

## EXPLANATORY STATEMENT

Approved by the Hon Paul Fletcher MP, Minister for Communications, Urban Infrastructure, Cities and the Arts

*Telecommunications Act 1997*

***Telecommunications Amendment (Local Access Lines—Class Exemptions) Regulations 2022***

### **Purpose and operation of the Instrument**

The purpose of the *Telecommunications Amendment (Local Access Lines—Class Exemptions) Regulations 2022* (the Instrument) is to amend the *Telecommunications Regulations 2021* (the Regulations). Both the Instrument and the Regulations are made by the Governor-General under section 594 of the *Telecommunications Act 1997* (the Act).

Section 594 provides that the Governor-General may make Regulations prescribing matters required or permitted to be prescribed by the Act, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Subsection 33(3) of the *Acts Interpretation Act 1901* relevantly provides that where an Act confers a power to make an instrument of a legislative character (including regulations) the power shall be construed as including a power exercisable in the like manner and subject to the like conditions to repeal, rescind, revoke, amend, or vary any such instrument.

The Instrument is a legislative instrument for the purposes of section 8 of the *Legislation Act 2003*.

The Instrument increases the customer limit above which controllers of local access lines used to provide superfast carriage services are subject to wholesale-only, or structural separation, requirements. This is expected to provide an incentive for smaller superfast broadband infrastructure providers to enter the market. The measure aims to increase competition, and thus result in lower prices and improved services for superfast broadband users.

Sections 142C and 143 of the Act provide that controllers of local access lines either constructed or upgraded on or after 1 January 2011 used to provide superfast carriage services are subject to wholesale-only (i.e. structural separation) requirements. For the purposes of the Act, a superfast carriage service enables end-users to download communications with a transmission speed that is normally 25 megabits per second or more that is supplied using a line to a premises occupied or used by an end-user.

Section 143A of the Act provides for the Australian Competition and Consumer Commission (ACCC) to make determinations exempting controllers of lines capable of supplying superfast broadband services from the structural separation requirements contained in sections 142C or 143 of the Act. Under subsection 143A(8) of the Act, in deciding to make an exemption determination, the ACCC must have regard to: whether the exemption determination would promote the long-term interests of end-users; any matters specified by the Minister in accordance with his power to do so under section 143A(9) (there currently are none); and any other matters (if any) the ACCC considers relevant.

For the purposes of making such determinations, the ACCC can specify the number of residential customers that are permitted to be supplied superfast carriage services by a

person over local access lines. The number of such services must not exceed 2,000, or a higher number specified in the Regulations, which may not exceed 12,000. These thresholds apply on a single basis (where the person is not a member of an associated group) and on a group basis (where the person is a member of an associated group). Once such a determination is made, persons supplying equal to or less than the threshold number of services can elect to be bound by the determination and must, in accordance with subsection 143A(3) and among other things, provide services on a wholesale and non-discriminatory basis.

The Instrument increases the residential customer threshold from 2,000 to 12,000. As a result, by virtue of the Regulations, the ACCC can make a determination that has the effect of exempting controllers of superfast fixed-line broadband networks servicing up to 12,000 residential customers from the requirement to separate their wholesale and retail businesses.

A provision-by-provision description of the Instrument is set out in the notes at [Attachment A](#).

The Instrument is a disallowable legislative instrument for the purposes of the *Legislation Act 2003*.

### **Documents incorporated by reference**

The instrument does not incorporate any document by reference.

### **Consultation**

On 25 August 2020, the ACCC issued the *Telecommunications (Superfast Broadband Network Class Exemption) Determination 2020* (the Determination). The ACCC decided to exempt network controllers with up to 2,000 retail residential customers from the structural separation requirements. The ACCC indicated that it was satisfied an exemption from the separation requirements would reduce the disproportionate regulatory cost burden on the operators of smaller networks, and would enable them to invest in competitive infrastructure through increasing the reach of their networks and improving the quality of services provided to end-users.

The ACCC noted that the majority of the submissions it received in response to consultation on the Determination supported the inclusion of a mechanism in the instrument to allow the threshold to increase to a maximum of 12,000 residential customers if this were, at a future point, specified in the Regulations. The Determination included a provision that if the class exemption threshold was increased via the Regulations then the benefit would automatically flow through to the controllers of relevant lines.

From 15 January 2021 to 5 February 2021, the Department of Infrastructure, Transport, Regional Development and Communications (the Department) conducted a public consultation process to gauge whether there was support for the Minister recommending to the Governor-General that amendments to the Regulations to be made to enable the ACCC to increase the class exemption limit to 12,000 residential retail customers. Six submissions were received – from NBN Co, the Australian Communications Consumer Action Network

and four smaller broadband infrastructure providers (Aussie Broadband, Interphone, Lyneham Networks and Telair).

The Department concluded that increasing the limit on the class exemption to 12,000 residential customers would benefit smaller network operators and promote long term infrastructure-based competition in the market.

### **Regulatory impact assessment**

A Regulation Impact Statement (RIS) was prepared to evaluate policy options relating to the instrument. The RIS for the instrument is available at the Office of Best Practice Regulation website at [obpr.pmc.gov.au](http://obpr.pmc.gov.au). The RIS was prepared by the Department of Infrastructure, Transport, Regional Development and Communications, and has been assessed as adequate by the Office of Best Practice Regulation.

### **Statement of compatibility with human rights**

Subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* requires the rule-maker in relation to a legislative instrument to which section 42 (disallowance) of the *Legislation Act 2003* applies to cause a statement of compatibility with human rights to be prepared in respect of that legislative instrument.

The statement of compatibility set out below has been prepared to meet that requirement.

#### *Human rights implications*

The Department has assessed whether the Instrument is compatible with human rights, being 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.

Having considered the likely impact of the Instrument and the nature of the applicable rights and freedoms, the Department has formed the view that the Instrument does not engage any of those rights or freedoms.

#### *Conclusion*

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

**Notes to the Telecommunications Amendment (Local Access Lines—Class Exemptions) Regulations 2022**

**Section 1 - Name of Regulations**

This section provides that the name of the Instrument is the *Telecommunications Amendment (Local Access Lines—Class Exemptions) Regulations 2022*.

**Section 2 - Commencement**

This section provides for the Instrument to commence on the day after the instrument is registered.

**Section 3 - Authority**

This section provides that the Instrument is made under the *Telecommunications Act 1997*.

**Section 4 - Schedules**

This section provides that each instrument that is specified in a Schedule to the Instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to the Instrument has effect according to its terms.

**Schedule 1 - Amendments**

*Item [1] – After Part 3*

Item 1 inserts a new Part 3A into the *Telecommunications Regulations 2021* entitled ‘Local access lines’ and section 13A into the Regulations.

Section 13A specifies 12,000 for the purposes of subparagraphs 143A(1)(d)(ii), 143A(1)(e)(ii), 143A(2)(d)(ii), and 143A(2)(e)(ii) of the *Telecommunications Act 1997*. The effect is to increase the maximum number of residential customers for the purposes of the ACCC’s class exemption determinations under section 143A of the Act.