

EXPLANATORY STATEMENT

Issued by the Authority of the Minister for Communications

Telecommunications Act 1997

Telecommunications (Statutory Infrastructure Providers—Circumstances for Exceptions to Connection and Supply Obligations) Determination 2024

Authority

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

Purpose

Under the Act, statutory infrastructure providers (SIPs) have default obligations to connect premises and supply wholesale services to premises upon reasonable request from a carriage service provider (CSP) on behalf of an end-user. The *Telecommunications (Statutory Infrastructure Providers—Circumstances for Exceptions to Connection and Supply Obligations) Determination 2024* (the Instrument) supports this core obligation on SIPs, but sets out certain circumstances where a SIP may be reasonably excepted from these obligations.

The Instrument re-makes, with some added exceptions, the *Telecommunications (Statutory Infrastructure Providers—Circumstances for Exceptions to Connection and Supply Obligations) Determination 2021* (the 2021 instrument). The 2021 instrument will self-repeal on 28 May 2024, and given that this Instrument is intended to commence before that date, the Instrument repeals the 2021 instrument.

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 applies to all SIPs in Australia and is in accordance with reasonable community expectations about the connection and supply of services.

When the statutory arrangements for the SIP regime were first developed and enacted, a range of practical issues were identified that SIPs would need to manage in fulfilling the broader statutory objectives of connecting and supplying services to individual premises. Due to the high level of detail required it was determined that this was more appropriate for delegated rather than primary legislation.

This approach 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’.¹ By describing the specific circumstances under which SIPs are exempted from obligations to connect and supply services, the Instrument provides clarity for stakeholders in the industry and community, including CSPs and end-users.

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 take all reasonable steps to facilitate requests received from CSPs on behalf of end-users. Accordingly, the Instrument only sets out limited and distinct circumstances where exceptions to a SIP’s connection and supply obligations might apply. This is an acknowledgment that fulfilling these obligations depends on CSPs and end-users cooperating with SIPs and following reasonable processes, otherwise connection and supply of services may not be feasible.

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 5 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 5 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. If the end-user or CSP wishes to dispute the refusal, they have the option of providing this notice to regulatory bodies such as the ACMA or the TIO.

The Telecommunications Legislation Amendment (Enhancing Consumer Safeguards and Other Measures) Bill 2023, if passed by the Parliament, will replicate the 360P(12) notification requirements for circumstances where a SIP refuses to supply a service under subsection 360Q of the Act.

Separately, the SIP framework also enables the Minister for Communications to make standards, rules and benchmarks that SIPs must comply with in relation to their operations. Such requirements could include connection and/or supply timeframes on SIPs. If such standards, rules and benchmarks were to be made, they may be relevant to this Instrument, noting that no such requirements have been imposed to date.

The Australian Communications and Media Authority (ACMA) is responsible for enforcing SIPs’ compliance with the regime, and maintains a public register of SIPs. The circumstances

¹ See: www.pmc.gov.au/resource-centre/government/legislation-handbook (section 5.65)

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, some 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, new legislation or changing end-user needs). As stated above, rather than including the measures within the Act itself, describing circumstances for exceptions in this instrument allows the Government to provide more specific and flexible regulation that can be updated via an amendment to the Instrument where necessary. Notably, an Instrument update is a far quicker process than amending an Act of Parliament, and as such is more responsive to community and industry needs.

This Instrument is subject to review via sunseting arrangements, whereby legislative instruments will automatically self-repeal after a fixed 10-year period, as set out in Part 4 of Chapter 3 of the *Legislation Act 2003*. The Government can choose to remake or let an Instrument lapse as it sees fit at the end of the 10-year period.

Details of the Instrument are set out in **Attachment A**.

Background

Context and conceptual overview of approach

In recognition of the foundational role telecommunications plays in the functioning of modern 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 denied. In applying the Instrument, SIPs should preference connecting premises and supplying services over refusal wherever feasible. However, there may be circumstances where it is impractical, unsafe, unreasonable or unaffordable for SIPs to connect or supply a service ('Unaffordable' refers to the costs a SIP would need to absorb to remediate a particular challenging circumstance if an exception were not available). The Instrument specifies these circumstances, providing clarity for stakeholders and ensuring SIP resources are used in an efficient and equitable manner.

The SIP regime is legislated in Part 19 of the Act. 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. 32 other carriers (as at April 2024) have become the SIPs for individual service areas, typically in existing residential estates or new developments.

The SIP regime was designed with the understanding that it may not always be commercially viable for the SIP in a designated service area to provide services to some premises. These services need to be subsidised, whether internally or externally, to ensure there is universal access for all people in Australia. Because NBN Co is the default SIP, it connects and supplies the majority of these remote areas. NBN Co's fixed wireless and satellite services are subsidised by the Regional Broadband Scheme. For other SIPs, it is a commercial decision whether 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 current and future premises in that designated area.

However, there may be circumstances where the cost to connect premises or supply services should be considered, 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 it is more practical to be distributed via an accommodation provider (e.g. in a hotel or caravan park), or the cost of supply would be prohibitive due to necessary adjustments at the premises concerned. This Instrument describes such circumstances and provides the option for a SIP to claim an exception to connection or supply obligations.

