

## **Replacement Explanatory Statement**

Issued by the Authority of the Minister for Communications, Urban Infrastructure, Cities and the Arts

*Telecommunications Act 1997*

### **Telecommunications (Statutory Infrastructure Providers—Circumstances for Exceptions to Connection and Supply Obligations) Determination 2021**

#### **Authority**

Under subsections 360P(3) and 360Q(4) of the *Telecommunications Act 1997* (the Act), the Minister has the authority to make an instrument determining the circumstances where the connection obligation (under subsection 360P(1)) and the supply obligation (under subsection 360Q(1)) do not arise in relation to requests for wholesale broadband services from a carriage service provider (CSP) to a statutory infrastructure provider (SIP).

#### **Replacement**

This Explanatory Statement was replaced in November 2021 at the request of the Senate Standing Committee for the Scrutiny of Delegated Legislation to better explain why the matters the Instrument deals with are better covered in subordinate legislation than in the statute. The Committee's views can be found in its relevant reports.<sup>1</sup> In light of the Committee's views, public comment will also be sought separately on reducing the duration of the Instrument from ten to three years and, if warranted, this will be progressed separately. If such a variation to the Instrument is made, there will be a separate variation Instrument and Explanatory Statement.

#### **Purpose**

Under the Act, SIPs have default obligations to connect premises and supply wholesale services to premises upon reasonable request from a CSP on behalf of an end-user. The *Telecommunications (Statutory Infrastructure Providers—Circumstances for Exceptions to Connection and Supply Obligations) Determination 2021* (the Instrument) supports this core obligation on SIPs, but sets out certain circumstances where a SIP may be reasonably exempted from these obligations.

The primary objective of the Instrument is to provide clarity and consistency about the circumstances where SIPs are not obliged to connect premises and/or supply wholesale services. The Instrument establishes an important baseline that will apply across all SIPs in Australia and ensures the circumstances are in line with reasonable community expectations about the connection and supply of services.

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<sup>1</sup> The Committee's views are set out in relevant correspondence with the Minister. See: [www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Scrutiny\\_of\\_Delegated\\_Legislation/Index/January\\_June\\_2021](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Index/January_June_2021)

A requirement to allow the framework to be tailored was anticipated when the statutory arrangements for the SIP regime were first developed and enacted, recognising a range of practical issues may need to be managed by SIPs in fulfilling the broader statutory objectives of connecting and supplying services to individual premises. It was also anticipated that a high level of detail would be required and this was more appropriate for delegated rather than primary legislation.

The approach taken is consistent with guidance in the *Legislation Handbook* issued by the Department of Prime Minister and Cabinet in February 2017. It states that ‘matters of detail and matters which may change frequently are best dealt with by subordinate legislation’.<sup>2</sup>

By clearly establishing the circumstances under which SIPs are excepted from obligations to connect and supply services, the Instrument provides clarity for stakeholders across the supply chain, including CSPs and end-users.

While the Instrument deals with exceptions to the connection and supply obligations, the overall SIP framework is designed to promote the connection and supply of broadband services to premises in Australia. As a general principle, SIPs are expected to respond positively to requests received from CSPs on behalf of end-users, and to take all reasonable steps to facilitate such requests. Accordingly, the Instrument only seeks to set out limited and distinct circumstances where exceptions to SIPs’ connection and supply obligations might arise. However, the Instrument also reflects the need for CSPs and end-users to provide assistance, where appropriate, to enable the connection and supply of services.

Generally, the exceptions within the Instrument are intended to be relied upon by a SIP when there are no reasonable steps that could be otherwise taken to rectify an issue that is preventing connection or supply, or that such efforts to resolve such issues have been unsuccessful.

Subsection 360P(12) of the Act sets out obligations on a SIP if it refuses a request from a CSP to connect particular premises. It must give written notice of the refusal to the CSP within five business days of the decision to refuse. In turn, if a CSP receives this notice, it must give a copy of the notice to the end-user within five business days after receiving the notice. This provides a mechanism for end-users to have visibility when a connection request is refused, and on what grounds. The end-user or CSP could provide the notice to the ACMA or the TIO if they wished to dispute the refusal.

Separately, the SIP framework also enables the Minister to make standards, rules and benchmarks that SIPs must generally comply with in relation to their operations. If such standards, rules and benchmarks are made, they may be relevant to this Instrument if they

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<sup>2</sup> See: [www.pmc.gov.au/resource-centre/government/legislation-handbook](http://www.pmc.gov.au/resource-centre/government/legislation-handbook) (section 5.65)

impose connection and/or supply timeframes on SIPs relating to the provision of wholesale broadband services within their individual service areas.<sup>3</sup>

The Australian Communications and Media Authority (ACMA) is responsible for enforcement and compliance matters with the SIP arrangements, and maintains a public register of SIPs. The circumstances in the Instrument will also provide clarity for the ACMA in its role as regulator of the SIP regime.

The Instrument is a Disallowable Legislative Instrument for the purposes of the *Legislation Act 2003*. The Instrument commences the day after it is registered.

A high level of detail on exceptions is required to sufficiently guide operational decisions by SIPs and to provide appropriate clarity to consumers. While some exceptions may need to be ongoing features of the SIP regime, the exceptions as a whole or individually may also need to be modified over time given the range of factors affecting the provision of telecommunications services across Australia (for example technological developments or greater community reliance on telecommunications, such as has already arisen due to lockdowns as a result of COVID-19). As noted above, rather than including the measures within the Act itself, setting out the detail of exceptions in this instrument allows the Government to provide a high level of detail on these distinct circumstances, but also to make timely adjustments, where necessary.

