

EXPLANATORY STATEMENT

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

Telecommunications Act 1997

*Telecommunications (Structural Separation—Networks and Services Exemption)
Instrument (No. 1) 2011*

Authority

Subsections 577A(20) and (21) of the *Telecommunications Act 1997* (the Act) enable the Minister, by legislative instrument, to exempt a specified fixed-line carriage service or a specified telecommunications network from the scope of an undertaking given by Telstra under subsection 577A(1) (Telstra's structural separation undertaking—SSU), and the associated provisions at subsections 577BA(11) and 577BC(2) of the Act.

Purpose

Under paragraph 577A(1)(a), structural separation is regarded as Telstra, at all times after the designated day, ceasing to supply fixed-line carriage services to retail customers in Australia using a telecommunications network over which Telstra is in a position to exercise control. The purpose of the *Telecommunications (Structural Separation—Networks and Services Exemption) Instrument (No. 1) 2011* (the Instrument) is to exempt certain networks and services from the scope of Telstra's SSU.

The extension of the exemption to the associated provisions means that Telstra does not have to make provision for the specified exempted networks and services in its migration plan, subject to any conditions or limitations to the exemption. In addition, exempted networks and services are relevant for the purposes of section 577BA, which establishes authorisation for the purposes of section 51(1) of the *Competition and Consumer Act 2010*. Exempted networks and services are excluded from the operation of certain provisions in section 577BA.

Background

The definitive agreements between Telstra and NBN Co will provide for the progressive disconnection of Telstra's copper network and the broadband capability of its hybrid fibre-coaxial (HFC) network as the wholesale only NBN Co fibre network is rolled out. This will deliver the envisaged structural reform of the telecommunications sector.

Undertaking structural separation in this manner will lead to a national outcome where there is a wholesale only network operating across the country which is not controlled by any retail company. Separation between the network provider and retail providers will mean better and fairer infrastructure access for service providers, greater retail competition and better services for consumers and businesses.

This method of structural separation is supported by the government and was one of the ways foreseen under Part 33 of the Act that Telstra could propose (see the explanation for

subsection 577A(1) in the notes on clauses in the Explanatory Memorandum to the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010).

Read together with Part 33 of the Act, the Instrument has the general effect that, by the designated day, Telstra is required to cease supplying services over its copper network and its HFC network to premises located within the fibre footprint deployed by NBN Co Limited as at that date. Telstra will be permitted to continue to supply certain broadcasting services over its HFC network. Under subsection 577A(10) of the Act, the term ‘designated day’ refers to either 1 July 2018, or another day specified by the Minister. It is expected that the designated day will align with the completion of disconnection processes associated with the rollout of the optical fibre national broadband network.

Section 5 of the Instrument and Schedule 2 have the effect of exempting from the scope of structural separation Telstra’s networks other than its copper and HFC networks. As a result, Telstra will be able to continue to supply fixed-line carriage services to retail customers over such other networks.

Section 4 and Schedule 1 have the effect of exempting from the scope of structural separation certain fixed-line carriage services. The effect of this is that Telstra can continue to supply those fixed-line carriage services to retail customers, including using the copper and HFC networks.

The Instrument is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

Consultation

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).

The Department of Broadband, Communications and the Digital Economy also consulted directly with Telstra, NBN Co Limited and the Australian Competition and Consumer Commission (ACCC) on the draft Instrument.

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

ATTACHMENT**Details of the Telecommunications (Structural Separation Undertaking—Networks and Services Exemption) Instrument (No. 1) 2011****Section 1—Name of the Instrument**

This clause provides that the title of the Instrument is the *Telecommunications (Structural Separation—Networks and Services Exemption Instrument (No. 1) 2011*.

Section 2—Commencement

As provided for in subsection 3(2) of the Instrument, expressions used in this Instrument have the same meaning as in the *Telecommunications (Migration Plan Principles) Determination 2011* (Migration Plan Principles). Therefore, section 2 provides that the Instrument commences on either the commencement of the Migration Plan Principles or the day after the Instrument is registered on the Federal Register of Legislative Instruments, whichever is later.

