

EXPLANATORY STATEMENT

Approved by the Australian Competition and Consumer Commission

Telecommunications Act 1997

Telecommunications (Superfast Broadband Network Class Exemption) Determination 2025

Authority

The Australian Competition and Consumer Commission (**the ACCC**) has made the *Telecommunications (Superfast Broadband Network Class Exemption) Determination 2025 (the Instrument)* under subsection 142BD(2) and subsections 143A(1) and (2) of the *Telecommunications Act 1997 (the Telecommunications Act)*.

Subsection 142BD(2) of the Telecommunications Act empowers the ACCC to specify, by legislative instrument, a carriage service as a designated carriage service for the purpose of Part 8 of the Telecommunications Act.

Under subsections 143A(1) and (2) of the Telecommunications Act, the ACCC may, by legislative instrument, determine class exemptions from sections 142C or 143 of the Telecommunications Act. The ACCC previously made the *Telecommunications (Superfast Broadband Network Class Exemption) Determination 2020*, which commenced on 27 August 2020 and expires five years from the day it commenced.

Purpose and operation of the Instrument

On 14 May 2020, the Parliament passed the *Telecommunications Legislation Amendment (Competition and Consumer) Act 2020*. This Act amends the Telecommunications Act and gives superfast fixed-line network operators the option of operating on a functionally separated basis, rather than a structurally separated basis as had been required before the legislative reforms. This can be by way of an eligible network operator electing to be bound by a deemed functional separation undertaking or the network operator lodging a customised functional separation undertaking for the ACCC's approval.

Subsections 143A(1) and (2) of the Telecommunications Act provide that the ACCC may, by legislative instrument, make a determination exempting a particular class of persons from the separation requirements set out in sections 142C or 143 that would otherwise apply. Once made, persons within the class specified in such a determination can then elect to be bound by the class exemption rather than be subject to the separation requirements.

Paragraphs 143A(1)(d) and 143A(2)(d) of the Telecommunications Act provide that the exemptions given by a determination made under subsections 143A(1) or (2) must be limited to persons, or associated groups, who have a maximum of 2,000 fixed-line residential customers, or if a higher number (not exceeding 12,000 residential customers) is specified in the regulations, that higher number. On 5 March 2022, the *Telecommunications Amendment (Local Access Lines—Class Exemptions) Regulations 2022* amended the *Telecommunications Regulations 2021* to specify the higher number of 12,000. The class exemption will cease to apply once this specified threshold is exceeded. In those circumstances, affected persons will then be required to operate either on a functionally separated basis in a form approved by the ACCC, or on a wholesale-only basis. The Instrument includes an obligation on persons who have elected to be bound by it to report annually to

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the ACCC on whether they remain below the maximum threshold.

Persons who elect to be bound by the Instrument are required to offer the Superfast Broadband Access Service (SBAS) on a non-discriminatory basis and to make publicly available the terms and conditions relating to price or a method of ascertaining price and other terms and conditions on which they offer to supply the SBAS to wholesale customers and prospective wholesale customers.

Long Term Interests of End-users

In deciding whether to make a determination under subsections 143A(1) or (2) of the Telecommunications Act, pursuant to subsection 143A(8), the ACCC must have regard to whether a determination would promote the long-term interests of end-users (LTIE) of carriage services or of services supplied by means of carriage services.

Under section 152AB of the *Competition and Consumer Act 2010*, to determine whether something is in the LTIE, the ACCC must consider whether it is likely to:

- promote competition in markets for listed services;
- achieve any-to-any connectivity in relation to carriage services that involve communication between end-users; and
- encourage the economically efficient use of, and the economically efficient investment in, telecommunications infrastructure.

The ACCC considers that the *Telecommunications (Superfast Broadband Network Class Exemption) Determination 2020* has promoted competition, and is satisfied that the Instrument will continue to promote competition, through encouraging competitive entry of smaller superfast network operators and promote competition in retail and wholesale markets. The requirement for network operators to publish the price and non-price terms and conditions of their SBAS offers will facilitate retail competition on these networks by providing transparency to prospective wholesale customers on the terms and conditions on which the service is offered.

The ACCC does not consider that the Instrument would have any bearing on any-to-any connectivity.

The ACCC considers that the *Telecommunications (Superfast Broadband Network Class Exemption) Determination 2020* has reduced the disproportionate regulatory cost burden on operators of smaller networks of being structurally or functionally separated when participating in superfast broadband markets, enabling them to further invest in competitive infrastructure through increasing the reach of their networks and improving the quality of services provided to end-users. The ACCC is satisfied that the Instrument will continue to promote ongoing investment in small networks and will enable continuity in the supply of superfast broadband services for consumers connected to them.

