

## **EXPLANATORY STATEMENT**

Issued by the authority of the Minister for Communications

*Telecommunications Act 1997*

*Telecommunications (Carrier Licence Exemption) (ICON, DDTS, Electricity and Water Distribution) (Use for specified purposes) Determination 2023*

### **Authority**

Paragraph 51(1)(c) of the *Telecommunications Act 1997* (the Act) allows the Minister to determine that section 42 of the Act does not apply in relation to a specified use of a network unit.

Section 42 of the Act prohibits the owner of a network unit from using the network unit to supply carriage services to the public unless the owner holds a carrier licence or a nominated carrier declaration is in force (which enables a nominated telecommunications carrier to assume the responsibilities imposed on another entity in relation to specified network units).

The Determination is a legislative instrument for the purposes of the *Legislation Act 2003* (Cth).

### **Purpose**

The purpose of the *Telecommunications (Carrier Licence Exemption) (ICON, DDTS, Electricity and Water Distribution) (Use for specified purposes) Determination 2023* (the determination) is to exempt specified uses of network units owned by the Commonwealth (specifically the Intra Government Communications Network (ICON)), the Australian Capital Territory (ACT) Government's Digital Data and Technology Solutions Group (DDTS), ActewAGL, and Icon Water from the carrier licensing requirement in section 42 of the Act.

In general terms, the exempted entities will not be required to have a carrier licence, nor will a nominated carrier declaration need to be in force, in respect of the other parties' use of each other's network units for, as appropriate, the performance of public duties, responding to national emergencies and for managing the supply and transmission of electricity, gas, water, sewerage, and storm water drainage services in the ACT.

The exemption is made subject to conditions requiring each of the parties to the exemption to provide annual reports on the use of their networks to the Australian Communications and Media Authority (ACMA). The reporting requirements are designed to assist compliance monitoring.

The Commonwealth, ACT Government and the ACT's public utilities share telecommunications infrastructure for public purposes, thereby avoiding the regulatory costs that would arise were they required to obtain a carrier licence, or build duplicate infrastructure to avoid those regulatory costs. The exemption allows this sharing to occur while maintaining the security of the Commonwealth ICON network. ICON provides telecommunications services to Commonwealth agencies within the ACT and it is critical the

network has a high degree of physical protection. It would be contrary to the public interest if the ICON network were subject to access requirements in the Act.

The exemption will not adversely affect the long-term interests of end-users or have anti-competitive effects on the supply of telecommunications services. The exempted entities do not operate in commercial telecommunications markets, nor provide telecommunications services directly to end-users. The exemption is limited to network sharing between those entities.

In reliance of subsection 33(3) of the *Acts Interpretation Act 1901*, the Determination repeals the *Telecommunications (Carrier Licence Exemption — ICON, SSICT and ACTEW Networks) Determination 2013 (No. 1)* (the 2013 Determination) which served the same purpose of granting an exemption. The 2013 Determination was due to expire on 1 October 2023.

### Background

On 19 April 2013, the then Communications Minister made the 2013 Determination to exempt ICON, the ACTEW Corporation, which at the time provided electricity, gas and water services, and DDTS's predecessor (then known as SSICT) from requiring a carrier licence to provide each other with specified communications services.

In making the 2013 Determination, the then Minister considered that it was appropriate for an exemption to be granted, as it would not adversely affect the long-term interests of end-users to grant such an exemption, nor would such an exemption have anti-competitive effects on the supply of telecommunications services. This was because the ICON and ACT Government did not operate in commercial markets, nor provide services directly to end-users, and the use of network units by ACTEW was limited to support network resilience for critical utility services within the ACT. The reasons for granting the 2013 Determination have not altered in any significant respect.

As a result, the Determination is in largely the same terms as the 2013 Determination, which was to expire on 1 October 2023. However, adjustments have been made to provide the parties to the exemption greater flexibility to provide services through alternative line links. The Determination also updates the corporate identities of the entities that are covered by the new Determination to reflect name changes. It also allows the exempted entities to share infrastructure to respond to national emergencies.