The Instrument will be subject to review due to sunseting arrangements, whereby legislative instruments are subject to automatic repeal after a fixed 10 year period, as set out in Part 4 of Chapter 3 of the *Legislation Act 2003*.

Details of the Instrument are set out in Attachment A.

## **Background**

### *Context and conceptual overview of approach*

The Instrument has been drafted in the context of the Government's new Universal Service Guarantee (USG) for telecommunications<sup>4</sup>, of which the SIP regime is a critical component. The USG aims to provide people in Australia with reasonable access to both telephone and baseline broadband services. This recognises that access to basic broadband services is increasingly important to participation in contemporary social and economic life and that this is likely to continue to be the case, as has been the case historically with the telephone service. The importance of access to broadband has been clearly demonstrated during lockdowns throughout the COVID-19 pandemic.

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<sup>3</sup> Consultation on such an instrument started in early 2021. See: [www.communications.gov.au/departmental-news/consultation-draft-standards-rules-and-benchmarks-statutory-infrastructure-providers-sips](http://www.communications.gov.au/departmental-news/consultation-draft-standards-rules-and-benchmarks-statutory-infrastructure-providers-sips)

<sup>4</sup> Senator the Hon. Mitch Fifield, Minister for Communications and the Arts, Telecommunications Universal Service Guarantee, 5 December 2018, [www.mitchfifield.com/2018/12/telecommunications-universal-service-guarantee/](http://www.mitchfifield.com/2018/12/telecommunications-universal-service-guarantee/)

In recognition of the foundational role telecommunications plays in the operation of our society, the Instrument starts from the principle that each premises in Australia should have access to baseline broadband services as the default, and it is only in exceptional circumstances that this principle should be limited. In applying the Instrument, SIPs should preference connecting premises and providing services wherever feasible over refusing connections or services. However, the Instrument recognises that there may be circumstances where it is simply impractical, unsafe, unreasonable or wholly unaffordable for SIPs to provide SIP services and specifies these limited set of circumstances for the greater confidence and certainty of consumers and stakeholders.

The SIP regime is set out in Part 19 of the Act and supports the broadband component of the USG by providing a SIP for all areas of Australia to respond to reasonable requests for connection and supply of broadband services. Under the SIP regime, NBN Co is the default SIP for all parts of Australia and is obliged to connect and supply wholesale broadband services in any area where no other SIP operates. To date, a number of other SIPs have been designated by the Minister as the SIP for individual service areas, typically in existing estates or new developments. Over time, additional carriers may become SIPs for particular areas by entering into contracts to provide telecommunications services in real estate development projects, which they must in turn register with the ACMA.

In terms of affordability, the SIP regime (by design) recognises that it may not always be commercially viable for the SIP in a particular area to provide services to some premises and that some services need to be subsidised, whether internally or externally, to ensure there is access to these services. This is particularly true of NBN Co as the default SIP, which necessarily supplies services in remote areas on a subsidised basis. In this context, NBN Co's fixed wireless and satellite services are supported by the new Regional Broadband Scheme. In the case of other SIPs, it is their commercial judgment to enter into contracts to connect and supply telecommunications services to designated service areas, doing so in the knowledge they will then have a statutory obligation to service all premises in that defined area.

However, there may be circumstances where the cost to connect premises or to supply services should be taken into account, particularly where losses would need to be borne by the wider community. For example, this could include instances where a broadband service is already being provided to premises (either by the SIP or another provider), or an existing service can reasonably be shared (e.g. in a share house), or is better on-supplied by an accommodation provider (e.g. in a hotel or caravan park), or the cost of supply would be prohibitive in the absence of the contracting end-user making some adjustments at the premises concerned.

That an end-user is difficult to deal with, or has complained publicly about the performance of the SIP network, or has the option of a third party provider, are not seen as appropriate grounds for SIPs refusing or denying connection or supply requests. This would ultimately risk negatively impacting end-users' access to a basic means of social and economic participation. It is envisaged SIPs will effectively operate as neutral, common carriers.

Generally, the Instrument is concerned with circumstances which excuse a SIP from connecting or supplying a service in an absolute way, albeit it at a particular point in time. It generally avoids circumstances where a SIP can supply a service, but where some delay may be involved. This is seen as more of a timeframe issue, than a delivery issue *per se*. In some instances, however, there is a fine line between whether an absolute refusal is warranted, or simply a delay (e.g. in case of premises' construction being finalised and power connected). SIPs are expected to exercise judgment in considering such issues, noting the fundamental intention of the SIP regime is to facilitate access, not deny it. In all instances, circumstances in which connection or supply have been refused can change (e.g. construction of premises may be completed and power connected) and where circumstances change so too may a SIP's exemption from connecting and/or supplying services. While the Instrument sets out the circumstances in which SIPs may refuse connection and/or supply, it is always open to SIPs to connect and/or supply service even if they are not required to under the Instrument.

Potential capacity constraints within SIP networks was a matter raised in consultation. However, SIPs are expected to plan for and maintain sufficient capacity to respond to connection or supply requests in their service areas. As such, capacity constraints are not seen as appropriate grounds for outright refusal for connection or supply by SIPs, as opposed to an issue of timing (as set above). If circumstances were to arise that significantly impact the capacity of a SIP network, the regulator would have scope to take any extenuating factors into account, noting that depending on situation, it may take some time to resolve capacity issues. As already noted above, the Minister may make standards, rules and benchmarks that SIPs must generally comply with in relation to their operations, and this could extend to establishing reasonable timeframes for SIPs to respond to any capacity issues.

