

EXPLANATORY STATEMENT

Issued by the Authority of the Minister for Broadband, Communications
and the Digital Economy

Telecommunications Act 1997

*Telecommunications (Acceptance of Undertaking about Structural Separation—Matters)
Instrument 2011*

Authority

Subsection 577A(7) of the *Telecommunications Act 1997* (the Act) authorises the Minister for Broadband, Communications and the Digital Economy to set out the matters in writing that the Minister will require the Australian Competition and Consumer Commission (ACCC) to consider in deciding whether to accept an undertaking about structural separation (SSU) given by Telstra under section 577A of the Act.

Purpose

In deciding whether to accept an SSU, subsection 577A(6) of the Act provides that the ACCC must have regard to several matters including the national interest in structural reform of the telecommunications industry (paragraph 577A(6)(aa)), the impact of structural reform on consumers and competition in telecommunication markets (paragraph 577A(6)(ab)), and matters specified by the Minister in an instrument (paragraph 577A(6)(a)). The purpose of the *Telecommunications (Acceptance of Undertaking about Structural Separation—Matters) Instrument 2011* (the Instrument) is to set out in writing those additional matters that the Minister requires the ACCC to have regard to in deciding whether to accept an SSU.

The Act provides that Telstra may not give an SSU to the ACCC before the Minister makes an instrument under subsection 577A(7) (see subsection 577A(9)).

Background

The government supports Telstra's proposal to structurally separate by migrating its customer services to the National Broadband Network (NBN) as that network is progressively rolled out. Such an approach will ultimately lead to a national outcome where there is a wholesale-only network not controlled by any retail company.

The Instrument requires the ACCC to consider the following matters in deciding whether to accept an SSU:

- the government's broadband policy objectives;
- the expected distribution of the long-term economic benefits of Telstra's structural separation;
- the conduct that would be authorised under section 577BA of the Act as a consequence of accepting an SSU; and
- whether the SSU provides for the ACCC to be given a copy of all relevant agreements.

The government also recognises the importance of industry access to Telstra's copper network on a transparent and equivalent basis in the lead-up to its structural separation.

Further, the Act provides that the ACCC must not accept an SSU given to it by Telstra unless the ACCC is satisfied that the SSU provides for transparency equivalence in the period from the entry into force of the SSU to the designated day (see subsections 577A(2) and (3)). For this reason, the Instrument sets out in greater detail transparency and equivalence matters for the period Telstra is migrating customer services to the NBN that the ACCC must have regard to in deciding whether to accept an SSU given to it by Telstra.

The transparency and equivalence measures are not intended to require Telstra to implement functional separation. Functional separation would, at a minimum, require Telstra's retail business units to use exactly the same access services on exactly the same terms and conditions and using the same systems and processes as its wholesale customers. It would also require a much stricter form of organisational separation than is intended under the interim transparency and equivalence measures.

The Instrument is not a legislative instrument for the purposes of the *Legislative Instruments Act 2003* (see subsection 577A(23) of the Act). Under subsection 577A(22), the Minister must cause a copy of the Instrument to be published on the website of the Department of Broadband, Communications and the Digital Economy (the Department).

Consultation

Under subsection 577A(7A), the Minister must publicly consult for a period of 14 days before making this Instrument.

Drafts of five regulatory instruments which create the framework for Telstra's structural separation, including a draft of this Instrument, were released for public consultation for a period of 14 days on 1 June 2011.

In response, submissions were received from the Competitive Carriers' Coalition (CCC), Optus, Telstra, Australian Communications Consumer Action Network (ACCAN), Vodafone Hutchison Australia (VHA) and Herbert Geer (on behalf of iiNet, Internode and Adam Internet). Matters that have been addressed in the Instrument in response to an issue raised by a submitter are identified in the discussion of the relevant section set out below.

The Department also consulted directly with Telstra, NBN Co Limited and the ACCC on the draft Instrument.

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

ATTACHMENT**Details of the Telecommunications (Acceptance of Undertaking about Structural Separation—Matters) Instrument 2011****Section 1—Name of Instrument**

Section 1 provides that the name of the Instrument is the *Telecommunications (Acceptance of Undertaking about Structural Separation—Matters) Instrument 2011*.

