



AUSTRALIAN
SENATE

Senate Standing Committee for the
Scrutiny of Delegated Legislation
Parliament House, Canberra ACT 2600
02 6277 3066 | sdlc.sen@aph.gov.au
www.aph.gov.au/senate_sdsc

12 November 2020

The Hon Paul Fletcher MP
Minister for Communications, Cyber Safety and the Arts
Parliament House
CANBERRA ACT 2600

Via email: Paul.Fletcher.MP@aph.gov.au

CC: dlo@communications.gov.au

Dear Minister,

**Telecommunications (Superfast Broadband Network Class Exemption)
Determination 2020 [F2020L01061]**

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) assesses all legislative instruments subject to disallowance, disapproval or affirmative resolution by the Senate against scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instrument, and the committee seeks your advice in relation to this matter.

Modification of primary legislation

Parliamentary oversight

Senate standing order 23(3)(j) requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be enacted via primary rather than delegated legislation). This includes where an instrument modifies or exempts persons or entities from the operation of primary legislation. In addition, Senate standing order 23(3)(k) requires the committee to scrutinise each legislative instrument as to whether it complies with any other ground relating to the technical scrutiny of delegated legislation. This includes whether an instrument limits parliamentary oversight.

Section 7 of the instrument exempts certain classes of persons from the requirements of sections 142C or 143 of the *Telecommunications Act 1997* (Telecommunications Act), relating to the supply of eligible services on a wholesale basis.

The instrument is made under subsections 143A(1) and (2) of the Telecommunications Act. Those provisions allow the Australian Competition and Consumer Commission to make a determination exempting specified classes of persons from the separation requirements in sections 142C or 143 of the Telecommunications Act.

Provisions of delegated legislation that modify or exempt persons or entities from the operation of primary legislation may limit parliamentary oversight, and may subvert the appropriate relationship between Parliament and the executive. The committee considers that such measures should ordinarily be included in primary legislation, unless a sound justification for the use of delegated legislation is provided. In this instance, the exemption in section 7 of the instrument appears to capture any person who meets the criteria in paragraphs 143A(1)(b)–(e) or 143A(2)(b)–(e) of the Telecommunications Act. It is therefore unclear why it is necessary to provide a power for exemptions to be made by delegated legislation when the criteria for the exemption is already specified in the primary legislation.

In addition, the committee is concerned that these measures appear to be intended to remain in force for at least 10 years (until the instrument sunsets under the *Legislation Act 2003*). The committee's longstanding view is that provisions which modify or exempt persons or entities from the operation of primary legislation should cease to operate no more than three years after they commence. This is to ensure a minimum degree of regular parliamentary oversight.

In light of this, from a scrutiny perspective, the committee considers that, if it is not proposed to set out the exemption on the face of the primary legislation, the instrument should at least be amended to specify that it ceases to operate three years after it commences. If it becomes necessary to extend the operation of the exemption, the committee considers that this should be done by amending the primary legislation or via a subsequent legislative instrument that is subject to disallowance and parliamentary scrutiny.

In light of the above, the committee requests your advice as to:

- **why it is considered necessary and appropriate to provide for the exemptions from the separation requirements in sections 142C or 143 of the Telecommunications Act in delegated, rather than primary, legislation; and**
- **if it is not proposed to set out these exemptions on the face of the primary legislation, whether the instrument could at least be amended to specify that the instrument ceases to operate three years after it commences.**

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **26 November 2020**.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to sdlc.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair

Senate Standing Committee for the Scrutiny of Delegated Legislation



PAUL FLETCHER MP

Federal Member for Bradfield

Minister for Communications,
Cyber Safety and the Arts

MC20-013402

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
Parliament House
Canberra ACT 2600

Dear ^{Concetta}Chair

Thank you for your letter dated 12 November 2020 concerning the *Telecommunications (Superfast Broadband Network Class Exemption) Determination 2020* ('the class exemption').

My responses to the matters raised by the committee are set out below.

Appropriateness of making the class exemption under delegated legislation

You sought reasons why it is necessary and appropriate to provide class exemptions from the carrier separation rules via delegated, rather than primary legislation.

Under sections 142C and 143 of the *Telecommunications Act 1997* (the Act), providers of superfast broadband services must be either structurally or functionally separated. In other words, they must either operate on a wholesale-only basis, or operate wholesale and retail businesses independently of each other. The provisions establish a default level regulatory playing field. Without this constraint, retail-only providers and NBN Co (which must operate on a wholesale-only basis) would be commercially disadvantaged compared to vertically integrated competitors.