#### *Comparison with USO Instrument*

In drafting the Instrument, regard has been given to the *Telecommunications Universal Service Obligation (Standard Telephone Service—Requirements and Circumstances) Determination 2011*<sup>5</sup> (the Universal Service Obligation (USO) Instrument), which performs a similar role in relation to the USO, which supports the voice component of the USG. The approach taken in this Instrument is, however, different to that taken in the USO Instrument, which adopts a very prescriptive approach to defining types of eligible and non-eligible premises, reflecting many years of accumulated experience on the ground. In contrast, this Instrument takes a more streamlined, forward-looking, principles-based approach to simplify the drafting so it is easier for stakeholders to understand and more straightforward for SIPs to implement. However, there are many other broader similarities between the two instruments with many exceptions similar in concept, if not exact wording.

Given this Instrument takes a broader approach than the USO Instrument, it should generally be the case that SIPs will connect and supply services in circumstances where Telstra, as the

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<sup>5</sup> See [www.legislation.gov.au/Details/F2012C00339](http://www.legislation.gov.au/Details/F2012C00339)

USO provider, would also be expected to reasonably provide a voice service under the USO. This is consistent with, and complementary to, SIP services provided by fixed line and fixed wireless networks being required to support voice services. This supports the delivery of voice services under the USO, noting that the NBN fixed line network is the platform Telstra will generally use to deliver USO voice services where it is available.

### *Concept of 'premises'*

Consistent with the principle of maximising the number of connected premises across Australia and access to SIP broadband services for people in Australia, the Instrument uses a broad, undefined concept of 'premises', in keeping with the approach adopted in primary legislation. The intention is that 'premises' will be understood to have its common-sense meaning and, if necessary, the meaning of 'premises' under common law.

In the Instrument, 'premises' is taken to mean a single premises in line with common usage. In situations where it is important to distinguish between one premises or multiple premises, this will generally be apparent from the context in which the term appears.

Under the SIP regime, 'premises' is not defined and is intended to have its ordinary meaning. Therefore, SIPs are expected to connect and supply services to premises that are generally accepted as distinct residential premises, places of business, schools, places of worship, or the premises of community groups, charities and not-for-profits. A place of residence is generally expected to be capable of supporting continual or periodic independent private residency, have basic utilities, and incorporate or provide reasonable access to sanitation and food preparation facilities.

Individual rooms in hotels, nursing homes or hospitals, for example, would not be considered individual residential premises as these do not provide for independent private residency, however, the buildings in which there are located would be considered premises, as would places of business or not-for-profit activity, with access to SIP connections and services. Unless other arrangements are put in place (like separate leaseholds), it is envisaged that SIP connections to premises with multiple occupants (like hotels, nursing homes or hospitals) would be used to provide connectivity to the occupants via appropriate internal systems by the entities that own or operate those buildings.

In circumstances where there are multiple premises at the same building lot, unless there are other circumstances which impact connection or supply, a SIP is expected to consider and respond to connection and/or supply requests in relation to each identifiable premises on that lot on request. Depending on the relevant title arrangements, possible examples include, but are not limited to:

- a farm with a homestead and one or more staff residences;
- a house and a self-contained flat located on a single lot;
- a retirement village with standalone villas or units;
- a campus with separate educational buildings; or

- a shopping centre with separate, individual business premises within the complex.

The SIP connection and supply obligations are not expected to extend to SIPs fulfilling multiple connections to the same identifiable premises. For example, if three students reside in a house, the SIP would be generally expected on reasonable request from a CSP to arrange a single connection (and supply services) to the house, but would not be obliged to accept multiple requests to that premises (i.e. if all three students wanted a dedicated connection to their respective bedrooms). However, a SIP could always agree to make multiple connections to a single identifiable premises if it chooses to do so on a commercial basis.

This approach to the definition of premises is consistent with NBN Co's practices of not defining the types of premises it services, generally leaving this to operational practice. It has been deliberately adopted in this Instrument, consistent with the statute, to avoid the risk of defining premises and unintentionally excluding a type of premises that would generally be considered to be premises warranting access to a broadband service. However, the approach taken in the Instrument may be revisited in the future if it proves problematic in its interpretation and/or application (e.g. resulting in a too broad, or too narrow, range of premises being excluded).

Conversely, SIPs are not expected to connect or supply services to things or places which are not ordinarily considered premises, i.e. 'non-premises'. Examples of non-premises could include, but are not limited to:

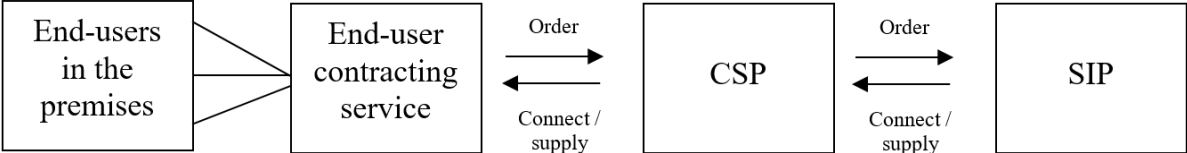
- traffic lights, traffic light controllers, electronic signs, traffic signals, including variable speed signs, and other similar transport equipment;
- bus or tram stops;
- banking and payment terminals (e.g. EFTPOS, ATM, carpark kiosks, vending machines);
- payphones;
- assistance telephones (e.g. elevator and roadside phones);
- water, gas, electricity equipment and other utility infrastructure (including storm water and sewage management facilities, transformers, pad mount substations, pole mount transformers, power links, street lighting pole, and street light controllers);
- other metering points (for any type of service);
- cameras (e.g. for security or traffic);
- bridge controls, swing bridges, and traffic control gates;
- mobile phone cell towers and radio antennas;
- bandstands, rotundas, and other park buildings;
- weather and pollution monitoring devices; or
- public alarm and security systems.