The ACCC considers that competition will continue to be safeguarded by:

- the legislated conditions in subsection 143A(3) of the Telecommunications Act and the limitations of the exemption;
- the requirement for new network operators to provide the declared SBAS, which allows the ACCC to set terms and conditions of access including wholesale price; and
- the ability for the Minister for Communications to make rules, standards and benchmarks in relation to Statutory Infrastructure Providers pursuant to sections 360U and 360V of the Telecommunications Act.

Further, the ongoing deployment of 5G mobile technology and the provision of high-speed fixed wireless broadband services will increasingly provide a competitive constraint on superfast fixed line

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broadband networks for some customer segments where these wireless networks are available. A provision-by-provision description of the Instrument is set out in the notes at **Attachment A**.

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

Documents incorporated by reference

The Instrument incorporates the following Acts as in force from time to time, as permitted by subsection 589(1) of the Telecommunications Act (including by the adoption of definitions), or otherwise refers to them:

- the *Acts Interpretation Act 1901*;
- the *Competition and Consumer Act 2010*;
- the *Legislation Act 2003*;
- the Telecommunications Act; and
- the *Telecommunications Legislation Amendment (Competition and Consumer) Act 2020*

These Acts are available free of charge at www.legislation.gov.au.

The Determination also incorporates regulations made for the purpose of subparagraphs 143A(1)(d)(ii) or 143A(1)(e)(ii) of the Telecommunications Act as in force from time to time and notwithstanding that such regulations do not exist at the time the Instrument was made (as permitted by subsection 589(2) of the Telecommunications Act).

The Determination also incorporates a declaration made by the ACCC under subsection 152AL(3) of the *Competition and Consumer Act 2010* in respect of the SBAS, as in force from time to time (as permitted by subsection 589(2) of the Telecommunications Act). This may be accessed free of charge from the ACCC's website at www.accc.gov.au. At the time the Instrument was made, there was a declaration in force (the current SBAS Declaration was made by the ACCC on 19 July 2021).

Consultation

Before the Instrument was made, the ACCC was satisfied that consultation was undertaken to the extent appropriate and reasonably practicable, in accordance with section 17 of the *Legislation Act 2003*.

On 29 April 2025, the ACCC sought feedback on a draft version of the Instrument included in an accompanying consultation paper. Interested stakeholders were invited to make submissions to the ACCC by 28 May 2025 including in respect of the draft instrument.

The ACCC received one submission, from Superloop Limited. The consultation paper and Superloop's submission to the consultation process are available on the ACCC's website.

Superloop supported the ACCC making the Instrument in similar terms to the *Telecommunications (Superfast Broadband Network Class Exemption) Determination 2020*, including the new requirement on network operators to publish the price and non-price terms and conditions of their SBAS offers.

In its submission, Superloop noted that where a merger between one or more network operators that has elected to be bound by the Instrument results in the merged entity supplying fixed-line services to more than 12,000 residential customers, that company would immediately become ineligible for the class exemption. In these circumstances, the network operator would be required to either operate on a

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wholesale-only basis or give the ACCC a functional separation undertaking.

Given the time and financial resources involved in achieving either outcome, Superloop suggested that the ACCC should consider incorporating additional terms in the Instrument to provide the network operator a minimum 12-18 month transition period, during which the Instrument would continue to apply.

Section 143A of the Telecommunications Act sets out the limitations on the ACCC's power to make the Instrument. This includes that it can only apply to a person, either alone or with any associates, who supplies fixed-line carriage services to a number of residential customers not exceeding 12,000. Given this, the ACCC does not have the power to make the Instrument apply to a person that supplies fixed-line carriage services to more than 12,000 residential customers.

The ACCC expects that a merged entity will comply with all applicable laws after a merger. The ACCC expects that where a person anticipates exceeding the 12,000 residential customer threshold in the Instrument through the proposed acquisition of another SBAS provider, the person should immediately commence steps towards implementing functional separation

Regulatory impact assessment

A preliminary assessment of the proposal to make the Instrument was conducted by the Office of Impact Analysis (OIA), for the purposes of determining whether an Impact Analysis would be required. OIA advised that detailed analysis is not required under the Australian Government's Policy Impact Analysis Framework as the Instrument does not represent a significant difference from the status quo, based on the likely costs or benefits per annum to Australian businesses (OIA reference: OIA25-09556).