Under section 143A of the Act, the Australian Competition and Consumer Commission (ACCC) can make class exemptions from the carrier separation rules. This power was introduced by the *Telecommunications Legislation Amendment (Competition and Consumer) Act 2020*, and the relevant provisions came into effect on 25 August 2020. The ACCC relied on this power to make the class exemption.

The provisions allow the ACCC, as the independent expert competition regulator, to grant class exemptions for smaller providers if it is in the long-term interests of end-users of telecommunications services (as required by paragraph 143A(8)(a) of the Act). The availability of a class exemption is limited by paragraphs 143A(1)(b)-(e) and 143A(2)(b)-(e) of the Act. Class exemptions can only apply to persons with no more than 2,000 fixed-line residential customers (or up to 12,000 if specified by regulation). A person must elect to be bound under a written notice given to the ACCC.

The Committee has suggested that section seven of the class exemption captures any person that meets the criteria in paragraphs 143A(1)(b)-(e) and 143A(2)(b)-(e) of the Act, and that it is therefore unclear why the exemptions should be made by delegated legislation. However, the provisions do provide useful flexibility in allowing the ACCC to tailor class exemptions to respond to market factors and individual circumstances. That flexibility would be lost if the class exemption parameters were contained only in primary legislation.

For instance, the ACCC can specify that the class exemption applies to persons with less than the 2,000 customer upper limit. The ACCC can add conditions and limitations to any class exemption. Indeed, section eight of the class exemption creates several conditions and limitations that go beyond those provided for by the Act. Beneficiaries of the class exemption must supply a service provided for by existing ACCC final access determinations relating to the supply of superfast broadband services on a non-discriminatory basis.

Further, section 33(3) of the *Acts Interpretation Act 1901* provides the makers of legislative instruments with power to repeal, rescind, revoke, amend, or vary such instruments. Subsequently, the ACCC will be able to monitor the implementation of the class exemption and make changes in response to changing circumstances. This is important given telecommunications is a dynamic market where technologies can rapidly change. If the class exemption was enshrined in primary legislation, the scope of the exemption could not shift in response to changing circumstances, and could create adverse market outcomes.

When the Parliament provided the ACCC with the power to establish a class exemption, it specified that class exemptions would be legislative instruments and thus remain subject to parliamentary disallowance. This ensures that the instrument and any subsequent modifications will be subject to scrutiny by the legislature.

The proposed ten-year duration of the ACCC Class Exemption

The Committee also raised concerns that the class exemption is intended to remain in force for at least 10 years (until the instrument sunsets in accordance with the *Legislation Act 2003*). The Committee has expressed the view that to ensure a minimum degree of parliamentary oversight, provisions which modify or exempt persons or entities from the operation of primary legislation should cease to operate no more than three years after they commence.

The ACCC has advised that it opposes amending the exemption instrument to specify that it ceases to operate three years after its commencement, for the following reasons.

First, the class exemption is only available to a narrow class of very small network operators to facilitate their entry into the market. This provides a limited exception to the costs of implementing and maintaining the structural or functional separation requirements (costs are disproportionately large for smaller network operators) that would otherwise apply. This will support the growth of their businesses which will promote investment, competition and consumer benefits in the telecommunications market over the longer term. This view was established through the required application of the long-term interests of end users test, for which the promotion of competition and efficient investment are key criteria.

Further, section four of the Act indicates that Parliament intends telecommunications to be regulated in a manner that ‘does not impose undue financial and administrative burdens on participants in the Australian telecommunications industry’. Due to the lengthy payback periods for recovering high construction costs of fibre networks, the ACCC is of the view that a three-year operation period is unlikely to provide sufficient certainty to prospective network operators. Consequently, if the duration of the class exemption was reduced to three years then this would potentially deter market entry and detract from the competitive outcomes (and associated consumer benefits) that would otherwise accrue in the sector.

In addition to being available to only a narrow class of very small network operators, the availability of the exemption falls away as exempted entities grow beyond the upper threshold of 2,000 residential services. Of the six small operators supplying less than the threshold number of lines that provided submissions to the ACCC’s June 2020 consultation on the class exemption, the majority indicated they expected to exceed the specified threshold within a period of five years. In this context, the duration of the class exemption is less important than the class threshold because it is not envisaged that network operators would typically derive a benefit from the relief granted by the class exemption for the full ten years.

Finally, as part of its regulatory responsibilities, the ACCC monitors the operation and market effects of the delegated legislation it makes, including to ensure it remains fit for purpose. As indicated above, if the ACCC forms the view that the class exemption is no longer operating as intended, it could exercise its powers under subsection 33(3) of the *Acts Interpretation Act 1901* to amend the exemption (including by amending the scope of the exempted class or by the insertion of a cessation provision) or otherwise by revoking the class exemption.