### Impact Analysis

The Office of Impact Analysis has advised that this proposal, with reference number OIA23-05501, is unlikely to have a more than minor impact. As such, the preparation of an Impact Analysis was not required.

### 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 in **Attachment A**.

## Consultation

In granting this Determination, the Minister sought the views of:

- the ACMA
- the Australian Competition and Consumer Commission
- the telecommunications industry in Australia, through Communications Alliance
- the Attorney-General's Department
- the Department of Finance
- the DDTS
- Icon Water, and
- ActewAGL.

Details of the Determination are set out in Attachment B.

## **ATTACHMENT A**

### ***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, DDTS, Electricity and Water Distribution) (Use for specified purposes) Determination 2023***

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 obligations under section 42 of that Act do not apply in relation to a specified use of a network unit.

Section 42 of the Act prohibits the owner of a network unit from using the network unit to supply carriage services to the public unless the owner holds a carrier licence or a nominated carrier declaration is in force (which enables a nominated telecommunications carrier to assume the responsibilities imposed on another entity in relation to specified network units).

The purpose of the *Telecommunications (Carrier Licence Exemption) (ICON, DDTS, Electricity and Water Distribution) (Use for specified purposes) Determination 2023* (the determination) is to exempt specified uses of network units owned by the Commonwealth (specifically the Intra Government Communications Network (ICON)), the Australian Capital Territory (ACT) Government's Digital Data and Technology Solutions Group (DDTS), ActewAGL, and Icon Water from the carrier licensing requirement in section 42 of the Act.

In general terms, the exempted entities will not be required to have a carrier licence, nor will a nominated carrier declaration need to be in force, in respect of the other parties' use of each other's network units for, as appropriate, the performance of public duties, responding to national emergencies and for managing the supply and transmission of electricity, gas, water, sewerage, and storm water drainage services in the ACT.

The exemption is made subject to conditions requiring each of the parties to the exemption to provide annual reports on the use of their networks to the Australian Communications and Media Authority (ACMA). The reporting requirements are designed to assist compliance monitoring.

The Commonwealth, ACT Government and the ACT's public utilities share telecommunications infrastructure for public purposes, thereby avoiding the regulatory costs that would arise were they required to obtain a carrier licence, or build duplicate infrastructure to avoid those regulatory costs. The exemption allows this sharing to occur while maintaining the security of the Commonwealth ICON network. ICON provides telecommunications services to Commonwealth agencies within the Australian Capital Territory and it is critical the network has a high degree of physical protection. It would be

contrary to the public interest if the ICON network were subject to access requirements in the Act.

The exemption will not adversely affect the long-term interests of end-users or have anti-competitive effects on the supply of telecommunications services. The exempted entities do not operate in commercial telecommunications markets, nor provide telecommunications services directly to end-users. The exemption is limited to network sharing between those entities.

The replacement determination is in largely the same terms as the *Telecommunications (Carrier Licence Exemption — ICON, SSICT and ACTEW Networks) Determination 2013 (No. 1)* (the 2013 Determination), which was to expire on 1 October 2023. The reasons for granting the 2013 Determination have not altered in any significant respect. However, adjustments have been made to provide exempted entities with greater flexibility to provide services through alternative line links. The Determination also updates the corporate identities of the entities that are covered by the new Determination to reflect name changes. It also allows the exempted entities to share infrastructure to respond to national emergencies.

### **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.

**Details of the *Telecommunications (Carrier Licence Exemption) (ICON, DDTS, Electricity and Water Distribution) (Use for specified purposes) Determination 2023***

**Section 1 – Name of the Determination**

Section 1 of the Determination provides that the name of the Determination is the *Telecommunications (Carrier Licence Exemption) (ICON, DDTS, Electricity and Water Distribution) (Use for specified purposes) Determination 2023*.

**Section 2 – Commencement**

Section 2 provides that the Determination commences on the day after it is registered on the Federal Register of Legislation.

**Section 3 – Authority**

Section 3 provides that this instrument is made under paragraph 51(1)(c) of the *Telecommunications Act 1997*.

**Section 4 – Definitions**

Section 4 sets out the key definitions used in the Determination.