Statement of compatibility with human rights

This section of the explanatory statement is prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Instrument

This Instrument has been made by the ACCC under subsections 143A(1) and (2) and subsection 142BD(2) of the *Telecommunications Act 1997* to reduce the cost burden on smaller networks in participating in superfast broadband markets and to encourage investment in new broadband infrastructure. The Instrument specifies as a designated carriage service the SBAS for the purposes of Part 8 of the *Telecommunications Act 1997*. The specification of a designated carriage service is applicable to particular conditions or limitations set out in section 8 of the Instrument.

Human rights implications

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

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

Conclusion

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

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Notes to the *Telecommunications (Superfast Broadband Network Class Exemption) Determination 2025*

Section 1 – Name

This section provides for the Instrument to be cited as the *Telecommunications (Superfast Broadband Network Class Exemption) Determination 2025*.

Section 2 – Commencement

This section provides for the Instrument to commence on 27 August 2025.

Section 3 – Authority

This section provides that the Instrument is made under subsections 142BD(2), 143A(1) and 143A(2) of the *Telecommunications Act 1997*.

Section 4 – Definitions

This section defines key terms used in the Instrument, and indicates where other key terms are defined. A number of other terms used in the Instrument are defined in the *Telecommunications Act 1997*.

Section 5 – References to other instruments

This section provides that in the Instrument, unless the contrary intention appears:

- a reference to any other legislative instrument is a reference to that other legislative instrument as in force from time to time; and
- a reference to any other kind of instrument is a reference to that other instrument as in force from time to time.

Section 6 - Specification of designated carriage service

Subsection 142BD(2) of the *Telecommunications Act* empowers the ACCC to specify, by legislative instrument, a carriage service as a designated carriage service for the purpose of Part 8 of the *Telecommunications Act 1997*.

This section provides that the SBAS is a designated carriage service for the purposes of Part 8 of the *Telecommunications Act 1997*.

Section 7 – Exemption

This section is largely based on subsections 143A(1) and 143A(2) of the *Telecommunications Act 1997*, which specify the criteria that a person must meet to be exempt from the separation requirements under sections 142C or 143 of the *Telecommunications Act 1997*.

This section also provides for an automatic alignment of the maximum class exemption threshold of fixed-line carriage services to a higher number of residential customers (not exceeding 12,000) if specified in regulations made for the purpose of subparagraphs 143A(1)(d)(ii) or 143A(1)(e)(ii) of the *Telecommunications Act 1997*, and as in force from time to time.

Section 8 – Conditions and Limitations

This section largely replicates subsection 143A(3) of the *Telecommunications Act 1997* and sets out the conditions and limitations that apply where a person has elected to be bound by the Instrument and therefore exempt from the separation requirements under sections 142C or 143 of the *Telecommunications Act 1997*.

Paragraphs 8(a) to (c) of the Instrument replicate subsections 143A(3)(a) to (c) of the *Telecommunications Act 1997* and provide that a person who elects to be bound by the Instrument must ensure that the SBAS is available for supply to wholesale customers or prospective wholesale customers, that the person must not discriminate between the person's wholesale customers or prospective wholesale customers and must not discriminate in favour of itself in relation to the supply of the SBAS.

Paragraph 8(d) of the Instrument replicates subsection 143A(3)(d) of the *Telecommunications Act 1997* and specifies the activities where the person subject to the exemption must not discriminate between wholesale customers or prospective wholesale customers.

Paragraph 8(e) of the Instrument replicates subsection 143A(3)(e) of the *Telecommunications Act 1997* and specifies the activities where the person subject to the exemption must not discriminate in favour of itself.

Paragraphs 8(f) to (i) of the Instrument specify a number of other conditions pursuant to subsection 143A(3)(f) of the *Telecommunications Act 1997*. Paragraphs 8(f) and (g) of the Instrument provide for annual compliance reporting in respect of the number of residential customers of a person who elects to be bound by the Instrument. Paragraphs 8(h) and (i) of the Instrument require a person to whom the Instrument applies to notify the ACCC in writing within 14 days if the class exemption threshold set out in paragraphs 7(a) or (b) has been exceeded.

Paragraph 8(j) of the Instrument specifies that the person must publish the price and non-price terms and conditions on which it offers to supply the SBAS to wholesale customers and prospective wholesale customers.