Section 3—Definitions

Section 3 sets out definitions of key terms used in the Instrument, and provides that where the Instrument uses expressions that are also used in the Migration Plan Principles, those expressions have the same meaning in the two instruments, unless the contrary intention appears. Subsections 3(3) and (4) provide such a contrary intention with respect to the expression ‘disconnected’ (in the context of copper networks and HFC networks), which is given a specific meaning for the purposes of the Instrument (see also Schedule 3).

Section 4—Exempt fixed-line carriage services

Section 4 provides that for the purposes of subsection 577A(20) of the Act, each class of fixed-line carriage services specified at an item in column 1 of the table at Schedule 1 to the Instrument is exempt from Telstra’s SSU, subject to the conditions or limitations, if any, for that item in column 2 of the table.

Section 5—Exempt telecommunications networks

Section 5 provides that for the purposes of subsection 577(21) of the Act, each relevant network or class of relevant network specified at an item in column 1 of the table at Schedule 2 to the Instrument is exempt from Telstra’s SSU, subject to the conditions or limitations, if any, for that item in column 2 of the table.

Schedule 1—Exempt fixed-line carriage services

The table at Schedule 1 includes 12 items, each setting out a class of fixed-line carriage service that is exempt from Telstra’s SSU.

Item 1 exempts fixed-line carriage services supplied to locations that are not premises. A premises is defined in the Migration Plan Principles. This provision will allow Telstra to continue to supply fixed-line carriage services to those locations that do not qualify as premises and that therefore will not be connected to the NBN Co fibre network.

Item 2 exempts fixed-line carriage services supplied to a premises where, as at the designated day, that premises is not in any fibre rollout region. This provision provides certainty to Telstra as to the scope of its structural separation requirements. The provision has the effect that Telstra is not required to cease supplying services over its networks where the rollout of the NBN Co fibre network does not occur. The term fibre rollout region is defined in the Migration Plan Principles and means an area identified by NBN Co in a notice published on its website as a rollout region in which fibre is being deployed, or will be deployed, as part of the NBN Co fibre network. In the government's statement of expectations given to NBN Co dated 17 December 2010, the government's objective is for NBN Co to connect 93 per cent of Australian homes, schools and businesses with fibre to the premises (FTTP) technology providing broadband speeds of up to 100 mega bits per second, with a minimum fibre coverage obligation of 90 per cent of Australian premises.

Items 3 and 4 exempt fixed-line carriage services supplied to premises using a copper line or a line that forms part of an HFC network respectively where, at the designated day, that premises:

- is in a fibre rollout region; and
- has not been passed by the NBN Co fibre network and disconnected from the copper or HFC networks.

These items have the effect that if a premises is in a fibre rollout region, and that premises has:

- been passed by the NBN Co fibre network; and
- not been disconnected from the copper or HFC network;

then Telstra is permitted to continue to supply fixed-line carriages to that premises.

Equally, these items have the effect that, if a premises is in a fibre rollout region, and that premises has not been passed by the NBN Co fibre network, then Telstra is permitted to continue to supply fixed-line carriages to those premises.

The Migration Plan Principles set out when a premises is 'passed by the NBN Co fibre network'; essentially, a premises is passed by the NBN Co fibre network when it is included on a list published by NBN Co of premises that have been passed by, and are capable of being connected to, that network.

Subsections 9(8) and 10(6) in the Migration Plan Principles require Telstra's migration plan to specify the relevant circumstances in which Telstra will not, by the designated day, disconnect premises from its copper and HFC networks that are passed by the NBN Co fibre network. Any circumstances where Telstra is not disconnecting premises which have been passed by the NBN Co fibre network must not be inconsistent with the circumstances set out in an agreement between Telstra and NBN Co given to the ACCC to which subsection 577BA(3) of the Act applies (see subsections 9(9) and 10(7) in the Migration Plan Principles).