A SIP cannot reject a connection or supply request because 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. The SIP regime protects the public from subjective commercial interests and ensures Government policy objectives are maintained.

The Instrument addresses circumstances in which permanent or longer-term issues prevent a SIP from connecting or supplying a service. It is not intended to apply to circumstances which constitute a temporary delay to a service that would otherwise be connected or supplied by the SIP without issue. In some instances, however, there is a fine line between whether an absolute refusal is warranted, or simply a delay (e.g. a new development experiences a construction delay, but is close to completion). 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. Circumstances in which connection or supply have been refused can change (e.g. a lack of SIP access to premises due to an impediment is resolved by the end-user), and where circumstances change so too may a SIP's exception from connecting and supplying services. In addition, while the Instrument sets out the circumstances in which SIPs may refuse connection and supply, the SIP may choose to proceed even if it is eligible for an exception under the Instrument.

An issue raised during consultation on the draft Instrument was the potential for a SIP to deny a connection or a service because of capacity constraints in a network. 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 appropriate grounds for outright refusal for

connection or supply by SIPs (and are not treated as such in the Instrument). This would constitute a delay and require action by the SIP to resolve the capacity constraint. If circumstances were to occur that significantly impact the capacity of a SIP network (such as a new development with thousands of new premises in a rural or regional area with limited backhaul), the regulator would have scope to take any extenuating factors into account, noting that depending on the situation, it may take some time to resolve capacity issues. Ideally, with appropriate prior notice by the developer and forward planning by the SIP, this type of situation should be anticipated and therefore capacity provided by the SIP in advance of premises being occupied.

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 2021 instrument, regard was given to the *Telecommunications Universal Service Obligation (Standard Telephone Service—Requirements and Circumstances) Determination 2011*² (the Universal Service Obligation (USO) Instrument), which performs a similar role in relation to the USO, requiring Telstra Limited to ensure that voice services and payphones are reasonably accessible to all people in Australia, regardless of where they live or conduct business. The USO Instrument adopts a prescriptive approach to defining types of eligible and non-eligible premises, reflecting many years of accumulated experience on the ground. In contrast, this Instrument was designed with a more streamlined, principles-based approach, making it easier for stakeholders to understand and more straightforward for SIPs to implement. There is some alignment between the two instruments, with many exceptions similar in concept, if not exact wording.

In circumstances where SIPs are obliged to connect and supply voice and broadband services, Telstra is likewise obliged to provide voice services under the USO. This is complementary to fixed line and fixed wireless SIP networks needing to support voice services (noting that satellite services are excepted from needing to support voice services under the *Telecommunications Act 1997*). SIP fixed-line networks are available to 94% of Australia's population. This arrangement supports the delivery of voice services under the USO, because NBN Co's fixed line networks are the platforms Telstra predominantly uses to deliver USO voice services.

² <https://www.legislation.gov.au/F2011L00417/latest/text>. Please note that this instrument was re-made in 2023 – see <https://www.legislation.gov.au/F2023L00221/asmade/text>.

Concept of 'premises'

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 line with common usage, 'premises' is taken to mean a single premises (the 's' does not denote plural). In situations where it is important to distinguish between one premises or multiple premises, this will be apparent from the context in which the term appears.

SIPs are expected to connect and supply services to distinct residential premises, places of business, schools, places of worship, or the premises of community groups, charities and not-for-profits. A residence should be capable of supporting continual or periodic independent private residency, have basic utilities, and provide reasonable access to sanitation and food preparation facilities.

Individual rooms in hotels, nursing homes or hospitals are not considered distinct residential premises as these do not provide for independent private residency. However, the buildings in which they are located are considered premises, with a concordant obligation by SIPs to provide a centralised supply of services. Unless other arrangements are put in place (like separate leaseholds), SIP connections to premises with multiple individual rooms would be distributed to end users by the entities that own or operate those buildings. Solutions may include a building MDF with internal wiring to rooms or distributed wireless access points.

In circumstances where there are multiple premises on the same lot, a SIP is expected to connect/supply service requests to each identifiable premises on that lot. 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 apartment 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.

For example, if a granny flat is located on the same lot (same property title) as a house and it is being utilised as a separate premises, the SIP for that service area is obliged to connect/supply separate services to the granny flat upon request from a CSP. The technical means of providing that connection is a decision for the SIP, as long as the granny flat has a separate billable account with their RSP that they can access independently from any other accounts or end-users associated with the other premises (house). This maintains privacy for residents of the granny flat. Some possible connection options include extending cabling from a vacant port in the SIP Network Termination Device (NTD, sometimes called an NTU) located at the house to a router at the granny flat (so the NTD would have 2 separate activated services through 2 different ports), or a separate NTD could be installed at the granny flat. Although the means of connection is a decision for the SIP, the owners of the property are responsible for funding any installation of cabling or pathways (pits, pipe/conduit, cable trays,

and associated construction works) within the lot boundaries to facilitate implementation of the SIP's preferred solution. In principle, this is consistent with legislation regarding new real estate development projects as specified in Part 20A of the *Telecommunications Act 1997*, whereby the developer (who is the property owner at that stage) is obliged to install 'fibre-ready facilities' (pit and pipe) for each new lot in a real estate development project before any lots are sold. In this granny flat example, if the owner of the property has not yet carried out the construction works required to extend cabling and pathways beyond the main house to connect the granny flat, the SIP would be eligible for a connection/supply exception under this Instrument until such time as the civil works have been carried out.