Consequently, the ACCC has expressed the view that while it understands and appreciates the Committee’s long-held views on these matters, it considers that the instrument should remain in its current form. I agree with that assessment.

Thank you again for bringing your concerns to my attention. I hope the information in this letter is of some help.

Yours sincerely

Paul Fletcher

21 / 11 / 2020



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10 December 2020

The Hon Paul Fletcher MP
Minister for Communications, Cyber Safety and the Arts
Parliament House
CANBERRA ACT 2600

Via email: Paul.Fletcher.MP@aph.gov.au

CC: dlo@communications.gov.au


Dear Minister,

**Telecommunications (Superfast Broadband Network Class Exemption) Determination 2020
[F2020L01061]**

Thank you for your response of 21 November 2020 to the Senate Standing Committee for the Scrutiny of Delegated Legislation in relation to the above instrument. The committee considered your response at its private meeting on 9 December 2020 and has resolved to seek your further advice about the issues outlined below.

Modification of primary legislation

Parliamentary oversight

Your response advises that the provision of class exemptions via delegated legislation is appropriate as it provides for flexibility in allowing the Australian Competition and Consumer Commission (ACCC) to tailor such exemptions to respond to market factors and individual circumstances. You further advise that the ACCC considers that limiting the duration of the exemption to three years could create uncertainty and undermine the business growth and long-term interests of small network operators. However, you noted that it is not envisaged that the class exemption will be required for the full 10 years as many small network operators will surpass the relevant thresholds within five years.

While noting your advice about the necessity of including class exemptions in delegated legislation, the committee remains concerned to ensure that instruments which provide for exemptions from primary legislation are subject to regular parliamentary oversight. Noting that it is not anticipated that the class exemption will be required for the full ten years, the committee considers that the instrument should be amended to specify that it ceases to operate five years after it commences. Amendments to this effect would guarantee that the relevant provisions would be able to operate for a significant period, whilst also ensuring more regular parliamentary oversight of the measures.

The committee therefore requests your advice as to whether the instrument could be amended to specify that the instrument ceases to operate five years after commencement.

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. As a result, on 7 December 2020, the committee

gave notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **13 January 2020**.

Finally, please note that, in the interests of transparency this correspondence and your response will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to sdlc.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation



PAUL FLETCHER MP

Federal Member for Bradfield
Minister for Communications,
Urban Infrastructure,
Cities & the Arts

MS20-000983

Senator the Hon Concetta Fierravanti-Wells
Chair, Senate Standing Committee for the Scrutiny of Delegated Legislation
Parliament House
Canberra ACT 2600

Dear Senator Fierravanti-Wells

Thank you for your letter dated 10 December 2020, concerning the motion by the Senate Standing Committee for the Scrutiny of Delegated Legislation to disallow the Australian Competition and Consumer Commission's (ACCC) *Telecommunications (Superfast Broadband Network Class Exemption) Determination 2020* (class exemption).

Your letter indicated that the Committee thought the class exemption should be amended so that its duration was reduced from ten years to five years after commencement.

The ACCC intends to amend the class exemption so that it has a five year duration. The ACCC also plans to register the amending instrument on the Federal Register of Legislation prior to the date that you have proposed to move that the class exemption be disallowed. Given the ACCC's stated intent, I would be grateful if you would please consider withdrawing the disallowance motion.

Thank you for bringing your concerns to my attention.

Yours sincerely

Paul Fletcher

14 / 1 / 2021



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4 February 2021

The Hon Paul Fletcher MP
Minister for Communications, Urban Infrastructure, Cities and the Arts
Parliament House
CANBERRA ACT 2600

Via email: dlo@communications.gov.au

Dear Minister,

**Telecommunications (Superfast Broadband Network Class Exemption) Determination 2020
[F2020L01061]**

Thank you for your response of 14 January 2021 to the Senate Standing Committee for the Scrutiny of Delegated Legislation, in relation to the above instrument.

The committee considered your response at its private meeting on 3 February 2021. On the basis of your advice, the committee has concluded its examination of the instrument.

The committee welcomes the Australian Competition and Consumer Commission's undertaking to amend the instrument to specify it ceases after 5 years of operation. In light of this undertaking, the committee has resolved to withdraw the disallowance notice in place on the instrument.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

Thank you for your assistance with this matter.

Yours sincerely,

~~Senator~~ the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation