reasonable for TransACT to supply the service to an access seeker if it would deprive another person of a protected contractual right.)
- Electronically publish, and maintain on the wholesale section of its website, a reference offer, with both price and non-price terms and conditions upon which it offers to supply the TransACT Layer 3 Wholesale Interconnection Service. This obligation is intended to ensure that there is transparency 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 replicates the non-discrimination requirement under the level playing field rules.
- 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.

While TransACT's networks in Ballarat, Geelong and Mildura in Victoria are HFC networks and it is understood any extensions would also be HFC, the references to VDSL and FTTP are included to ensure that if there are any such extensions they are operated so as to offer a wholesale service.

These conditions cease to apply if the TransACT Layer 3 Wholesale Interconnection Service offered and supplied by TransACT becomes a declared service (for the purposes of Part XIC of the CCA). This is because if the service is declared, TransACT (and any other carrier or carriage service provider supplying the declared service) will have to comply with the Category A SAO requirements under Part XIC of the CCA and the other forms of regulation by the ACCC under the telecommunications access regime in Part XIC of the CCA. This reflects the view that such generic regulation should apply as the norm.

If at any time the conditions are not satisfied, TransACT would be subject to the requirements of section 141 and 143 of the Act with respect to the ACT Very Small Networks and each Victorian Very Small Scale Network that is either a FTTP or VDSL network. Any failure to comply with those requirements would result in TransACT (and any other related body corporate) committing an offence under sections 141(4) and 143(1) of the Act respectively.

A condition to supply a similar wholesale service does not apply to the Victorian Very Small Scale Networks that are HFC networks. TransACT has advised that it is not viable for it to offer a wholesale service on these networks at this time. On balance, given the expected limited scope of any very small scale network deployments and the merit of consumers of having access to superfast broadband over them, while the availability of a wholesale service is preferable, the exemption has been given even though no wholesale service is being provided.

It is noted that 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.

Subclause 4(4)—Network Information Condition

The second set of conditions apply to both the ACT Very Small Scale Networks and the Victorian Very Small Scale Networks.

Under the condition TransACT is required to:

- provide to the ACMA and the ACCC, within time frames specified, such additional information on its specified relevant networks as is reasonably required to ascertain the particular network footprints
- provide to the ACMA and the ACCC details of each Very Small Scale Network that comes into existence during the particular reporting period, and
- electronically publish on its website within specified time frames, details of each Very Small Scale Network that has come into existence from commencement of the instrument (being 12 April 2012) and onwards.

These conditions are imposed for transparency, monitoring, and enforcement purposes. First, they enable the ACMA or the ACCC to seek additional information to enable them to be clear on the specified relevant network footprints within which the exemptions apply (paragraph 4(4)(a)). Second, they ensure the ACCC and ACMA are aware of new Very Small Scale Networks that are built, given they are subject to exemptions, but are also subject to regulatory obligations (paragraph 4(4)(b)). Third, publication of details on the TransACT website (paragraph 4(4)(c)) enables access seekers and, where relevant, consumers, to know where TransACT is operating networks for which exemptions have been granted.

Subclause 4(5)—Standard Telephone Service Condition

The final set of conditions also applies to both the ACT Very Small Scale Networks and the Victorian Very Small Scale Networks. The conditions are that TransACT is required to offer and supply to end users, upon reasonable request, a standard telephone service over each Specified TransACT network, where the particular premises are:

- passed by a Very Small Scale Network, and
- not passed by a fixed-line telecommunications network that is that is owned by Telstra.

‘Passed’ means that the carrier has network infrastructure outside an end user’s premises that is ready and able for connection to the premises upon request.

The relevance of Telstra infrastructure is because Telstra is currently the Universal Service Provider and if it has infrastructure passing an end user’s premises it is expected it would use this to provide a standard telephone service. However, this may not be the case where TransACT is providing the first fixed-line network in a locality that is a new real estate development. This condition ensures that end users have access to a standard telephone service, noting that TransACT may provide the sole fixed-line network in the areas concerned for a time.

The obligation to supply the standard telephone service only applies in respect of a ‘reasonable request’. Examples of circumstances where a request would not be considered reasonable may include where:

- the end customer does not agree to TransACT’s standard terms and conditions for the installation and supply of the standard telephone service
- the person making the request does not provide identification
- the installation or supply of a standard telephone service at the end customer’s proposed location would put TransACT’s employees or contractors at risk of exposure to unreasonable health or safety risks, and
- the consent or authority of any person other than the person making the request is required before TransACT is authorised to perform the works necessary to install the standard telephone service and consent or authority is not provided.

If at any time the applicable conditions are not satisfied, TransACT and TransACT Victoria will be subject to the requirements of section 141 and 143 of the Act with respect to the relevant networks. Any failure to comply with those requirements would result in TransACT or TransACT Victoria (or any associated persons), as the case may be, committing an offence under sections 141(4) and 143(1) of the Act respectively.

Schedule 1

The network footprints of the specified relevant networks are shown in the relevant maps at Annexure A to Schedule 1, as identified in column 2 of the table. Column 1 of the table at Schedule 1 sets out TransACT’s and TransACT Victoria’s respective network footprints.

Under paragraph 4(4)(a) of the instrument (as discussed above), the ACMA or the ACCC (as applicable) may request that TransACT provide to the requesting entity, within specified time frames, additional information as is reasonably requested to enable them to ascertain the footprints on its specified relevant networks.

To the extent that these exemptions are relevant to other fibre footprints for which exemptions from the level playing field rules have already been granted (that is, FFTP networks in Molonglo Stage 1, Harrison 4 or Fyshwick 26) because there are sites within these network footprints that are more than 1 kilometre from the networks concerned, additional information on those network footprints has been provided or is available as part of those exemptions.