Section 2—Commencement

Section 2 provides that the Instrument will commence on the day after it is published on the Department's website in accordance with subsection 577A(22) of the Act.

Section 3—Definitions

Section 3 sets out definitions of terms used in the Instrument.

The term *network business unit* is defined in section 3 to mean a business unit of Telstra that supplies the following in relation to eligible services:

- fault detection, handling and rectification;
- service activation and provisioning.

These are the upstream support functions that commonly support both wholesale and retail services.

Subsection 3(2) specifies that the term *independent telecommunications adjudicator* has the same meaning as in section 152EQ of the *Competition and Consumer Act 2010* (CCA).

Subsection 3(3) provides that for the purposes of subsection 3(2), it is assumed that Division 3 of Part 1 of Schedule 1 to the *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act 2010* has commenced. Division 3 of Part 1 of Schedule 1 to that Act revokes section 152EQ of the CCA and replaces it with a new section 152EQ, which provides for a definition of the independent telecommunications adjudicator. For this reason, subsection 3(3) is required in order to allow for that new definition to be applied to this instrument, even though the relevant provision of the CCA will not have come into effect when the Instrument commences—new section 152EQ will commence when the SSU comes into force.

Section 4—Matters to which the ACCC must have regard

For the purposes of paragraph 577A(6)(a) of the Act, section 4 sets out matters the ACCC is to have regard to in deciding whether to accept an SSU.

The government's telecommunications policy

The government's telecommunications policies are intended to dramatically improve the availability of broadband across Australia by creating a national network that is not controlled by a retail company or companies. Paragraph 4(a) of the Instrument requires the ACCC to have regard to the government's policy objective of improving the accessibility and

quality of broadband services for consumers in Australia, including those in regional, rural and remote Australia.

Structural reform of the sector

Paragraph 4(b) requires the ACCC to have regard to the government's support for a form of structural separation whereby Telstra will progressively migrate fixed-line carriage services that it supplies to retail customers to the NBN Co fibre network as that network is rolled out. This recognises that there are a number of ways Telstra could choose to structurally separate under Part 33 of the Act.

In accordance with the definitive agreements with NBN Co, Telstra will elect to structurally separate by migrating its customer services to the NBN Co fibre network as that network is progressively rolled out. Most of the copper network would be disconnected and use of Telstra's HFC network would be limited to pay TV services (the scope of Telstra's SSU is discussed in the Explanatory Statement accompanying the *Telecommunications (Structural Separation Undertaking—Networks and Services Exemption) Instrument 2011*). This method of structural separation is supported by the government as it delivers the government's structural reform objectives of a wholesale-only network operating across the country which is not controlled by any retail provider.

Economic benefits of structural separation

Paragraph 4(c) requires the ACCC to have regard to the expected distribution of the long-term economic benefits for different types of consumers in different geographic areas that would occur as a result of Telstra's structural separation.

Conduct that would be authorised

Paragraph 4(d) requires the ACCC to have regard to the conduct that would be authorised under section 577BA of the Act as a consequence of the ACCC's acceptance of the SSU or the SSU coming into force.

Section 577BA of the Act and subsection 151AJ(9) of the CCA authorise certain conduct engaged in by Telstra, NBN Co, and other relevant persons for the purposes of Parts IV and XIB of the CCA. The authorisation provided by section 577BA links closely with an SSU given to the ACCC. The ACCC's acceptance of an SSU is relevant to whether particular conduct is authorised under section 577BA (see for example paragraphs 577BA(3)(f)(ii) and (iii)). Similarly, the entry into force of an SSU provides a trigger for the authorisation of certain conduct under section 577BA (see for example paragraphs 577BA(3)(f)(iv) and (v) and subsections 577BA(7) and (8)).

This provision in the Instrument makes it clear that when deciding whether to accept an SSU, the ACCC must have regard to the conduct that would be authorised as a consequence of its acceptance of the SSU and as a consequence of the SSU coming into force.

The ACCC being given relevant agreements

It is expected that the SSU will reflect elements of the agreements entered into between Telstra and NBN Co, as well as potentially between Telstra and other persons, for the

purposes of Telstra's structural separation. Accordingly, paragraph 4(e) requires the ACCC to have regard to whether the SSU provides for the ACCC to be given written copies of all the contracts, arrangements or understandings entered into by Telstra in order for it to comply with its SSU. It is the government's intention that the ACCC should have visibility of all such agreements.