Two notes have been inserted at the beginning of the section. The first indicates that a number of expressions used in this Determination are defined in section 7 of the *Telecommunications Act 1997*, and specifically identifies that the terms **ACMA** and **carriage service** have the same meaning as in section 7 of the Act. The second is to clarify the expression **core function** has the same meaning as subsection 23(11) of the Act.

The term **Act** means the *Telecommunications Act 1997* (Cth).

The term **ActewAGL Corporation** is defined by its relevant entities and their respective Australian Company Number (ACN). ActewAGL was part of the ACTEW Corporation that was covered by the previous instrument, the *Telecommunications (Carrier Licence Exemption — ICON, SSICT and ACTEW Networks) Determination 2013 (No. 1)*.

The term **Designated ActewAGL Corporation Communications Infrastructure** is defined as telecommunications infrastructure comprising line links owned by an ActewAGL Corporation and located within the Australian Capital Territory.

The term **Designated ICON Communications Infrastructure** is defined to cover the Intra Government Communications Network (ICON) telecommunications infrastructure that is owned by the Commonwealth and located in the Australian Capital Territory.

The term **Designated DDTS Communications Infrastructure** is defined to cover the telecommunications infrastructure comprising line links that are owned by the Crown in right of the Australian Capital Territory and located within the Australian Capital Territory.

The term **DDTS Government Group** is defined to mean the Australian Capital Territory Government's Digital Data and Technology Solutions (DDTS) Group, or any other replacement group or agency responsible for the Territory's administration of the Designated DDTS Communications Infrastructure from time to time. The DDTS Group is a successor to Shared Services ICT (SSICT) that was covered by the previous instrument, the *Telecommunications (Carrier Licence Exemption — ICON, SSICT and ACTEW Networks) Determination 2013 (No. 1)*.

The term **Designated Water Corporation Communications Infrastructure** is defined to mean telecommunications infrastructure comprising line links that are owned by a Water Corporation (currently trading as Icon Water Limited) and located within the Australian Capital Territory.

The term **ICON Department** is defined to mean the Commonwealth Department of Finance or other replacement Commonwealth body or agency responsible for the Commonwealth's administration of the Designated ICON Communications Infrastructure from time to time.

The term **ICON Secretary** is defined to mean the agency head of the ICON Department, which is currently the Commonwealth Department of Finance.

The term **Permitted Electricity Services** is defined to mean any carriage service that is necessary or desirable for managing the generation, transmission, distribution or supply of electricity.

The term **Permitted Gas Services** is defined to mean any carriage service that is necessary or desirable for managing the transmission, distribution or supply of natural gas in a pipeline.

The term **Permitted Water Services** is defined to mean any carriage service that is necessary or desirable for managing the distribution of water, supply of sewerage services, and managing the supply of storm water drainage services.

The term **related body corporate** is defined as having the same meaning given under the *Corporations Act 2001* (Cth).

The term **Water Corporation** is defined as Icon Water Limited, trading as Icon Water identified with its Australian Company Number (ACN), and noted to be wholly owned by the Crown in right of the Australian Capital Territory. Icon Water was part of the ACTEW Corporation that was covered by the previous instrument, the *Telecommunications (Carrier Licence Exemption — ICON, SSICT and ACTEW Networks) Determination 2013 (No. 1)*.

## Section 5 – Schedules

Section 5 provides 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.

## Section 6 – Designated ICON Communications Infrastructure

Subsection 6(1) exempts the use of Designated ICON Communications Infrastructure (which by definition must be located in the Australian Capital Territory) by certain entities for particular listed purposes from the carrier licencing requirement in section 42 of the Act.

Paragraph 6(1)(a) grants, with respect to the use of the Designated ICON Communications Infrastructure, an exemption to the Crown in right of the Australian Capital Territory for: (i) the principal purpose of exercising or performing a public function or duty; and (ii) in connection with preparing, responding, or recovering from an emergency specified in a national emergency declaration within the meaning of the *National Emergency Declaration Act 2010*.

