

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 2018)

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 *Legislation 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 to the ‘Designated Day’.

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 23 December 2015 the exemptions were further extended by the Minister for Communications until 1 July 2018.

On 22 December 2017, Telstra wrote to the Minister of Communications requesting that the cessation date applying to its existing exemptions in relation to its South Brisbane network be extended indefinitely. If an indefinite exemption was unacceptable, Telstra proposed a Cessation Date well beyond the Designated Day, FY40. For the reasons summarised below, the Minister has decided neither option is acceptable, and has instead decided to extend the exemptions until the Designated Day.

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 20 February 2018 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.

On 23 March 2018, the ACMA provided its formal advice to the Minister regarding the proposal. The ACCC provided its advice on 21 March 2018. Submissions on the request were received from two stakeholders—NBN Co and the Australian Communications Consumer Action Network (ACCAN).

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. In July 2016 the ACCC made a 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 is available to access seekers on regulated terms and conditions. At the time of the 2015 extension it was envisaged that a 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. The latest ACCC advice indicates that competition in the South Brisbane area is still weak. Responses by the ACCC and ACCAN

indicate that consumer/end-user outcomes are also comparatively poor, with materially higher prices compared to equivalent services in NBN-services areas.

The Minister has decided to extend the exemptions until the Designated Day, currently 1 January 2020. Telstra will not be in a position to comply with Parts 7 and 8 by 1 July 2018. Allowing the exemptions to expire on 1 July 2018, therefore forcing Telstra to comply with Parts 7 and 8 by that date, risks disrupting services in South Brisbane. The Government does not condone this outcome.

The Government is disappointed by continued weak competition in South Brisbane and comparatively poor outcomes for end-users to those in NBN-serviced areas. Maintenance of the status quo is not a long-term viable option. The Government continues to view the exemptions as temporary. Over the long-term, the South Brisbane network, if owned and operated by a carrier other than NBN Co, should be operated in compliance with Part 8 of the Act.² The Government would prefer to see NBN, or NBN-equivalent, services delivered to South Brisbane and a marked improvement in competition and subsequent end-user outcomes.

If services are not able to be provided by Telstra in South Brisbane in compliance with the Act, or Telstra is unable to sell the network to a provider that can, the Government would expect NBN Co to overbuild or acquire existing networks. Considering protracted unsuccessful negotiations between NBN Co and Telstra for the sale of the South Brisbane Network to NBN Co, overbuild in the area is a real possibility.

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 2018))*.

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 23 December 2015, is further varied as set out in the Schedule to the Instrument.

² The Government currently has legislation before the Parliament (the Telecommunications Legislation Amendment (Competition and Consumer) Bill 2017) that will repeal Part 7 and amend Part 8 to include an option for networks such as South Brisbane to be operated on a functionally separated basis, if approved by the ACCC.

Schedule – Detail of Amendments

The amendments to Schedule 2 implement the Ministers decision to extend the exemption to the designated day.

Item 1

Item 1 of the Schedule to the Instrument amends the cessation date of the Original Instrument from 1 July 2018 to either the ‘designated day’.

Item 2

Item 2 of the Schedule inserts ‘Note 2’, indicating that the ‘designated day’ is 1 January 2020, as specified by the Minister by instrument under paragraph 577A(10)(b) of the Act.

Item 3

Item 3 of the Schedule inserts ‘designated day’ into the note accompanying clause 3.

Item 4

Item 4 of the Schedule amends paragraph 4(2)(c) to omit “,at all times from 1 October 2014 and until 1 July 2018”, ensuring expiration of the exemption on the designated day.