**EXPLANATORY STATEMENT**

Issued by the authority of the Minister for Broadband, Communications

and the Digital Economy

*Telecommunications Act 1997*

***Telecommunications (Carrier Licence Exemption — ICON, SSICT and ACTEW Networks) Determination 2013 (No. 1)***

Legislative Authority

Section 42 of the *Telecommunications Act 1997* (the Act) establishes a basic prohibition on the use of network units to supply carriage services to the public without a carrier licence or a nominated carrier declaration (which enables a nominated telecommunications carrier to assume the responsibilities imposed on the owner of the network units).

Supplying a carriage service to the public means supplying carriage services to people outside the ‘immediate circle’ of the network unit owner, as defined in section 23 of the Act. A person's immediate circle includes, for example, a person's employee or partner.

Paragraph 51(1)(c) of the Act enables the Minister for Broadband, Communications and the Digital Economy (the Minister) to determine that section 42 of the Act does not apply in relation to a specified use of a network unit (or group of network units).

Purpose

The purpose of the *Telecommunications (Carrier Licence Exemption — ICON, SSICT and ACTEW Networks) Determination 2013 (No. 1)* (the Determination) is to allow the Commonwealth, the Government of the Australian Capital Territory (ACT) and ACTEW Corporation to make designated parts of their respective ACT networks (which exist as at the date of the exemption), available to varying degrees to one another for limited specified uses without the need to meet the licensing requirements of section 42 of the Act.

The exemptions reflect practical arrangements for the efficient and secure provision of telecommunications services in the ACT, particularly in respect of government operations, and to ensure there are resilient and secure communications arrangements in place for critical infrastructure operated by ACTEW Corporation.

The exemptions are limited to:

* specified network links in place at the time of the commencement of the Determination; and
* specified uses relating to the core government functions of the Commonwealth and the ACT Government and, in the case of ACTEW Corporation, network resilience.

Background

Under the Act, scope exists for persons to operate a range of telecommunications facilities in specified circumstances without the need for a carrier licence. In particular, a person can generally operate facilities without being subject to carrier licensing requirements, where it is not supplying services to the public (section 42). A person is able to supply services to other persons within its immediate circle, which includes employers or partners (section 23). The arrangements provide persons with flexibility to meet their own telecommunications needs where this is feasible and attractive for them to do so, with minimal regulation.

As a result of this approach, for example, governments in Australia are able to operate significant networks for use by government employees. In addition, the Act contains a range of statutory exemptions for specified entities to operate telecommunications facilities, including transport authorities (section 47) and electricity supply bodies (section 49). The Commonwealth, the ACT Government and ACTEW Corporation each operate private optical fibre networks in the ACT under these statutory exemptions.

By contrast, under the Act an owner of a network unit must have a carrier licence or a nominated carrier declaration if the network unit is used to supply a carriage service to the public, unless an exemption applies.

Paragraph 51(1)(c) of the Act enables the Minister for Broadband, Communications and the Digital Economy (the Minister) to determine that section 42 of the Act does not apply in relation to a specified use of a network unit.

The three networks subject to the Determination are: the Intra-Government Communications Network (ICON) owned by the Commonwealth and managed on its behalf by the Department of Finance and Deregulation; the Shared Services ICT network (SSICT) owned by the ACT Government and managed on its behalf by the Commerce and Works Directorate; and the ACTEW network owned by ACTEW Corporation and operated by a joint venture entity ActewAGL. ICON and SSICT provide dedicated point-to-point links to their respective Government agencies across the ACT. The ACTEW network supports the delivery of utility services in the ACT.

The Determination enables access only to designated parts of the respective networks by the specified entities for specified purposes to meet practical needs.

First, ACTEW Corporation and ActewAGL, which are commercial entities fully or partly owned by the ACT Government, will be able to make limited use of the Designated Category A ICON Communications Infrastructure as specified in item 1 of Schedule 1 to support network resilience for the purpose of managing and operating essential services namely, water, sewerage, drainage, electricity and gas services.

Second, the Determination will allow the ACT Government and non-commercial ACT Government authorities and institutions to use the Commonwealth’s Designated Category B ICON Communications Infrastructure, as specified in item 2 of Schedule 1, to carry out ACT Government public functions and duties such as provision of government administration, public education, public health care, and emergency services management within the ACT.

Third, the Determination allows the Commonwealth and non-commercial institutions and authorities of the Commonwealth to use the ACT's Designated SSICT Communications Infrastructure, as specified in Schedule 2, to carry out public functions and duties (for example, the provision of government administration).