The same principles described in the above paragraph are applicable to other types of multi-premises arrangements on a single lot. The key policy outcome of the SIP regime is that all premises in Australia have access to eligible telephone and broadband internet services. The presence of another premises on the same title should not be an insurmountable obstacle to that outcome, and SIPs should work constructively and cooperatively with CSPs and end-users to achieve the goals of the SIP regime.

The SIP connection and supply obligations do not extend to SIPs providing multiple connections to the same identifiable premises. For example, if 3 students reside in a share house (which would have some shared communal facilities such as a kitchen), upon request from a CSP the SIP would only be expected to connect/supply a single service to the house. However, a SIP is always at liberty to make multiple connections to a single premises if it chooses to do so on a commercial basis. A share house is distinguished from a granny flat (as described above) because each bedroom is not considered a separate premises. Residents of a share house are expected to share an internet connection though internally-wired ethernet sockets or a wireless router, much as they share other communal facilities and utilities (power, water) within the premises.

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 was deliberately adopted when this Instrument was first made in 2021 in order to be consistent with the statute. This avoids the risk of defining premises and therefore unintentionally excluding a type of premises that would warrant 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).

SIPs are not expected to connect or supply services to things or places which are not ordinarily considered premises ('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);

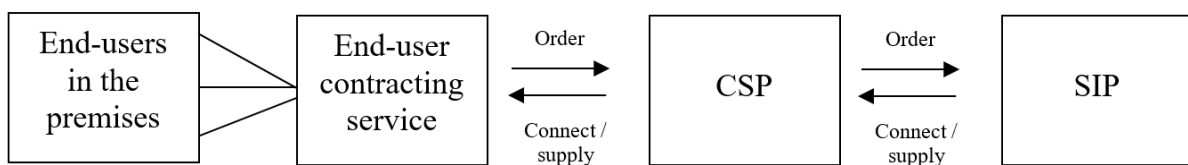
- payphones;
- assistance telephones (e.g. elevator and roadside phones);
- water, gas, electricity equipment and other utility infrastructure (including storm water and sewage management facilities, transformers, pad mount substations, pole mount transformers, power links, street lighting pole, and 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, and NBN Co’s publicly available Approved Non-Premises List³. While SIPs are not obliged to connect and/or supply to ‘non-premises’, they may do so if they choose on a commercial basis.

References to ‘end-user’

While the SIP regime is concerned with access to baseline broadband services, individuals and businesses will not usually communicate directly with SIPs. Their contract for a service is with a CSP, who in turn has a contract with SIPs such as NBN Co.

The relationships are shown 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’. However, the Act does not define ‘end-user’. Within the Instrument, the end-user 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 physical connection to infrastructure already exists). An end-user in this context is not necessarily the final consumer of the broadband service. For example, an end-user could be a landlord for a share house that enters into a contract for a broadband service that tenants in the share house utilise, or an end-user could be a business that enters into a contract for a broadband service that is utilised by its staff or customers.

³ See <https://www.nbnco.com.au/content/dam/nbn/documents/sell/wba/2023/wba5/nbn-approved-non-premises-list-20231201.pdf.coredownload.pdf>

Circumstances for exceptions

The Instrument provides a range of specific circumstances where the obligations on SIPs to connect and/or supply wholesale broadband services would not apply. However, an exception does not apply indefinitely – it is dependent on the context at the time of the request for a service. Any subsequent connection and supply requests would need to be considered at that point in time, because circumstances may have changed.

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 aligns with Part 19 of the Act, where connection and supply obligations are described in separate subsections. This is because connection and supply involve different actions to be undertaken by the SIP. For example, the actions involved for a SIP in connecting premises for the first time to an existing network would differ from the activities involved if a SIP is requested to commence supplying eligible services where a connection to a 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.

Remaking of Instrument during 2024

Consultation

With the 2021 Instrument due to self-repeal in May 2024, the Department of Infrastructure, Transport, Regional Development, Communications and the Arts (the Department) consulted stakeholders on whether the instrument should continue, be allowed to lapse, or continue in an amended form. The Department’s initial view was that the 2021 Instrument should be remade, as it provided a valuable mechanism for SIPs to seek an exception where it is impractical, unsafe, unreasonable or unaffordable for SIPs to connect or supply a service. The instrument provided clarity for stakeholders and ensured SIP resources were used in an efficient and equitable manner. Informal feedback to the Department in the years since the original instrument was made indicated it was valued by stakeholders and should be retained.

The Department undertook a consultation process during February-April 2024 with SIPs, industry representatives, consumer representatives and regulators. Stakeholders were given the opportunity to provide general feedback on the instrument and whether it was functioning as intended, as well as an open invitation to suggest any amendments to existing exceptions or possible new inclusions. They were also asked for an opinion on an appropriate sunset period for the remade instrument.

The department received formal written submissions or informal feedback from 6 stakeholders, including the Australian Communications Consumer Action Network (ACCAN), the Australian Communications and Media Authority (ACMA), Communications Alliance, NBN Co, the Telecommunications Industry Ombudsman (TIO) and TPG Telecom.