These examples of ‘non-premises’ are consistent with those set out in the original Statement of Expectations issued to NBN Co in December 2010<sup>6</sup>, and NBN Co’s publicly available ‘non-premises list’<sup>7</sup>. While SIP are not obliged to connect and/or supply to ‘non-premises’, they may do so if they choose.

*References to ‘end-user’*

While the SIP regime is fundamentally concerned with promoting consumer and business access to baseline broadband services, consumers and businesses will not generally deal directly with SIPs, but will deal with (and contract) with a CSP, which in turn, will deal (and contract) with NBN Co or other SIPs. This is because the *National Broadband Network Companies Act 2011* creates a general requirement that NBN Co is to supply eligible services on a wholesale basis, and because Part 8 of the Act generally requires other network operators that operate high speed broadband networks to operate on a wholesale-only basis, where those networks are used to supply residential and small business customers.

As a result, the Instrument generally assumes CSPs fulfil this intermediary role. The relationships are reflected in the following diagram.



The Act makes reference to connection and supply of services to be requested by CSPs on behalf of an ‘end-user’ or to facilitate the supply of services to ‘end-users’. The Act does not define ‘end-user’. In most instances, however, the ‘end-user’ as referenced within the Instrument is considered to be the person who is entering into an arrangement for either the ‘connection and supply’ of a broadband service, or just the ‘supply’ of a broadband service (where a connection already exists). An ‘end-user’ in this context may not necessarily be the final consumer of the broadband service. For example, an ‘end-user’ could be an individual that enters into contract to access broadband services they or others in a home use, or an ‘end-user’ could be a business that enters into a contract for a broadband service that is ultimately used by its staff or customers.

*Circumstances for exceptions*

The Instrument provides a range of specific and targeted circumstances where the obligations on SIPs to connect and/or supply wholesale broadband services would not apply in relation to a request at a particular point in time, noting circumstances may change. However, any subsequent connection and supply requests would need to be separately considered on their merits noting circumstances may have changed.

<sup>6</sup> See Attachment A – premises definitions at [www.nbnco.com.au/content/dam/nbnco/documents/statement-of-expectations.pdf](http://www.nbnco.com.au/content/dam/nbnco/documents/statement-of-expectations.pdf)  
<sup>7</sup> See [www.nbnco.com.au/content/dam/nbnco2/2019/documents/sell/wba/20190827-approved-non-premises-list.pdf](http://www.nbnco.com.au/content/dam/nbnco2/2019/documents/sell/wba/20190827-approved-non-premises-list.pdf)



A description and explanation of the individual circumstances contained in the Instrument is provided at Attachment A.

Division 1 of the Instrument sets out the circumstances where the SIP is not required to fulfil the obligations to ‘connect’ premises and Division 2 of the Instrument sets out the circumstances where the SIP is not required to ‘supply’ wholesale services. This reflects that connection and supply obligations are separately set out in Part 19 of the Act, and connection and supply involve slightly different activities to be undertaken by the SIP. For example, the activities involved for a SIP in connecting premises for the first time to an existing qualifying wholesale network would differ from the activities involved if a SIP is requested to commence supplying eligible services where a connection to a qualifying wholesale network has occurred previously and can be reactivated. This drafting approach provides flexibility so exceptions relating to connection and supply can be worded as required.

### Consultation

Following commencement of the SIP regime on 1 July 2020, the Department of Infrastructure, Transport, Regional Development and Communications undertook a public consultation process during November-December 2020 on a proposed instrument dealing with circumstances for connection and supply. Stakeholders were given the opportunity to provide feedback on the proposed instrument, including seeking input on any regulatory or compliance costs, or propose other alternatives.

Formal written submissions were received from three SIPs (NBN Co, Telstra and one other SIP on a confidential basis), the Telecommunications Industry Ombudsman (TIO), the Australian Communications Consumer Action Network (ACCAN), and the Regional, Rural and Remote Communications Coalition (RRRCC).<sup>8</sup> Feedback was also provided by regulators, the Australian Competition and Consumer Commission (ACCC) and the ACMA.

NBN Co did not support making an Instrument, arguing its own ‘connection approvals policy’ was sufficient, and an Instrument should only be considered if there was a significant failure with that policy. In contrast, Telstra, ACCAN, RRRCC and the TIO indicated general support for making an Instrument, with some of these submissions raising specific concerns with aspects of NBN Co’s connection approvals policy.