Paragraph 6(1)(b) grants, with respect to the use of Designated ICON Communications Infrastructure, an exemption to an authority or institution of the Australian Capital Territory other than authorities or institutions that carry on a business as a core function (as defined by subsection 23(11) of the Act) for (i) the purposes of exercising or performing a public function or duty; and (ii) in connection with preparing, responding, or recovering from an emergency specified in a national emergency declaration within the meaning of the *National Emergency Declaration Act 2010*.

Paragraph 6(1)(c) grants, with respect to the use of Designated ICON Communications Infrastructure, an exemption to an ActewAGL Corporation for the supply of Permitted Gas Services or Permitted Electricity Services.

Paragraph 6(1)(d) grants, with respect to the use of Designated ICON Communications Infrastructure, an exemption to a Water Corporation for the supply of Permitted Water Services.

Subsection 6(2) specifies two conditions to which the exemption is subject. The first, at paragraph 6(2)(a) is that the ICON Secretary (or an authorised representative) must provide a report to the ACMA by 30 September each year the instrument is in force, setting out: (i) in relation to Designated ICON Communications Infrastructure used during the reporting period: (A) the locations of the infrastructure as at the applicable report date; (B) the capacity of line links if the Designated ICON Communications Infrastructure is a line link; and (ii) the legal name and associated identifier (such as an ABN or ACN) of each user of the Designated ICON Communications Infrastructure at the applicable report date.

The second condition, set out at paragraph 6(2)(b) is that the uses of the Designated ICON Communications Infrastructure are to be authorised in writing by: (i) either the ICON Secretary, currently the Secretary of the Commonwealth Department of Finance, or an authorised representative of the ICON Secretary with respect to permitted use in subsection 6(1); and (ii) an authorised representative of the ACT Government with respect to the permitted use in paragraph 6(1)(a); (iii) an authorised representative of the relevant authority or institution with respect to the permitted use described in paragraph 6(1)(b); (iv) an authorised representative of the relevant ActewAGL Corporation with respect to the permitted use described in paragraph 6(1)(c); and (v) an authorised representative of the relevant Water Corporation with respect to the permitted use in paragraph 6(1)(d).



## **Section 7 – Designated DDTS Communications Infrastructure**

Subsection 7(1) exempts the use of Designated DDTS Communications Infrastructure (which by definition must be located in the Australian Capital Territory) by the Commonwealth from the carrier licencing requirements in section 42 of the Act: (i) for the purposes of exercising or performing a public function or duty; or (ii) in connection with preparing, responding, or recovering from an emergency specified in a national emergency declaration within the meaning of the *National Emergency Declaration Act 2010*.

Subsection 7(2) specifies two conditions for which the exemption is subject.

The first, at paragraph 7(2)(a) is that an authorised representative of the DDTS Government Group must provide a report to ACMA by 30 September each year the instrument is in force, setting out: (i) for each line in relation to Designated DDTS Communications Infrastructure used during the reporting period: (A) the locations of the infrastructure as at the applicable report date; (B) the capacity of those links; and (ii) the legal name and associated identifier (such as an ABN or ACN) of each user of the Designated DDTS Communications Infrastructure at the applicable report date.

The second condition, set out at paragraph 7(2)(b) is that the uses of the Designated DDTS Communications Infrastructure are to be authorised in writing by the following people: (i) an authorised representative of the ACT Government with respect to the permitted use in subsection 7(1); and (ii) The ICON Secretary or an authorised representative with respect to permitted use in subsection 7(1).

## **Section 8 – Designated ActewAGL Corporation Communications Infrastructure**

Subsection 8(1) exempts the use of Designated ActewAGL Communications Infrastructure (which by definition must be located in the Australian Capital Territory) by certain entities for particular listed purposes from the requirements of section 42 of the Act. Section 42 requires that a communications network unit is not to be used to supply communications to the public without the network owner having a carrier licence or being subject to a nominated carrier declaration.

Paragraph 8(1)(a) grants, with respect to the use of Designated ActewAGL Communications Infrastructure, an exemption to the Crown in right of the Australian Capital Territory for: (i) the purposes of exercising or performing a public function or duty; and (ii) in connection with preparing, responding, or recovering from an emergency specified in a national emergency declaration within the meaning of the *National Emergency Declaration Act 2010*.