Most stakeholders considered the existing Instrument fit-for-purpose, and did not propose any changes to the exceptions included. On the appropriate length of sunseting for the Instrument, the majority of stakeholders supported 10 years as an appropriate timeframe. NBN Co noted that there were some inconsistencies between exceptions available to it from the Standard Access Obligations under Part XIC of the *Competition and Consumer Act 2010*, and the SIP connection and supply obligations. It proposed the instrument be amended to address this issue. It also proposed some amendments to deal with circumstances where CSPs have accepted a SIP's standard offer, but then do not follow the requirements necessary for the SIP to supply a service.

The department considered the submissions and feedback received from stakeholders, and has made some amendments as a result.

Amendments to the Instrument

Following consideration of the issues raised by stakeholders during consultation (including proposed drafting suggestions), changes were made to the Instrument. There are new exceptions in Division 2 (supply obligations) that align with the exceptions available from the Standard Access Obligations under Part XIC of the *Competition and Consumer Act 2010*, as well as exceptions relating to standard processes under industry codes and SIP standard offers. These are explained in detail in **Attachment A**.

Impact Analysis

The Office of Impact Analysis (OIA) has advised that a detailed impact analysis is not required (OIA24-07346).

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 2024*

Part 1—Introductory

Section 1 – Name

This section states that the name of the Instrument is the *Telecommunications (Statutory Infrastructure Providers—Circumstances for Exceptions to Connection and Supply Obligations) Determination 2024*.

Section 2 – Commencement

This section states that the Instrument commences on the day after it is registered on the Federal Register of Legislation.

Section 3 – Authority

This section states 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 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 building lot, carriage service provider, connected, eligible service, NBN corporation, qualifying carriage service, qualifying telecommunications network, relevant service area, request, service area and statutory infrastructure provider. These terms have the same meaning in the Instrument as under the Act, pursuant to section 13 of the *Legislation Act 2003*.

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)(1) defines specific terms used in the Instrument.

Act means the *Telecommunications Act 1997*.

CCA means the *Competition and Consumer Act 2010*.

declared service has the same meaning as given by section 152AL of the CCA.

relevant SIP means a statutory infrastructure provider for a service area within which the premises is subject to a request for a connection of an end-user, or supply of an eligible service to a carriage service provider (in order that the carriage service provider can provide qualifying carriage services to the end-user at premises). There can be more than one relevant SIP for a service area, but this is relatively uncommon.

Subsection (4)(2) clarifies references to end-user as being the person who has entered into a legally binding arrangement with the carriage service provider for the connection or supply of an eligible service.

Subsection (4)(3) states that references within the Instrument relating to a request for a connection or supply of an eligible service to premises located 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 is entitled to connection and/or supply, unless an exception applies under the Instrument. This is discussed in more detail above (pages 6-7).

Subsection (4)(4) states that where there is more than one relevant SIP for a service area, the circumstances determined in Part 2 may be applicable in relation to each relevant SIP. In other words, an exception that applies to one SIP in a service area may also apply to any other relevant SIP in that same service area, depending on the context.

Section 5 – Schedules

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

Part 2—Circumstances

Division 1—Exceptions to the obligation to connect premises to a qualifying telecommunications network

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

Note 1 states that under subsection 360P(1) of the Act, a SIP for a service area is obliged to connect an end user at premises in the service area, on reasonable request by a carriage service provider (CSP) on behalf of the end user, to a qualifying telecommunications network.

Note 2 states that under subsection 360P(2) of the Act, the obligation to connect premises to a qualifying telecommunications network does not arise under subsection 360P(1) in the

circumstances specified in a ministerial determination under subsection 360P(3). This Instrument is a ministerial determination under subsection 360P(3).

Note 3 states that connection to a qualifying fixed line telecommunications network is required unless it is not reasonable to do so, and where it is not reasonable to do so, connection must be to another type of qualifying telecommunications network, such as one which uses either a fixed wireless or satellite technology platform (see paragraphs 360P(1)(a) and (b) of the Act).

Note 4 states that a SIP is not obliged under subsection 360P(1) of the Act to connect premises in order that a CSP can provide qualifying carriage services to an end user, where the premises is not situated in the provider's service area. In other words, a SIP's obligation to connect and supply only applies in a service area where they are the designated SIP (or the default SIP, in the case of NBN Co).

Section 6 – Determination of connection circumstances

Paragraphs 6(a)–(m) describe separate circumstances where a SIP is eligible for an exception from its obligations under Part 19 of the Act to arrange a connection to premises.

Premises under construction

Subparagraph 6(a)(i) provides an exception to the obligation on SIPs to connect premises where the SIP 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) policy⁴ to maximise ready access to modern telecommunications. This circumstance provides the SIP with some discretion as to when such work can occur during the construction phase. In practice, SIPs are likely to facilitate connection requests before construction is complete as it is more cost-effective than retro-fitting infrastructure after completion. For example, the trenching/boring of conduit is easier and cheaper in bare soil as opposed to breaking out concrete driveways/pathways to access the ground underneath.