Following consideration of the issues raised by stakeholders during consultation (including proposed drafting suggestions), key changes made to the Instrument are:

- relying on the generally understood meaning of ‘premises’ rather than seeking to define what an eligible ‘premises’ is, with the risk of accidentally excluding relevant premises;
- better recognising industry practice whereby connections can be provided during construction, not simply after construction is complete (see subparagraph 5(a)(i));

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<sup>8</sup> Public submissions will be found at: [www.communications.gov.au/have-your-say/consultation-reasonable-connection-and-supply-requests-statutory-infrastructure-providers](http://www.communications.gov.au/have-your-say/consultation-reasonable-connection-and-supply-requests-statutory-infrastructure-providers)

- more clearly distinguishing between the role and responsibilities of developers, SIPs, CSPs and end-users in various scenarios (see subparagraphs 5(d), 5(h), 5(m), 6(g), and 6(l)); and
- recognising that ‘impediments’ like topography or vegetation could prevent connection and/or service supply unless remedial action is taken (see subparagraph 5(m) and 6(l)).

### Regulatory Impact Statement

The Office of Best Practice Regulation (OBPR) has advised no Regulatory Impact Statement (RIS) is required for the Instrument and assessed the determination as having a no more than minor regulatory impact (OBPR ID: 43675).

### Statement of compatibility with human rights

A statement of compatibility with human rights for the purposes of Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* is set out at Attachment B.

**Details of the *Telecommunications (Statutory Infrastructure Providers—Circumstances for Exceptions to Connection and Supply Obligations) Determination 2021***

**Part 1—Introductory**

Section 1 – Name

This section provides that the name of the Instrument is the *Telecommunications (Statutory Infrastructure Providers—Circumstances for Exceptions to Connection and Supply Obligations) Determination 2021*.

Section 2 – Commencement

This section provides for the Instrument to commence on the day after it is registered on the Federal Register of Legislation.

Section 3 – Authority

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

Section 4 – Definitions

This section provides definitions of certain terms used in the Instrument.

The note in the section indicates that a number of terms used in the Instrument are defined in the Act, including carriage service provider, connected, eligible service, qualifying carriage service, qualifying telecommunications network, relevant service area, request, and service area. These terms have the same meaning in the Instrument as under the Act, pursuant to section 13 of the *Legislation Act 2003*.

Subsection (4)(1) sets out specific definitions used in the Instrument.

*Act* is defined to mean the *Telecommunications Act 1997*.

The term, **statutory infrastructure provider**, is defined as a statutory infrastructure provider within the meaning of section 360A of the *Telecommunications Act 1997*. An abbreviation of the term, ‘SIP’ is used in the Instrument and has the same meaning.

Subsection (4)(2) clarifies references to end-user, as being the end-user that is the person who has entered into a legally binding arrangement with the carriage service provider for the connection or supply of an eligible service. End-user is a term used throughout in the Instrument.

Subsection (4)(3) provides that references within the Instrument relating to a request for a connection of, or supply of an eligible service to, premises sited at a building lot that has more than one premises is taken to relate to the individual premises specified in the request regardless of the existence of other premises at the building lot. This is to clarify that where

there are multiple premises at a building lot, each premises may be entitled to connection and/or supply depending on the wider circumstances as discussed on page 5 above.

## **Part 2—Circumstances**

Division 1 of Part 2 of the Instrument sets out the circumstances in which the connection obligation under subsection 360P(1) of the Act does not apply.

### Section 5 – Determination of connection circumstances

Four notes are provided at the beginning of Division 1 of the Instrument. Note 1 highlights the obligation on SIPs within the Act to connect an end-user at premises within the SIP's service area, on reasonable request by a CSP.

Note 2 explains the obligation on SIPs to connect premises (as per Note 1) does not arise in circumstances specified in a ministerial determination made under subsection 360P(3) of the Act.

In accordance with paragraphs 360P(1)(a) and (b) of the Act, note 3 highlights the core obligation on SIPs to connect premises to a qualifying fixed-line telecommunications network wherever possible. Otherwise, a SIP must arrange to connect the premises to another type of qualifying telecommunications network (i.e. a fixed-wireless or satellite network).

Note 4 explains that SIPs are not obliged to accept requests to connect premises located outside their designated service areas.

Paragraphs 5(a)-(m) set out different circumstances which, if satisfied individually, provide the SIP with an exception from its obligations under Part 19 of the Act to arrange a connection to premises.

Paragraph 5(a) covers three circumstances relating to the characteristics of premises in which the obligation on a SIP to provide a connection would not apply. Similar exceptions apply under the USO Instrument.

#### *Premises under construction*

Subparagraph 5(a)(i) provides that a SIP is not obliged to connect premises if it considers construction of the premises has not adequately progressed to support a connection. Thus, it is not sufficient in itself for the SIP to argue that the premises are not complete, but rather that construction is not sufficiently advanced. As such, the provision recognises the common industry practice of pre-provisioning connections during construction to facilitate ready access to services when people move into a new premises. This approach is consistent with the objective of the Telecommunications in New Developments (TIND) policy<sup>9</sup> to maximise ready access to modern telecommunications. The circumstance necessarily provides the SIP with some discretion and judgement as to when such work can reasonably occur during the

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<sup>9</sup> See [www.communications.gov.au/documents/2020-telecommunications-new-developments-policy](http://www.communications.gov.au/documents/2020-telecommunications-new-developments-policy)

construction phase. Generally, it is anticipated that SIPs will seek to facilitate such requests noting that this is generally more cost-effective than retro-fitting infrastructure once construction is complete.

### *Planning and development*

Subparagraph 5(a)(ii) provides that a SIP does not need to provide a connection where premises do not comply with planning and development laws dealing with structural safety and integrity. This means a SIP could not rely on this circumstance to reject a connection request on the basis of a minor, unapproved structure. A similar exception applies under the USO Instrument.