Paragraph 8(1)(b) grants, with respect to the use of Designated ActewAGL Communications Infrastructure, an exemption to an authority or institution of the Australian Capital Territory other than authorities or institutions that carry on a business as a core function (as defined by subsection 23(11) of the Act) for: (i) the purposes of exercising or performing a public function or duty; and (ii) in connection with preparing, responding, or recovering from an emergency specified in a national emergency declaration within the meaning of the *National Emergency Declaration Act 2010*.

Paragraph 8(1)(c) grants an exemption to a Water Corporation for the supply of Permitted Water Services.

Subsection 8(2) specifies two conditions to which the exemption is subject. The first, at paragraph 8(2)(a) is that each ActewAGL Corporation must provide a report to ACMA by 30 September each year the instrument is in force, setting out: (i) in relation to Designated ActewAGL Corporation Communications Infrastructure used during the reporting period: (A) the locations of the infrastructure as at the applicable report date; and (B) the capacity of line links if the Designated ActewAGL Corporation Communications Infrastructure is a line link; and (ii) the legal name and associated identifier (such as an ABN or ACN) of each user of the Designated ActewAGL Corporation Communications Infrastructure at the applicable report date.

The second condition, set out at paragraph 8(2)(b) is that the uses of the Designated ActewAGL Communications Infrastructure are to be authorised in writing by the following people: (i) an authorised representative of the ACT Government with respect to the permitted use in paragraph 8(1)(a); (ii) an authorised representative of the relevant authority or institution with respect to the permitted use described in paragraph 8(1)(b), and (iii) an authorised representative of the relevant Water Corporation with respect to the permitted use in paragraph 8(1)(c).

## **Section 9 – Designated Water Corporation Communications Infrastructure**

Subsection 9(1) exempts the use of Designated Water Corporation Communications Infrastructure (which by definition must be located in the Australian Capital Territory) by named entities for particular listed purposes from the requirements of section 42 of the Act. Section 42 requires that a communications network unit is not to be used to supply communications to the public without the network owner having a carrier licence or being subject to a nominated carrier declaration.

Paragraph 9(1)(a) grants an exemption to the Crown in right of the Australian Capital Territory for: (i) the purposes of exercising or performing a public function or duty; and (ii) in connection with preparing, responding, or recovering from an emergency specified in a national emergency declaration within the meaning of the *National Emergency Declaration Act 2010*.

Paragraph 9(1)(b) grants an exemption to an authority or institution of the Australian Capital Territory other than authorities or institutions that carry on a business as a core function (as defined by subsection 23(11) of the Act) for: (i) the purposes of exercising or performing a public function or duty; and (ii) in connection with preparing, responding, or recovering from an emergency specified in a national emergency declaration within the meaning of the *National Emergency Declaration Act 2010*.

Subsection 9(2) specifies two conditions to which the exemption is subject. The first, at paragraph 9(2)(a) is that each Water Corporation must provide a report to ACMA by 30 September each year the instrument is in force, setting out: (i) in relation to Designated Water Corporation Communications Infrastructure used during the reporting period: (A) the locations of the infrastructure as at the applicable report date; and (B) the capacity of line links if the Designated Water Corporation Communications Infrastructure is a line link; and (ii) the legal name and associated identifier (such as an ABN or ACN) of each user of the Designated Water Corporation Communications Infrastructure at the applicable report date.

The second condition, set out at paragraph 9(2)(b) is that the uses of the Designated Water Corporation Communications Infrastructure are authorised in writing by the following people: (i) the relevant Water Corporation with respect to the permitted use in paragraph 9(1); (ii) an authorised representative of the ACT Government with respect to the permitted use in paragraph 9(1)(a); and (iii) an authorised representative of the relevant authority or institution with respect to the permitted use described in paragraph 9(1)(b).

These conditions assist with compliance and help ensure that the intent of this instrument is not being breached during the exemption period.

### **Schedule 1 – Repeals**

Schedule 1 repeals in full the previous instrument, *Telecommunications (Carrier Licence Exemption — ICON, SSICT and ACTEW Networks) Determination 2013 (No. 1)*.