Premises and development

Subparagraph 6(a)(ii) provides an exception to the obligation on SIPs to connect premises where premises do not comply with planning and development laws on structural safety and integrity. This means a SIP could not rely on this circumstance to reject a connection request

⁴ See <https://www.infrastructure.gov.au/department/media/publications/2024-telecommunications-new-developments-policy>

on the basis of a minor, unapproved element of the premises that is unrelated to structural safety and integrity.

Moveable premises

Subparagraph 6(a)(iii) provides an exception to the obligation on SIPs to connect premises 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 are moored boats, motorhomes, and caravans not parked at a location on an ongoing basis. It is not reasonable to require SIPs to bear the cost of arranging fixed connection to premises that are relocated frequently. If a structure is moved, SIP infrastructure may be damaged or lose functionality. This applies to both fixed-line infrastructure and fixed wireless/satellite services. Movement of an antenna could reduce performance or even lead to complete loss of a service. For moveable premises, connectivity would be better sourced via a mobile phone service or a mobile broadband dongle. However, a compromise may be possible, such as the SIP connecting fixed services to permanent premises on site, such as the office of a caravan park. From this location, access could be provided via wireless access points within the grounds.

However, SIPs are expected to arrange connections to moveable structures that are expected to be continuously located at a given location. Examples could include demountable offices or homes, or caravans that are located on private property and fixed in place such that they could not be readily moved (e.g. they are connected with power, water and sewerage by utility providers).

Power source

Paragraph 6(b) provides an exception to the obligation on SIPs to connect premises if the end-user has not arranged an adequate source of power at the premises to support the connection. While mains power is the source at most premises around Australia, in some remote locations, mains power is not available, so power must be generated on site (e.g. a fuel, solar or wind generator). This exception is an acknowledgment that SIP broadband connections require power to operate, which is a departure from the old days of copper phone lines, where power was supplied from the telephone exchange and end-users could make and receive phone calls without power at the premises.

Compliance with laws

Paragraph 6(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. Examples that may apply to SIPs in fulfilling connection and supply requests are: 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. This could involve direct statutory obligations imposed by primary legislation, requirements set out in subordinate legislation, directions from a court, or directions from a regulator or statutory authority. However, to rely on this circumstance, the SIP would need to have no reasonable steps available to lawfully avoid a potential contravention.

Civil works

Paragraph 6(d) provides an exception to the obligation on SIPs to connect premises where there are incomplete civil works that are a necessary pre-requisite for the connection, and the civil works are the responsibility of another party other than the SIP.

While SIPs provide much of the infrastructure to connect premises, there may be circumstances where further infrastructure needs to be installed, either by developers or the owner of the premises. Under Part 20A of the Act, before selling new premises or lots, developers are responsible for providing ‘fibre-ready facilities’ such as pit and pipe, as well as any associated trenching or construction works. This is necessary so SIP fixed-line cabling can be extended to the premises from the nearest network presence. If the developer fails to install fibre-ready facilities, the onus falls on the current owner of the premises. This allocation of responsibilities is consistent with the Telecommunications in New Developments (TIND) Policy 2024.

As an alternative measure, the SIP may choose to install pit and pipe (if the developer did not do so) and seek to recover the costs from the developer or end-users. If it is technically feasible, a SIP can choose to provide a connection in the absence of such works, but due to the exception available under this Instrument, SIPs are not obliged to do so.

To facilitate timely connection of new premises, developers should contact a SIP early in the development process to organise a connection, arrange the installation of pit and pipe according to industry guidelines (Comms Alliance G645:2017), and follow SIP form and process requirements, so premises have an eligible service available for end-users from the date they move in.

Pre-existing connections or requests

Paragraph 6(e) provides an exception to connection obligations where there is a pre-existing connection or outstanding request for a connection at the premises. The SIP is not obliged to provide multiple connections to the same identified premises, such as a share house, but SIPs are open to doing this on a commercial basis if they wish. However, as explained above, if there are multiple self-contained premises on a lot, a SIP is obliged to provide a connection to each identifiable premises.

Connections to third party networks

Paragraph 6(f) provides an exception 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. In many SIP service areas there are alternative networks capable of supplying a qualifying carriage service, and it would be uneconomic to require the SIP to connect a premises where a third-party connection is already in place. However, this exception is not permanent and depends on the context: providers that are not SIPs may refuse to supply a service, or withdraw services on a commercial basis, or end-users may not be satisfied with their service and cancel it. In such circumstances, the exception would no longer apply, and SIPs would be obliged to connect these premises upon request.

Health and safety

Paragraph 6(g) provides an exception to connection of a premises if health and safety risks are present and cannot be reasonably mitigated. SIPs (inclusive of their employees, sub-contractors and agents), end-users and the community should not be exposed to unsafe or hazardous working conditions or environments.

Access and consent

In performing connection activities, SIPs may need access to land or buildings for the installation of infrastructure. In circumstances where such access is required, the SIP should inform the requesting CSP. This is so the CSP can relay information to assist in providing access (e.g. from landlords, body corporates or residents). A SIP must take reasonable steps 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 obtained, paragraph 6(h) provides a SIP with an exception from connection obligations.