The implementation of an internal governance framework

Subsection 577A(5) of the Act provides that the ACCC must not accept an SSU unless it is satisfied that the SSU provides for adequate monitoring, and processes to facilitate monitoring, by the ACCC of Telstra's compliance with its SSU. In addition to these requirements set out in the Act, paragraph 4(f) of the Instrument requires the ACCC to have regard to whether the SSU requires Telstra to implement a governance framework that will:

- ensure appropriate oversight by Telstra of its compliance with the SSU;
- require regular reporting to the ACCC on Telstra's compliance;
- provide for the ACCC to consult with wholesale customers and other stakeholders about that compliance;
- permit the ACCC to disclose information given to it by Telstra for the purposes of that consultation (other than information that is commercially confidential); and
- provide assurance to wholesale customers that Telstra is meeting those obligations.

Subparagraphs 4(f)(ii)-(iv) respond to matters raised in the consultation process by the CCC, Optus and VHA in their submission to the draft of this Determination.

Transparency and equivalence measures

Subsection 577A(3) of the Act provides that the ACCC must not accept an SSU unless it is satisfied that the SSU provides for appropriate and effective interim transparency and equivalence arrangements to apply during the period that Telstra is migrating its customer services to the NBN.

Paragraph 4(g) sets out transparency and equivalence measures in relation to the supply of regulated services during this interim period that the ACCC must consider in deciding whether to accept Telstra's SSU. 'Regulated services' are all declared services (within the meaning of section 152AL of the CCA) as well as the two services specified in the *Telecommunications (Regulated Services) Determination (No 1) 2011*. A detailed explanation of the concept of regulated services is provided in the Explanatory Statement accompanying that Determination.

The measures set out under this paragraph are aimed at providing meaningful improvements to the current transparency and equivalence measures and are planned to complement the recent changes to the telecommunications access regime. They are not intended to require Telstra to implement functional separation. In accordance with the Act, if Telstra chooses not to voluntarily structurally separate it will be required to implement functional separation.

Paragraph 4(g) requires the ACCC to consider whether the interim equivalence and transparency measures in the SSU include the matters described at subparagraphs 4(g)(i)-(vii). It is the government's intention that each of those matters should be addressed in any SSU in the manner specified in the instrument.

Subparagraph 4(g)(i) requires measures to provide sufficient transparency to enable the ACCC to provide assurance to stakeholders that the SSU provides for equivalence in relation to terms and conditions relating to price or a method of ascertaining price.

Subparagraph 4(g)(ii) requires the ACCC to have regard to whether the SSU provides for Telstra to maintain organisational arrangements within Telstra that promote interim transparency and equivalence, including the arrangements and measures set out in Schedule 1 to the Instrument. The organisational arrangements set out in Schedule 1 that promote interim transparency and equivalence are described below:

- Separate business units: Telstra is required to maintain one or more wholesale business units and one or more network business units which are separate from its retail business units (item (1)).
- Staff to work principally for the business units they are engaged by: Subject to the limitations specified in certain other items of the Schedule, staff who are engaged to work for a particular Telstra business unit work principally for that business unit (item (2)).
- Wholesale business unit staff: Schedule 1 requires a prohibition on staff who are engaged to work for Telstra's wholesale business units undertaking any work for its retail business units (item (3)), subject to the types of work specified in item (11) that staff of any business unit may undertake (see below). Subject to the requirements of item (2), staff of the wholesale business unit may perform work for the network business units. In addition, Schedule 1 requires that where Telstra has in place an incentive remuneration scheme for staff of the wholesale business units, that scheme must be solely based on the performance of the wholesale business units, unless the ACCC has approved a different arrangement (item (4)). This measure is intended to minimise any incentive for wholesale staff to favour the interests of Telstra's retail businesses. Item (4) responds to matters raised in the consultation process by the CCC, Optus, ACCAN, VHA and Herbert Geer (on behalf of iiNet, Internode and Adam Internet).
- Network business unit staff: Schedule 1 requires a prohibition on staff who are engaged to work for Telstra's network business units undertaking any work for Telstra's retail business units, other than the following kinds of work where requested by a retail business unit:
 - (a) fault detection, handling and rectification;
 - (b) service activation and provisioning; or
 - (c) any other reasonable circumstance set out in the SSU in which those staff may perform another type of work for their retail business units (items (5) and (6)) – this is intended to provide appropriate flexibility for Telstra to set out when network business unit staff will undertake work for retail business units, subject to ACCC oversight of the circumstances in which this would apply.