### *Moveable premises*

Subparagraph 5(a)(iii) provides that a SIP does not need to provide a connection where premises are moveable structures and the structure is not reasonably expected to be continuously located at a given site. Examples of structures that would not be considered as continuously located at a given site could include, but are not limited to, moored boats or motorhomes and caravans not located on an ongoing basis. It is not generally considered reasonable to require SIPs to bear the costs of arranging fixed connection to premises that are relocated frequently, noting the provision of SIP infrastructure or equipment involves a significant cost, which is not appropriate for servicing what is essentially a transitory occupancy. Moreover, where a structure is moved, any SIP infrastructure or equipment may be damaged and the performance of wholesale services may be impacted (or rendered inoperable). Where moveable premises are concerned, connectivity may be better sourced from mobile service providers or on-supplied by other means. For example, a SIP could be otherwise requested to connect and supply fixed services to permanent premises such as the office of a caravan park or a yacht club, which in turn, might offer Wi-Fi services within the grounds, marina or facility.

However, unless other circumstances prevent it, SIPs are expected to arrange connections to moveable structures that are expected to be continuously located at a given location. Examples could include transportable offices or homes, or caravans that are located on private property for ongoing use in such way that they could not be readily moved (e.g. they are connected with power, water and sewerage by a utility provider or other means).

Similar principles apply to moveable premises under the USO Instrument.

A minimum timeframe for the occupancy of such premises was considered, but it has not been adopted at this point to keep the Instrument simple, and on the basis that end-users will need to pay for a SIP service and may have other service options like mobile or satellite available, which will tend to moderate demand if such premises are occupied on a limited basis. However, as generally set out above, the Instrument may be revisited in the future if it

becomes necessary to provide additional guidance, including on determining whether premises can be readily moved and/or on issues of occupancy.

#### *Power source*

Paragraph 5(b) provides an exception so that SIPs are not required to connect premises if the end-user has not arranged an adequate source of power to the premises to support the connection. The power can be self-supplied, for example, by a fuel, solar or wind generator, and does not need to be mains supplied. In many remote locations, mains power may not be available, and power is provided by other means. This exception recognises that power is required at premises for superfast broadband as currently provided. A similar exception applies under the USO Instrument.

#### *Compliance with laws*

Paragraph 5(c) provides an exception to the obligation on SIPs to connect premises, if in doing so, the SIP would contravene an applicable Commonwealth, State, Territory or local government law. Given the role and responsibilities of SIPs, examples of applicable laws that may generally apply to SIPs in fulfilling connection and supply requests could include, but are not limited to, laws dealing with workplace health and safety, or laws dealing with environmental, cultural or heritage issues.

The concept of contravention of a law is intended to be interpreted broadly (i.e. that this would extend to direct statutory obligations imposed by primary legislation, requirements set out in subordinate legislation or orders or similar forms of directions from a court, regulator or other authority of competent jurisdiction). However, to rely on this circumstance, the SIP would need to be able to demonstrate there are no reasonable steps available to it to lawfully avoid a potential contravention. A similar exception applies under the USO Instrument.

#### *Civil works*

Paragraph 5(d) provides that a SIP does not need to provide a connection where civil works that are a necessary pre-requisite for the connection, and that are the responsibility of another person to provide, have not been completed.

While SIPs must provide much of the infrastructure to provide connections, there may be circumstances where other works need to be completed, generally by developers, or the person responsible for the premises (e.g. the owner), before a connection can be completed by the SIP. In particular, developers are generally responsible under Part 20A of the Act for providing underground pit and pipe facilities, or poles for overhead cabling (known as ‘fibre-ready facilities’) so SIP cabling can be brought to the boundary of a property on which the premises is located. Further, the person responsible for the premises is generally responsible for providing trenching and conduit from the property boundary to the premises for an underground connection, although this may be done by the developer or builder during the construction of the premises. This allocation of responsibilities is consistent with that in the

TIND Policy since it was first issued in 2011, and in large part, this allocation of responsibilities pre-dates the TIND Policy.

Similar requirements apply under the USO Instrument.

Ultimately, what is important is that the necessary civil works are completed to enable a connection, not who completes them. For example, it would be open to a SIP to provide pit and pipe (if a developer did not do so) and seek to recover the cost from the developer or end-users. Equally, a SIP can still decide to provide a connection in the absence of such works if it wishes, in the interests of maximising connectivity, but is not required to do so under this exception.

A drafting note is provided to draw attention to the requirements under Part 20A of the Act for both incorporated and unincorporated developers, noting they are generally required to arrange for installation of pit and pipe in real estate development projects, or otherwise face penalties.

The Department of Infrastructure, Transport, Regional Development and Communications continues to work with developers, planning authorities and other stakeholders to promote awareness of, and compliance with, the TIND policy so that developers contract with a SIP early in the development process to provide infrastructure and arrange the installation of pit and pipe where needed, so SIPs can meet their obligations in a timely, cost-effective manner.

#### *Pre-existing connections or requests*

Paragraph 5(e) provides that a SIP does not need to provide a connection where there is a pre-existing connection or request for a connection in relation to the premises. That is, the SIP does not need to provide multiple connections to the same identified premises. For example, if multiple occupants of a share house were to request a SIP make multiple connections, such as to each individual bedroom within that premises, the SIP would not need to do so. This recognises that in some cases, providing a SIP connection may be loss-making, and in such circumstances only a single connection may be warranted. A similar exception applies under the USO Instrument.