Under Schedule 3 of the Act, carriers (including SIPs), have powers to inspect land, install certain telecommunications facilities, maintain existing telecommunications facilities, and have immunity from some state and territory legislation, such as planning laws. Known as the 'powers and immunities' framework, it facilitates the efficient, cost-effective, and nationally consistent construction and maintenance of telecommunications networks. The powers and immunities framework protects landowners 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 6(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). Under Part 19 of the Act, each SIP must make available 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 6(j) provides an exception to connection obligations in circumstances where the SIP has a reasonable need to identify an end-user, and the requested information (from the CSP) has not been made available to the SIP. This reflects that SIPs are subject to broader legislative requirements (it may be necessary for a SIP to identify an end-user for operational or law enforcement purposes).

Fraud

Paragraph 6(k) provides an exception to connection obligations if the SIP believes, on reasonable grounds, that the request to connect the premises is fraudulent. This exception is intended to reduce the risk of SIPs incurring losses or other liabilities due to third party fraudulent transactions or activities.

Occupancy rights

Paragraph 6(l) provides an exception to connection obligations if the SIP believes, on reasonable grounds, that the person to whom the connection relates does not have a legal right to occupy the premises.

Topographical or other impediments

Paragraph 6(m) provides an exception to connection obligations 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, before invoking this exception, the SIP must advise the CSP of the impediment, and if applicable, undertake any adjustment 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 by the SIP or CSP to address the impediment, or the end-user does not act to remove the impediment or make other reasonable adjustments, then the SIP is eligible for this exception.

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. The ‘impediment’ could be range of different things. For example, it may be a minor impediment, such as thick vegetation blocking access, through to more complex issues like the location of premises relative to a particular topographical feature (such as a hill, valley, cliff or being underground) that makes connecting the premises impractical without remediation. For these examples, remediation could be as simple as removing vegetation, to more complex solutions like providing a mounted antenna to extend a wireless/satellite signal to the premises.

In most cases, the end-user is the best-placed party to address such impediments, either directly, or with the assistance of expert contractors. If there are any costs associated with the removal of the impediment, these would be met by the end-user, unless otherwise agreed between the relevant parties.

Division 2—Exceptions to the obligation to supply eligible services

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

Note 1 states the obligation under 360Q(1)(a) of the Act for SIPs 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 a qualifying carriage service to the end-user.

Note 2 states the obligation for 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. This Instrument is a ministerial determination under subsection 360Q(4).

Note 3 states that SIPs are not obliged to supply eligible services to a CSP requesting supply in order to provide qualifying carriage services to an end-user at premises, if the premises is not located in the SIP’s designated service area.

Note 4 states that subsections 152AR(4) and (9) in Part XIC of the CCA set out the exceptions to category A standard access obligations applicable to the supply of declared services by a carrier or a carriage service provider that is not an NBN corporation. This relates to the exception at paragraph 7(m).

Note 5 states that subsections 152AXB(3) and (6) in Part XIC of the CCA set out the exceptions to category B standard access obligations applicable to the supply of declared services by an NBN corporation. This relates to the exception at paragraph 7(n).

Section 7 – Determination of supply circumstances

Paragraphs 7(a)–(p) describe separate circumstances where a SIP is eligible for an exception from its obligations under Part 19 of the Act to supply eligible services to premises on request from a CSP. Paragraphs 7(a)–(l) in Division 2 are broadly similar to Division 1, but

with amendments to focus on the ‘supply’ of services rather than the ‘connection’ of premises. Paragraphs 7(m)–(p) are new additions to the 2024 Instrument and will be described below in more detail.

Subparagraph 7(a)(i) states that a SIP is not required to 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 7(a)(ii)–(iv) mirror the circumstances set out in subparagraphs 6(a)(i)–(iii).

Paragraph 6(d) (*civil works*) is not replicated in Division 2, as civil works are relevant for connection requests, but not in the context of supply requests, since the infrastructure is already connected.

The remaining circumstances in paragraphs 7(a)–(l) are broadly similar to the circumstances as specified in section 6, but adapted to the supply of wholesale services by a SIP. The explanation provided for these provisions in section 6 is applicable to the circumstances in section 7.

Exceptions under Category A standard access obligations in Part XIC of the CCA

In this Instrument, new paragraph 7(m) provides an exception to supply obligations where a SIP (other than an NBN corporation) is supplying an eligible service that is also a declared service; and the SIP is subject to a category A standard access obligation (within the meaning of Part XIC of the CCA); and the SIP is *not* required to supply the declared service under subsection 152AR(3) of the CCA on the basis that:

- A. supplying the declared service would have any of the effects set out at paragraphs 152AR(4)(a) to (f) of the CCA; or
- B. there are reasonable grounds to believe any of the events set out at paragraphs 152AR(9)(a) or (b) of the CCA would occur, including on the basis of the grounds set out at paragraphs 152AR(10)(a) and (b) of the CCA (where applicable).

Category A standard access obligations are obligations that apply to all access providers other than an NBN corporation. They include basic obligations to interconnect facilities, supply active declared services and supply services necessary to obtain access to conditional-access customer equipment. Similar obligations apply to NBN corporations, but with some minor differences to reflect the wholesale-only obligations on NBN corporations. Those obligations are known as Category B standard access obligations (see the proposed exception at paragraph 7(n) below).