Subject to item (2), staff of the network business unit may perform work for the wholesale business units.

The rules around network business unit staff described above are also subject to the types of work specified in item (11) that staff of any business unit may undertake (see below).

In addition, Schedule 1 requires that where Telstra has in place an incentive remuneration scheme for staff of the network business units, that scheme must be solely based on the

performance of the network business units, unless the ACCC has approved a different arrangement (item (7)). As above, this measure is intended to minimise any incentive for wholesale staff to favour the interests of Telstra's retail businesses, and responds to matters raised in the consultation process by the CCC, Optus, ACCAN, VHA and Herbert Geer (on behalf of iiNet, Internode and Adam Internet).

- Retail business unit staff: Schedule 1 requires a prohibition on staff who are engaged to work for its retail business units undertaking any work for Telstra's wholesale business units (item (8)), and also a prohibition on those staff undertaking any work for its network business units, other than a kind of work where the SSU sets out reasonable circumstances in which those staff may undertake work for the network business units at their request (items (9) and (10))—as above, this is intended to provide appropriate flexibility, subject to ACCC oversight.

These rules around retail business unit staff are also subject to the types of work specified in item (11) that staff of any business unit may undertake (see below).

- Services that any staff can work on: The effect of item (11) is that, notwithstanding other provisions in Schedule 1, staff engaged to work in any type of Telstra business unit dealt with in this Schedule (retail, wholesale, or network) may engage in work relating to the supply of the types of services listed at paragraphs (11)(d)-(i). The services described at paragraphs (11)(d)-(h) are services that are technically or operationally efficient to supply across several business units and the costs involved in separating the supply are not justified. Examples include emergency call services and the supply of disability equipment. Paragraph (11)(i) provides a mechanism for the ACCC to approve additional types of services that it is not efficient for Telstra to provide across separate business units. This is intended to provide for appropriate flexibility as issues emerge, subject to ACCC oversight and approval.
- Clarification concerning resellers: Item (12) notes, for the avoidance of doubt, that none of the organisational arrangements described in Schedule 1 are intended to prevent a wholesale customer who resupplies services to a third person from choosing to be a customer of a retail business unit, if the retail business unit agrees. This clarification recognises that some Telstra wholesale customers also obtain retail services from Telstra.

The measures described in Schedule 1 are aimed at providing suitable organisational arrangements within Telstra so that it cannot favour its retail business over its wholesale customers in the provision of regulated services.

Subparagraph 4(g)(iii) requires the ACCC to have regard to whether the SSU contains measurable standards for the equivalent supply of regulated services to Telstra's wholesale customers and retail business units, and enforcement of those standards, including through service level guarantee payments. This measure responds to matters raised in the consultation process by the CCC, Optus and VHA.

Subparagraph 4(g)(iv) requires the ACCC to consider whether the SSU contains effective measures to protect from unauthorised disclosure or use certain confidential and commercially sensitive information. The relevant information is that which Telstra holds in relation to wholesale customers or end-users of services supplied by wholesale customers, where Telstra obtains that information for the purposes of, or in the course of, supplying

those wholesale services. This provision recognises that Telstra may, in its role as wholesaler, acquire information about its wholesale customers and their customers and other end-users of services, and requires Telstra to put appropriate restrictions on the disclosure and use of that information. The provision only applies to information Telstra obtains in its role as a supplier of wholesale services—it does not apply to information that Telstra may have acquired through other means, such as public information or information obtained through a former direct commercial relationship with an end-user. This provision was amended to respond to matters raised in the consultation process by the CCC, Optus and VHA.