Fourth, the Determination allows the ACT Government and non-commercial institutions and authorities of the ACT Government to use Designated ACTEW Corporation Communications Infrastructure, as specified in Schedule 3, to carry out public emergency management functions and duties.

The scope for each network to be used by another of the specified entities is summarised in the following table. The table is not a complete description of the exemption. For full details please refer to the Determination itself and as appropriate, commentary below.

|  |  |  |  |
| --- | --- | --- | --- |
| **User**  **Network** |  |  |  |
| Commonwealth | ACT Government | ActewAGL |
| ICON | Own use | Yes, for public policy purposes | Yes, for resilience of critical utility services |
| SSICT | Yes, for public policy purposes | Own use | No |
| ACTEW | No | Yes, for public emergency management | Own use |

The exemptions are intended to enable the Commonwealth, the ACT Government and ACTEW Corporation to use each other’s communications infrastructure where needed and thereby take advantage of efficiencies and security benefits. The exemptions are limited in terms of geography, persons, purpose and duration and are not expected to have a material impact on the competitive telecommunications market in the ACT. The exemptions will provide flexibility to the entities concerned in using telecommunications infrastructure within the ACT to perform their functions.

Consultation

On 6 February 2013, the Department of Broadband, Communications and the Digital Economy (the Department) published a draft determination on its website for public comment. The department contacted key stakeholders in the telecommunications sector as well as the Australian Communications and Media Authority and the Australian Competition and Consumer Commission.

Two confidential submissions were received. The submissions expressed concern about the broad nature of the proposed exemptions and the potential for the specified parties to increase their usage of the respective networks over time. As a consequence, it was submitted that the exemptions as proposed could harm the competitive supply of telecommunications infrastructure in the ACT.

In light of analysis of the submissions and further consultation with the parties concerned, the draft determination was revised to more precisely specify particular parts of the respective networks that could be used by the parties concerned and the purposes for which the networks could be used by the parties. The draft was also amended to provide more specificity over the records to be created and retained regarding the exempted networks.

The Determination is a legislative instrument for the purposes of the *Legislative Instruments Act 2003* (LIA)*.*

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

***Statement of Compatibility with Human Rights***

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

***Telecommunications (Carrier Licence Exemption — ICON, SSICT and ACTEW Networks) Determination 2013 (No. 1)***

This Determination 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 of the Determination**

Paragraph 51(1)(c) of the *Telecommunications Act 1997* (the Act) enables the Minister to determine that the carrier licensing requirements under section 42 of that Act do not apply in relation to a specified use of a network unit.

This Determination exempts specified uses of specified network units owned by the Commonwealth and the Government of the Australian Capital Territory (ACT) respectively, from the scope of section 42. The specified uses relate to:

* use of specified network units by the Commonwealth or the Government of the ACT, or non-commercial authorities or institutions of those governments for undertaking public functions and duties within the ACT; and
* use of specified network units by ACTEW Corporation and ActewAGL to support network resilience for critical utility services within the ACT.

This Determination also exempts use by the ACT Government of specified telecommunications infrastructure owned by ACTEW Corporation for public emergency management functions from the scope of section 42.

This Determination is intended to support the practical, efficient and secure supply of communications services within the ACT by the Commonwealth, the ACT Government and ACTEW Corporation to support their various activities. No human rights issues were raised during consultation.The specified exempt uses of network units do not raise any human rights issues.

**Human rights implications**

This Determination does not engage any of the applicable rights or freedoms.

**Conclusion**

This Determination is compatible with human rights as it does not raise any human rights issues.

**ATTACHMENT**

**Details of the *Telecommunications (Carrier Licence Exemption — ICON, SSICT and ACTEW Networks) Determination 2013 (No. 1)***

**Clause 1 – Name of the Determination**

Clause 1 of the Determination provides that the name of the Determination is the *Telecommunications (Carrier Licence Exemption — ICON, SSICT and ACTEW Networks) Determination 2013 (No. 1).*

**Clause 2 – Commencement**

Clause 2 provides that the Determination commences on the day after it is registered on the Federal Register of Legislative Instruments.

The Determination is subject to the ordinary sunsetting arrangements under Part 6 of the *Legislative Instruments Act 2003*, meaning that the determination will sunset (i.e. expire) on the first 1 October occurring 10 years after the legislative instrument was registered on the Federal Register of Legislative Instruments.

**Clause 3 – Definitions**

Clause 3 establishes the key definitions used in the Determination.

The term ***Act*** is defined by reference to the *Telecommunications Act 1997*.

The full name of ***ACTEW Corporation*** is provided, together with its Australian Company Number. The term is used in the definition of ‘Designated ACTEW Corporation Communications Infrastructure’ (as explained below) to describe the entity which owns that infrastructure. The term is also used in the operative provisions at clause 4, to identify ACTEW Corporation as a party who can use exempt ICON infrastructure for specified purposes, and at clause 8 in relation to the exemption for the Designated ACTEW Corporation Communications Infrastructure.

The term ***ActewAGL*** is defined by reference to specified organisations and each of their respective Australian Business Numbers, and any related bodies corporate of these organisations. Where applicable, the related trading name has been included. These organisations are responsible for the operation and management of various utility services in the ACT. The term is also used in the operative provisions at clause 4, to identify ActewAGL as a party who can use exempt ICON infrastructure for specified purposes. This is described more fully below.

The term ***Designated ACTEW Corporation Communications Infrastructure*** is defined as those line links owned by ACTEW Corporation which are in existence at the commencement of this Determination and specified in item 1 of Schedule 3. These line links are exempted for specified use by the ACT Government as outlined in clause 8.

The term ***Designated Category A ICON Communications Infrastructure*** is defined as those line links owned by the Commonwealth which are in existence at the commencement of this Determination and specified in item 1 of Schedule 1. These ‘Category A’ line links are exempted for specified use by ACTEW Corporation and ActewAGL as outlined in clause 4.

The term ***Designated Category B ICON Communications Infrastructure*** is defined as those line links owned by the Commonwealth which are in existence at the commencement of this Determination and specified in item 2 of Schedule 1. These ‘Category B’ line links are exempted for specified use by the ACT Government as outlined in clause 5.

The term ***Designated ICON Communications Infrastructure*** is defined as the Designated Category A ICON Communications Infrastructure and the Designated Category B ICON Communications Infrastructure. It is merely intended as a collective reference for the two categories of exempted ICON networks. The term is used in the record keeping conditions outlined in clause 6, and the usage criterion under paragraphs 4(c), 5(c), and 7(1)(c).

The term ***Designated SSICT Communications Infrastructure*** is defined as those line links owned by the ACT Government which are in existence at the commencement of this Determination and specified in item 1 of Schedule 2. These line links are exempted for specified use by the Commonwealth as outlined in clause 7.

The term ***related body corporate*** is defined as having the same meaning given under section 50 of the *Corporations Act 2001*  (Corporations Act). The term is used in the third limb of the definition of ‘ActewAGL’. Section 50 of the Corporations Act provides that a body corporate which is:

* a holding company of another body corporate; or
* a subsidiary of another body corporate; or
* a subsidiary of a holding company of another body corporate;

then the first-mentioned body and the other body shall be treated as being related to each other.

The effect is that any entity which, for the purposes of the Corporations Act, is a related body corporate (e.g. a subsidiary) of the following entities will receive the benefit of the exemption granted at clause 4 of this Determination in respect of the exempted use of the Designated Category A ICON Communications Infrastructure:

* ACTEW Distribution Ltd;
* Jemena Networks (ACT) Pty Ltd;
* ActewAGL Generation Pty Ltd.

For example, this means that the use of the ICON network by a subsidiary of ACTEW Distribution Ltd would be permitted by the exemption where such use is to support network resilience for one or more of the purposes in paragraph 4(b) (e.g. managing the generation, transmission, distribution or supply of electricity).

To aid the reader, two notes are inserted at the end of clause 3 indicating that the terms ***carriage service***,and ***line link*** have the same meaning as in section 7 of the Act; and the term ***core function*** has the same meaning as in subsection 23(11) of the Act.

**Clause 4 – Exemption – Designated Category A ICON Communications Infrastructure**

Clause 4 provides an exemption to the Commonwealth Government from the requirements of section 42 of the Act in relation to specified uses of Designated Category A ICON Communications Infrastructure. The exemption enables the use of the Designated Category A ICON Communications Infrastructure by ACTEW Corporation and ActewAGL where such use is wholly or principally to support network resilience for the purposes of generation, management, transmission, distribution and supply of specified utility services.

For clarity, because of the manner in which the exemption is framed, secondary uses of the network unit for minor purposes which are ancillary or incidental to supporting network resilience will also be covered (e.g. an ACTEW employee making a personal telephone call over the Commonwealth network).

This exemption is similar in concept to the statutory exemption under section 49 of the Act (relating to electricity supply bodies). Under the statutory exemption at section 49, ACTEW Corporation is already permitted to operate and use its own network for the carriage of communications outside of its immediate circle for limited uses.

The use of the ICON infrastructure by ACTEW Corporation or ActewAGL must be authorised in writing by both the Commonwealth and ACTEW Corporation or ActewAGL (as applicable) so that access is appropriately documented and managed and limited to the persons and purposes specified (see paragraph 4(c)). This exemption is subject to the conditions at clause 6 as explained below.

**Clause 5 – Exemption – Designated Category B ICON Communications Infrastructure**

Clause 5 provides an exemption to the Commonwealth Government from the requirements of section 42 of the Act in relation to specified uses of Designated Category B ICON Communications Infrastructure. The exemption enables the use of the Designated Category B ICON Communications Infrastructure by the ACT Government and certain non-commercial authorities and institutions of the ACT Government, wholly or principally for undertaking public functions and duties. The purpose of the exemption is to support the practical, efficient, and secure supply of communications services, such as for provision of education, health or emergency services.

For clarity, because of the manner in which the exemption is framed, secondary uses of the network unit for minor purposes which are ancillary or incidental to the undertaking of public functions and duties will also be covered (e.g. an ACT government employee making a personal telephone call over the Commonwealth network).

The use of the ICON infrastructure by the ACT Government must be authorised in writing by both the Commonwealth and ACT Governments so that access is appropriately documented and managed and limited to the persons and purposes specified (see paragraph 5(c)). This exemption is subject to the conditions at clause 6 as explained below.

To support transparency and competitive neutrality, the exemption does not generally apply to use of the infrastructure by an authority or institution with a core function of carrying on a business. The exception to this is ACTEW Corporation. As an ACT government-owned corporation which has as its core function the carrying on of a business, the specified use of the ICON network by ACTEW Corporation is covered by a separate exemption (see clause 4).

**Clause 6 – Condition – ICON Communications Infrastructure**

The exemptions in clauses 4 and 5 are subject to the two conditions set out in clause 6, namely that the Commonwealth Department of Finance and Deregulation (as the department currently responsible for the ICON network) is required to:

1. within 28 days of the Determination taking effect, create documents which record the precise location of the exempted infrastructure (being the relevant infrastructure in existence as at the date the Determination comes into force); and
2. retain such records in a readable and useable format for the duration of the Determination.

Although the Department of Finance and Deregulation would be expected, in accordance with its usual Commonwealth record keeping obligations, to retain such type of records relating to its infrastructure, the condition provides industry with assurance that any new ICON infrastructure installed after the Determination commences (which would not be covered by the exemption) can be readily identified in connection with any compliance and enforcement activities by the Australian Communications and Media Authority (ACMA).

**Clause 7 – Exemption – Designated SSICT Communications Infrastructure**

Clause 7 provides an exemption to the ACT Government from the requirements of section 42 of the Act in relation to specified uses of the Designated SSICT Communications Infrastructure. The exemption enables the use of the Designated SSICT Communications Infrastructure by the Commonwealth Government and certain non-commercial authorities and institutions of the Commonwealth Government wholly or principally for undertaking public functions and duties. The purpose of the exemption is to support the practical, efficient, and secure supply of communications services, such as for provision of government administration.

For clarity, because of the manner in which the exemption is framed, secondary uses of the network unit for minor purposes which are ancillary or incidental to the undertaking of public functions and duties will also be covered (e.g. a Commonwealth employee sending a personal email over the SSICT network).

Paragraph 7(1)(c) imposes an additional requirement that the use of the Designated SSICT Communications Infrastructure by the Commonwealth must be authorised in writing by both the ACT and Commonwealth Governments so that access is appropriately documented and managed and limited to the persons and purposes specified.

The exemption granted under subclause 7(1) is conditional upon the ACT Government’s Commerce and Works Directorate (as the directorate currently responsible for the SSICT network):

1. within 28 days of the Determination taking effect, creating documents which record the precise location of the Designated SSICT Communications Infrastructure at the time the Determination comes into force; and
2. retaining such records in a readable and useable format for the duration of the Determination.

Although the ACT Government would be expected, in accordance with its usual record keeping obligations, to retain such type of records relating to its infrastructure, the condition provides industry with assurance that any new SSICT infrastructure installed after the Determination commences (which would not be covered by the exemption) can be readily identified in connection with any compliance and enforcement activities by the ACMA.