In Part XIC of the CCA, paragraphs 152AR(4)(a)–(f) state there is no obligation to supply a declared service (an exception applies) if the imposition of the obligation would have any of the following effects:

- (a) preventing a service provider who already has access to the declared service from obtaining a sufficient amount of the service to be able to meet the service provider’s reasonably anticipated requirements, measured at the time when the request was made;
- (b) preventing the access provider from obtaining a sufficient amount of the service to be able to meet the access provider’s reasonably anticipated requirements, measured at the time when the request was made;
- (c) preventing a person from obtaining, by the exercise of a pre-request right, a sufficient level of access to the declared service to be able to meet the person’s actual requirements;
- (d) depriving any person of a protected contractual right;
- (da) preventing a designated Telstra successor company from complying with an undertaking in force under section 577A of the Telecommunications Act 1997;
- (e) preventing Telstra from complying with an undertaking in force under section 577C or 577E of the Telecommunications Act 1997; or
- (f) if a final migration plan is in force—requiring a designated Telstra successor company to engage in conduct in connection with matters covered by the final migration plan.

In Part XIC of the CCA, paragraphs 152AR(9)(a) and (b) describe exceptions to the obligation to supply a service if there are reasonable grounds to believe that:

- (a) the access seeker would fail, to a material extent, to comply with the terms and conditions on which the access provider complies, or on which the access provider is reasonably likely to comply, with that obligation; or
- (b) the access seeker would fail, in connection with that obligation, to protect:
 - (i) the integrity of a telecommunications network; or
 - (ii) the safety of individuals working on, or using services supplied by means of, a telecommunications network or a facility.

Paragraph (10) lists examples of grounds for believing as mentioned in paragraph (9)(a):

- (a) evidence that the access seeker is not creditworthy; and
- (b) repeated failures by the access seeker to comply with the terms and conditions on which the same or similar access has been provided (whether or not by the access provider).

In simplified terms, the new exceptions above would apply if:

- Supplying the requested new service would compromise the requirements of an existing declared service supplied by the SIP to a CSP.
- Supplying the requested new service would compromise the SIP’s requirement to have some of a declared service available for itself to perform network management functions.
- Supplying the requested new service would prevent a person with a pre-request right from obtaining a sufficient level of access to the declared service.
- Supplying the requested new service would depriving any person of a protected contractual right.

- Supplying the requested new service would prevent a designated Telstra successor company from complying with an undertaking in force under section 577A of the Act.
- Supplying the requested new service would prevent Telstra from complying with an undertaking in force under section 577C or 577E of the Act.
- Supplying the requested new service would require a designated Telstra successor company to engage in conduct in connection with matters covered by the final migration plan.
- The SIP has reasonable grounds to believe that the CSP would fail to comply with the terms and conditions on which the SIP complies, such as if the CSP is not creditworthy; or repeatedly fails to comply with the terms and conditions on which the same or similar supply has been provided previously.
- The SIP has reasonable grounds to believe that the CSP would fail to protect the integrity of a telecommunications network; or the safety of individuals working on, or using services supplied by means of, a telecommunications network or a facility.

These new exception circumstances ensure that there is no inconsistency between supply requirements under Part XIC of the CCA and requirements under the SIP regime.

Exceptions under Category B standard access obligations in Part XIC of the CCA

In this Instrument, new paragraph 7(n) provides an exception to supply obligations where an NBN corporation is supplying an eligible service that is also a declared service; and the NBN corporation is subject to a category B standard access obligation (within the meaning of Part XIC of the CCA); and the NBN corporation is not required to supply the declared service under subsection 152AXB(2) of the CCA on the basis that:

- A. supplying the declared service would have any of the effects set out at paragraphs 152AXB(3)(a) to (c) of the CCA; or
- B. there are reasonable grounds to believe any of the events set out at paragraphs 152AXB(6)(a) or (b) of the CCA would occur, including on the basis of the grounds set out at paragraphs 152AXB(7)(a) and (b) of the CCA (where applicable).

In Part XIC of the CCA, paragraphs 152AXB(3)(a)–(c) state there is no obligation to supply a declared service (an exception) if the imposition of the obligation would have any of the following effects:

- (a) preventing a service provider who already has access to the declared service from obtaining a sufficient amount of the service to be able to meet the service provider’s reasonably anticipated requirements, measured at the time when the request was made;
- (b) preventing the NBN corporation from obtaining a sufficient amount of the service to be able to meet the NBN corporation’s reasonably anticipated requirements, measured at the time when the request was made;
- (c) preventing a person from obtaining, by the exercise of a pre-request right, a sufficient level of access to the declared service to be able to meet the person’s actual requirements.

In Part XIC of the CCA, paragraphs 152AXB(6)(a) and (b) describe exceptions to the obligation to supply a service if there are reasonable grounds to believe that:

- (a) the access seeker would fail, to a material extent, to comply with the terms and conditions on which the NBN corporation complies, or on which the NBN corporation is reasonably likely to comply, with that obligation; or
- (b) the access seeker would fail, in connection with that obligation, to protect:
 - (i) the integrity of a telecommunications network; or
 - (ii) the safety of individuals working on, or using services supplied by means of, a telecommunications network or a facility.