However, as explained above, if there are multiple self-contained premises on a lot, a SIP is expected to provide a connection in relation to each identifiable premises. Equally, it is open to a SIP to make a commercial decision to provide multiple services to premises if they wish, presumably on the basis it is profitable overall.

#### *Connections to third party networks*

Paragraph 5(f) provides that a SIP does not need to provide a connection to premises where the premises are already connected to another third party qualifying telecommunications network, the SIP is reasonably satisfied a qualifying carriage service is being supplied, and the service is not being withdrawn by the provider or being terminated by the end-user. This exception recognises that there may be alternative networks in competition with SIP networks

where services are already being supplied, and it could be uneconomic to require the SIP to make a connection where one is already in place. A similar exception applies under the USO Instrument. However, the provision also recognises that providers that are not SIPs may refuse to supply service, or withdraw services, or that end-users may not be satisfied with their services (e.g. due to concerns over price, quality or customer service). In such circumstances, SIPs are obliged to respond to connection requests relating to premises in their service areas, absent other exceptions.

#### *Health and safety*

Paragraph 5(g) provides that a SIP does not need to provide a connection to premises if health and safety risks are present and cannot be reasonably mitigated. Similar circumstances are included in the USO Instrument. This recognises SIPs (and their employees and sub-contractors and agents), end-users and the community should not be exposed to unsafe or hazardous working conditions and/or environments.

#### *Access and consent*

In performing connection activities, SIPs may need access to land and buildings for the necessary installation of equipment. In circumstances where such access is required, the SIP is expected to take steps to inform the requesting CSP. This is to allow the CSP to pass on relevant information given that the end-user to assist in attaining the necessary access (e.g. from landlords, body corporates, strata bodies, occupants, or similar). A SIP must take reasonable endeavours to obtain access, including obtaining consent or using all lawful available avenues (including any under Commonwealth law), including carrier powers and immunities (see below). If access cannot be gained, paragraph 5(h) provides a SIP with an exception from its connection obligation to the premises.

The drafting note at paragraph 5(h) draws attention to Schedule 3 of the Act, under which carriers, including SIPs, have powers to inspect land, install certain telecommunications facilities, maintain existing telecommunications facilities, and have some immunities from state and territory legislation, such as planning laws. Known as the ‘powers and immunities’ framework, these powers have been established (among other things) in order to help facilitate the efficient, cost effective, and nationally consistent construction and maintenance of telecommunications networks. To support the connection and supply of wholesale broadband services, the Australian Government expects that SIPs will seek to negotiate access and engage with communities in a meaningful and sensitive way about proposed deployments. The powers and immunities framework protects landowner interests by requiring carriers, including SIPs, to undertake community notification and/or consultation when upgrading or deploying new infrastructure. Carriers (including SIPs) are also required to act in accordance with good engineering practices and interfere as little as practicable with the landowner’s use of the land.



### *SIP's terms and conditions*

Paragraph 5(i) provides an exception to SIPs from connecting premises if the CSP refuses to accept the SIP's terms and conditions (provided those terms and conditions are not inconsistent with this Instrument).

A note is provided here to draw attention to an aspect of Part 19 of the Act, which separately 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.

### *Identification information*

Paragraph 5(j) provides that a SIP does not have to connect premises in circumstances where it has a reasonable need to identify an end-user, and the requested information (from the CSP) has not been made available to the SIP. It is based on a similar circumstance provided for in the USO Instrument and generally reflects that SIPs are subject to broader legislative requirements (i.e. it may be necessary for a SIP to identify an end-user for operational or law enforcement purposes).

### *Fraud*

Paragraph 5(k) provides that a SIP does not need to connect premises if the SIP believes, on reasonable grounds, that the request to connect the premises is suspected to be fraudulent. It is based on a similar circumstance provided for in the USO Instrument and is intended to reduce the risk of SIPs incurring losses or other liabilities in respect of third party fraudulent transactions or activities.

### *Occupancy rights*

Paragraph 5(l) provides that a SIP does not need to connect premises if the SIP considers, on reasonable grounds, that the person to whom the connection relates, does not have a legal right to occupy the premises. It is based on a similar circumstance provided for in the USO Instrument.

### *Topographical or other impediments*

Paragraph 5(m) provides that a SIP does not need to connect premises in instances where, after visiting the premises or undertaking other relevant inquiries, the SIP has identified an 'impediment' to the connection (or the subsequent provision of a properly functioning service). An impediment must relate to features of the premises or the location of the premises.

However, to rely on this exception, the SIP must advise the CSP of the impediment, and if applicable, any reasonable adjustment that can be taken within reasonable timeframes to resolve the impediment, and request that the CSP provide those details to the end-user. If there are no steps that can be undertaken to address the impediment, or the end-user does not

take steps notified to remove the impediment or make other reasonable adjustments, then the SIP is not required to connect the premises.

This approach has been adopted to give end-users the opportunity to take steps to rectify matters within their control that may otherwise prevent the premises from receiving a SIP connection. ‘Impediments’ could cover a range of different issues. For example, they could include minor impediments, such as nearby vegetation, through to more complex issues such as the location of premises relative to a particular topographical feature such as a hill, valley, cliff or being underground (e.g. as in White Cliffs, NSW), that renders making a connection to the premises impractical without remediation. In addition to removing vegetation, such remediation may include providing, or meeting the cost of a pole or plinth mounted antenna or dish some distance from the premises so that an adequate signal can be received with additional cabling to bring the signal to the premises. In all instances, such solutions will depend on their practicality.