Subparagraph 4(g)(v) requires the ACCC to have regard to whether the SSU includes equivalent notification to Telstra's wholesale customers and its retail business units of matters relating to its network which affect the delivery or operational quality of regulated services. This provision is necessary to allow Telstra's wholesale customers to compete with Telstra on a fair and equal basis when supplying services to their customers that make use of regulated services.

Subparagraph 4(g)(vi) requires the ACCC to consider whether the SSU contains effective mechanisms for the resolution of disputes about equivalence between Telstra and its wholesale customers.

Subparagraph 4(g)(vii) requires the ACCC to consider whether the SSU contains measures to ensure that systems used for wholesale customers in relation to billing information, ordering, provisioning, fault reporting and fault rectification provide outcomes and functionality that are equivalent to the outcomes and functionality provided by the systems used for those matters by Telstra's retail business units. These network services are essential for service providers to supply retail services and the equivalent supply of those services is necessary to enable wholesale customers to compete with Telstra on a fair and equal basis. This measure responds to matters raised in the consultation process by the CCC, Optus and VHA.

The independent telecommunications adjudicator

One of the mechanisms that Telstra could propose under its SSU for the resolution of equivalence disputes is the establishment of an independent telecommunications adjudicator (ITA).

The ITA would be a company limited by guarantee (see section 152EQ of the CCA, to be inserted into that Act by item 67 of Schedule 1 to the *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act 2010* when the SSU comes into force) that would perform a dispute resolution role enabling Telstra and its wholesale customers to resolve non-price equivalence and service level concerns. A similar body has operated successfully in the United Kingdom for a number of years. The ACCC would be empowered to provide assistance to the ITA (again, see section 152EQ of the CCA).

The effect of paragraph 4(h) is that if Telstra does undertake in its SSU to establish the ITA, then the ACCC must, in deciding whether to accept the SSU, consider whether the ITA has the organisational and governance arrangements set out in Schedule 2. It is the government's intention that, if the ITA is established by Telstra, it should, at a minimum, have the arrangements set out in Schedule 2, which are designed to ensure that the ITA operates effectively, efficiently and independently from Telstra in resolving equivalence disputes. If Telstra establishes the ITA under its SSU, then it is given further roles and responsibilities

under the *Telecommunications (Migration Plan Principles) Determination 2011*. Those roles are described in detail in the Explanatory Statement for that Determination. Neither this Instrument nor that Determination require Telstra to establish the ITA under its SSU.

The organisational and governance arrangements prescribed by Schedule 2 of the Instrument include, among other things:

- a requirement for the company constitution to provide for the appointment of a person to the position of Adjudicator. It is envisaged that the person in that role would have responsibility for the resolution of equivalence disputes between Telstra and wholesale customers. The Adjudicator must be approved by the ACCC following a process of nomination to the ACCC and consultation by the ACCC with wholesale customers and stakeholders.
- a requirement for the company constitution to require the board of the ITA to create a charter of independence which guarantees the independence of the Adjudicator and is required to be approved by the ACCC.
- provision in the company constitution for the Adjudicator to report to the ACCC about any matter.
- requirements relating to the person to be appointed as Adjudicator, and the powers to be exercisable by the person in that role.
- a requirement for the company constitution to be approved by the ACCC, and not to be changed without the ACCC's approval.

These measures respond to matters raised in the consultation process by the CCC, Optus and VHA.

The statement of expectations given to NBN Co and NBN Co's Corporate Plan

Paragraph 4(i) and paragraph 4(j) require the ACCC to have regard to the government's statement of expectations given to NBN Co and NBN Co's Corporate Plan for 2011-2013. With Telstra electing, through the submission of an SSU based on migration to the NBN Co fibre network and by entering into the definitive agreements, to structurally separate by migrating customer services to the NBN Co fibre network, it is appropriate that the ACCC should have regard to the government's policy objectives for the NBN and how NBN Co proposes to meet those objectives, which are set out in these two documents.

NBN Co's governance and reporting framework

For similar reasons for the inclusion of paragraphs 4(i) and (j), paragraph 4(k) requires the ACCC to have regard to the governance and reporting framework for NBN Co established by the *National Broadband Network Companies Act 2011* and the *Telecommunications Legislation Amendment (National Broadband Measures—Access Arrangements) Act 2011*.