Item 5 exempts certain subscription and on-demand cable services that are not internet-protocol based services provided over Telstra's HFC network. This is consistent with the application of Telstra's SSU to the broadband capability of its HFC network.

Item 6 exempts fixed-line carriage services supplied using an optical fibre line forming part of Telstra's HFC network. However, the service is not exempt if it uses the coaxial cable part of the HFC network, which is the part which directly connects premises. Structural separation focuses on Telstra's customer access networks as these represent the critical element in providing a level playing field for competitors.

Item 7 exempts fixed-line carriage services that are supplied using a Telstra copper or HFC network in a fibre rollout region that is affected by material unavailability of the NBN Co fibre network. Material unavailability of the NBN means services are unable to be provided over the network by wholesale customers of NBN Co in an entire region for a period of at least five consecutive days. This exemption is subject to conditions that limit its application to where Telstra is not the cause of the unavailability of the services and to the fibre rollout region affected, and provides that it ceases once services can be supplied over the NBN in that region affected.

Items 8 and 9 exempt services supplied over Telstra's copper and HFC networks that Telstra is required to supply by or under law. These items remove any doubt that in the circumstance where Telstra is required to supply such services by or under law, it is permitted to do so under this Instrument.

Item 10 addresses a technical matter by exempting the supply of fixed-line carriage services using a HFC network to a premises using a cable modem, where that cable modem has been relocated from the premises within the same HFC deactivation area where the end-user originally acquired the service. HFC deactivation area means a geographical area served by the same modem termination system on a HFC network. Telstra's systems are unable to detect when a cable modem is moved in this manner. For this reason, Telstra is given a limited exemption applying to this scenario.

Items 11 and 12 exempt special services and special services inputs that are required to be supplied after the designated day.

Special services are legacy services provided by Telstra on a wholesale or retail basis over its copper network, which the NBN may not initially be capable of supporting. The list of special services is set out in Schedule 1 to the Migration Plan Principles.

Special service inputs, as defined in subsection 13(2) of the Migration Plan Principles, are wholesale carriage services supplied to Telstra's wholesale customers in a fibre rollout region which are used by those wholesale customers to supply their own special services.

If the special services and special services inputs have a particular disconnection day specified for them in the Migration Plan, with that day occurring after the designated day, they remain exempt until that particular disconnection day. If the special services and special service inputs are exempt under another item in the table, they remain exempt subject to any conditions that apply to that item.

Schedule 2—Exempt telecommunications networks

Items 1 to 12 of the table at Schedule 2 exempt certain telecommunications networks from the scope of Telstra's SSU. The effect of the exemptions is to permit Telstra to retain all its

networks other than its copper and HFC networks. Most of the items listed in the Schedule are self-explanatory. A detailed explanation of items 1 and 2 is set out below.

Item 1 exempts Telstra's inter-exchange (backhaul) networks. As outlined in relation to Item 6 of Schedule 1, structural separation focuses on Telstra's customer access networks as these represent the critical element in providing a level playing field for competitors. Telstra's backhaul networks will remain subject to regulation under Parts XIB and XIC of the Competition and Consumer Act.

Item 2 exempts networks that use optical fibre lines. These networks are not exempt to the extent that they contain copper lines or form part of a hybrid fibre-coaxial network.

However, a separate exemption under this instrument may apply with respect to copper lines or lines that form part of a HFC network. For example, item 3 of the table at Schedule 1 provides an exemption for fixed-line carriage services supplied using a copper line to a premises that is in a fibre rollout region but is not passed by the NBN Co fibre network. Similarly, item 4 of the table at Schedule 1 provides an exemption for fixed-line carriage services supplied using a line forming part of a HFC network to a premises that is in a fibre rollout region but is not passed by the NBN Co fibre network. Item 5 of the table at Schedule 1 provides an exemption for fixed-line carriage services (certain television and audio services) supplied using an HFC network.

Schedule 3—Disconnection

Schedule 3 sets out rules for determining when a premises is disconnected from Telstra's copper and HFC networks.