**Clause 8 – Exemption – Designated ACTEW Corporation Communications Infrastructure**

Clause 8 provides an exemption to ACTEW Corporation from the requirements of section 42 of the Act in relation to specified uses of the Designated ACTEW Corporation Communications Infrastructure. The exemption enables the use of the Designated ACTEW Corporation Communications Infrastructure by the ACT Government and certain non-commercial authorities and institutions of the ACT Government wholly or principally for the exercise or performance of a public emergency management function or duty. Access to Designated ACTEW Corporation Communications Infrastructure will support the practical, efficient and secure supply of telecommunications for emergency purposes, including rural fire services, in a cost effective manner.

Paragraph 8(1)(c) imposes an additional requirement that the use of the Designated ACTEW Corporation Communications Infrastructure by the ACT Government must be authorised in writing by both ACTEW Corporation and the ACT Government so that access is appropriately documented and managed and limited to the persons and purposes specified.

For clarity, because of the manner in which the exemption is framed, the use of the network unit for a secondary purpose which is ancillary or incidental to the undertaking of public functions and duties is also covered (e.g. an ACT government employee making a telephone call over the ACTEW network which relates to an administrative or personal matter).

The exemption granted under subclause 8(1) is conditional upon ACTEW Corporation

1. within 28 days of the Determination taking effect, creating documents which record the precise location of the Designated ACTEW Corporation Communications Infrastructure at the time the Determination comes into force; and
2. retaining such records in a readable and useable format for the duration of the Determination.

Although ACTEW Corporation would be expected, in accordance with its usual business practice, to retain such type of records relating to its infrastructure, the condition provides industry with assurance that any new ACTEW Corporation infrastructure installed after the Determination commences (which is not covered by the exemption) can be readily identified in connection with any compliance and enforcement activities by the ACMA.

**Schedules to the Determination**

There are three schedules to the Determination. In broad terms, the schedules describe the location (by suburb) of the endpoints of the line links which are the subject of the exemptions.

Schedule 1 is referenced in the definitions at clause 3 of ‘Designated Category A ICON Communications Infrastructure’ and ‘Designated Category B ICON Communications Infrastructure’.

Schedule 2 is referenced in the definition at clause 3 of ‘Designated SSICT Communications Infrastructure’.

Schedule 3 is referenced in the definition at clause 3 of ‘Designated ACTEW Corporation Communications Infrastructure’.

The routes are described in broad terms to minimise the potential for malicious damage to what is critical infrastructure. As such, it is not considered appropriate to detail the precise location of each line link which comprises the exempted network units in either the Determination or this explanatory statement, because they will be publicly accessible documents.

In the schedules there are several instances where the listed Location A and Location B points (being the endpoints for one or more links) are the same. For example in Schedule 2, the location endpoints for the line links in item 1.3  and 1.4 each cover Canberra City in the ACT. These are not duplicate entries; rather they reflect separate line links which are situated in different areas within that suburb.

As a condition of the relevant exemption, the network owners will be required to prepare and retain documents recording the precise location of the line links (i.e. the geographical coordinates of each endpoint of a line link) comprising the infrastructure which is the subject of the exemption. Should it be necessary from a telecommunications regulatory compliance and/or enforcement purpose, detailed network information would be made available to the ACMA on a confidential basis.

**Schedule 1 – Locations – Designated ICON Communications Infrastructure**

Two items form Schedule 1 to the Determination. The first item at Schedule 1 is a table which sets out the locations of the endpoints of the line links comprising the Category A Designated ICON Communications Infrastructure. The two locations listed in each row of the table identify the line links which are owned by the Commonwealth and are able to be used by ACTEW Corporation or ActewAGL in accordance with the exemption in clause 4.

Similarly, the second item at Schedule 1 is a table which sets out the locations of the endpoints of the line links comprising the Category B Designated ICON Communications Infrastructure. The two locations listed in each row of the table identify the line links which are owned by the Commonwealth and are able to be used by the ACT Government in accordance with the exemption in clause 5.

**Schedule 2 – Locations – Designated SSICT Communications Infrastructure**

Schedule 2 is a table which sets out the locations of the endpoints of the line links comprising the Designated SSICT Communications Infrastructure. The two locations listed in each row of the table designate line links which are owned by the ACT Government and are able to be used by the Commonwealth in accordance with the exemption in clause 7.

**Schedule 3 – Locations – Designated ACTEW Corporation Communications Infrastructure**

Schedule 3 is a table which sets out the locations of the endpoints of the line links comprising the Designated ACTEW Corporation Communications Infrastructure. The two locations listed in each row of the table designate line links which are owned by ACTEW Corporation (as defined in clause 3) and are able to be used by the ACT Government in accordance with the exemption in clause 8.