Paragraph (7) lists examples of grounds for believing as mentioned in paragraph (6)(a):

- (a) evidence that the access seeker is not creditworthy; and
- (b) repeated failures by the access seeker to comply with the terms and conditions on which the same or similar access has been provided (whether or not by the NBN corporation).

In simplified terms, the new exceptions above would apply if:

- Supplying the requested new service would compromise the requirements of an existing declared service supplied by an NBN corporation to a CSP.
- Supplying the requested new service would compromise an NBN corporation's requirement to have some of the declared service available for itself to perform network management functions.
- Supplying the requested new service would prevent a person with a pre-request right from obtaining a sufficient level of access to the declared service.
- An NBN corporation has reasonable grounds to believe that the CSP would fail to comply with the terms and conditions on which the NBN corporation complies, such as if the CSP is not creditworthy; or repeatedly fails to comply with the terms and conditions on which the same or similar supply has been provided previously.
- An NBN corporation has reasonable grounds to believe that the CSP would fail to protect the integrity of a telecommunications network; or the safety of individuals working on, or using services supplied by means of, a telecommunications network or a facility.

As with paragraph 7(m), these new exception circumstances ensure that there is no inconsistency between supply requirements under Part XIC of the CCA and requirements under the SIP regime (as it specifically applies to an NBN corporation).

Process or form requirements under SIP access agreements

New paragraph 7(o) provides an exception to supply obligations where a request for the supply of an eligible service does not comply with any reasonable process or form requirements for the request of supply of an eligible service as set out in a relevant SIP's access agreement with an access seeker or the terms and conditions published in accordance with section 360X of the Act, including where a request includes invalid, inaccurate or

incomplete information that would prevent a relevant SIP from fulfilling the supply obligation.

An ‘access agreement’ is a contract between an access provider and an access seeker relating to the supply of declared services. Section 360X of the Act requires SIPs to make standard offers for the supply of wholesale services available on their websites, including service prices and maximum timeframes for connection and fault rectification. Under subsection 360Q(9) of the Act, if a CSP submits a request for supply to a SIP that is based on the terms and conditions in the SIP’s standard offer as available on its website, then the SIP must comply with the request.

This circumstance is included to cover situations where a CSP fails to follow process or form requirements under a SIP access agreement (such as NBN Co Wholesale Broadband Agreements (WBAs)). This will protect SIPs from an obligation to supply where a CSP has signed the access agreement, but does not comply with terms and conditions, making it difficult, costly or impossible for the SIP to supply the service. The SIP is expected to work with the CSP to try and resolve any issues (such as confusion on behalf of the CSP) before utilising this exception. The outcome of this new exception circumstance is more efficient usage of resources for SIPs.

Transfer of eligible services

New paragraph 7(p) provides an exception to supply obligations where processing a request for the supply of an eligible service would result in the transfer of an eligible service that a relevant SIP is already supplying to another carriage service provider; and the requesting carriage service provider has not undertaken all actions required under any industry standard, industry code or supplementary industry guideline applicable to such a transfer.

This circumstance captures situations where a SIP is transferring an eligible service provided to an end-user from one CSP to another CSP. The requesting CSP is required to follow industry standards, codes, or guidelines, such as, in the case of services supplied over the National Broadband Network, Communications Alliance’s *C647:2023 NBN Access Transfer* (this may be updated periodically). This is to ensure appropriate procedures are followed to minimise the amount of time an end-user’s service may be out of action, and to prevent attempts at fraud from proceeding. In the first instance, the SIP is expected to work with CSPs who may not follow the requirements of any standard, code or guideline due to a misunderstanding. If there are repeated failures to follow requirements, this exception is available to SIPs.

Within the industry, a service ‘substitution’ is sometimes referred to separately from a service transfer. For the purpose of this Instrument, a service ‘substitution’ is taken to be covered by the transfer exception circumstance. A substitution still involves a transfer from one CSP to another requesting CSP, but the end-user’s service may need to be cancelled and a new service supplied in order to fulfil the specific requirements of the service/product ordered or

requirements of the end-user. Just as with transfers, CSPs are expected to follow any industry standards, codes or guidelines that are applicable to situations where a substitution of a service occurs.

The outcome of this new exception circumstance is more efficient usage of resources for SIPs, more efficient and accurate transfer of services for end-users, and a reduction in fraud instances.

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 2024

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.

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 33 SIPs as of April 2024.

Under Part 19 of the Act, all SIPs are currently bound by default obligations to connect premises (subsection 360P(1)) and to supply wholesale services on reasonable request from a CSP on behalf of an end-user (subsection 360Q(1)). The wholesale services should allow the CSP to supply the end-user with high-speed broadband and, on fixed-line and fixed wireless networks, support a voice service.

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

The *Telecommunications (Statutory Infrastructure Providers—Circumstances for Exceptions to Connection and Supply Obligations) Determination 2024* (the Instrument) is made under subsections 360P(3) and 360Q(4) of the Act. The Instrument describes specific circumstances where a SIP is excepted from these obligations. The Instrument re-makes a previous instrument, made in 2021, that will self-repeal on 28 May 2024.

The primary objective of the Instrument is to provide clarity and consistency for stakeholders by describing circumstances where SIPs are not obliged to connect premises and/or supply wholesale services. This provides a consistent baseline standard 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.

Conclusion

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