The approach recognises that in some instances the end-user may be best placed to address such impediments, either directly, or with third parties, such as the property owners if they are tenants. If there are any costs associated with the removal of the impediment, it is envisaged these would be met by the end-user, unless otherwise agreed between the relevant parties. This will increase the scope for SIP services to be provided where it might not otherwise be feasible.

## Division 2

Division 2 of Part 2 of the Instrument sets out the circumstances in which the supply obligation under subsection 360Q(1) of the Act does not apply.

### Section 6 – Determination of supply circumstances

Three notes are provided at the beginning of Division 2 of the Instrument.

Note 1 notes the obligation on SIPs within the Act to supply an eligible service to a CSP (if reasonably requested by the CSP on behalf of an end-user) in order for the CSP to provide that service to the end-user.

Note 2 notes the obligation on SIPs to supply eligible services to CSPs does not arise in the circumstances specified in a ministerial determination under subsection 360Q(4) of the Act.

Note 3 notes that SIPs are not obliged to supply services to a CSP requesting supply for premises that are not located in the SIPs designated service area.

Paragraphs 6(a)-(l) set out different circumstances, which if satisfied, provide that a SIP does not need to supply eligible services to premises on request from a CSP under Part 19 of the Act. Division 2 largely mirrors Division 1, but with amendments to reflect the focus on the ‘supply’ of services rather than the ‘connection’ of premises.

Subparagraph 6(a)(i) provides a SIP is not required to the supply a service if connection of the premises is not required under subsection 360P(1) of the Act, this being a necessary pre-requisite to supply. Otherwise, subparagraphs 6(a)(ii)-(iv) mirror the circumstances set out in subparagraphs 5(a)(i)-(iii).

Paragraph 5(d) (*necessary civil works*) is not replicated in Division 2, as civil works are a relevant for connection requests, but not in the context of supply requests.

The remaining circumstances in section 6 reflect the same circumstances as provided for in section 5, but adapted to the supply of wholesale services by a SIP. The explanation provided for these provisions in section 5 generally apply to the circumstances in section 6.

**Statement of Compatibility with Human Rights**

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

**Telecommunications (Statutory Infrastructure Providers—Circumstances for Exceptions to Connection and Supply Obligations) Determination 2021**

This Disallowable Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

**Overview**

Part 19 of the *Telecommunications Act 1997* (the Act) establishes a statutory infrastructure provider (SIP) regime to provide people in Australia with reasonable access to infrastructure and wholesale services for the delivery of superfast broadband services by carriage service providers (CSPs) to their premises. Together with the long-standing Universal Service Obligation under the *Telecommunications (Consumer Protection and Service Standards) Act 1999*, which provides people in Australia with access to telephone services, it forms the Government's Universal Service Guarantee (USG) for broadband and voice.

NBN Co Limited (NBN Co) is the default SIP for all of Australia. Other carriers can also become the SIP for a particular area by entering into a contract to provide telecommunications services in real estate development projects. There are currently 19 SIPs.

Under Part 19 of the Act, all SIPs are currently bound by default obligations to connect premises (subsection 360P(1)) and to supply wholesale superfast broadband services to premises upon reasonable request from a carriage service provider (CSP) on behalf of an end-user (subsection 360Q(1)).

Under subsections 360P(3) and 360Q(4) of the Act respectively, the Minister has the authority to make an instrument determining the circumstances where the connection obligation (under subsection 360P(1)) and the supply obligation (under subsection 360Q(1)) do not arise in relation to requests for the supply of wholesale superfast broadband services from a CSP to a SIP.

The *Telecommunications (Statutory Infrastructure Providers—Circumstances for Exceptions to Connection and Supply Obligations) Determination 2021* (the Instrument) is made under subsections 360P(3) and 360Q(4) of the Act. The Instrument sets out certain specific and limited circumstances where a SIP may be reasonably excepted from these obligations.

The primary objective of the Instrument is to provide clarity and consistency for stakeholders by setting out circumstances where SIPs are not obliged to connect premises and/or supply wholesale services.

The Instrument sets out circumstances in which connection and/or supply obligations are not considered practical or reasonable and provides a consistent baseline across all SIPs.

### ***Human rights implications***

No human rights issues were raised during the consultation process.

The Instrument is compatible with the rights and freedoms recognised or declared by the international instruments listed in subsection 3(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* as they apply to Australia.

The Instrument does not engage any of the applicable rights or freedoms.

Access to telecommunications services, including the internet, is however increasingly seen as important to broader social, economic, political and cultural participation. The SIP regime, and the wider USG of which it is part, is focused on maximising such access.

The Instrument starts from the principle that each premises in Australia should have access to baseline broadband services as the default, and it is only in specific and exceptional circumstances that this principle should be limited. In applying the Instrument, SIPs should preference connecting premises and providing services wherever feasible over refusing connections or services. However, the Instrument recognises that there may be circumstances where it is simply impractical, unsafe, unreasonable or wholly unaffordable for SIPs to provide SIP services and specifies these limited set of circumstances for the greater confidence and certainty of consumers and other stakeholders.

To the extent there is any limitation on access to the supply of wholesale broadband service by operation of the Instrument in respect of a particular request at a particular time, it would be permitted by law and only when considered necessary. The circumstances prescribed in the Instrument would be assessed by the relevant SIP in respect of a particular request and at a point in time: circumstances can change from time to time.

Overall the SIP regime and USG are disposed to maximising access to baseline broadband and the internet.

### ***Conclusion***

The Instrument is compatible with human rights as it does not raise any human rights issues.