

EXPLANATORY STATEMENT

Approved by the Australian Competition and Consumer Commission

Telecommunications Act 1997

Telecommunications (Permitted Information Sharing for Joint Functional Separation Undertakings) Determination 2020

Authority

The Australian Competition and Consumer Commission (**the ACCC**) has made the *Telecommunications (Permitted Information Sharing for Joint Functional Separation Undertakings) Determination 2020* (**the Instrument**) under subsection 151C(15) of the *Telecommunications Act 1997* (**the Telecommunications Act**).

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 giving the ACCC a standard or joint functional separation undertaking.

Subsection 151C(15) of the Telecommunications Act empowers the ACCC to determine, by legislative instrument, the kinds of information, as provided by a carrier or carriage service provider to a retailer, that may be disclosed to a wholesaler, or obtained, accessed or used by a wholesaler, where both parties are subject to the same joint functional separation undertaking, for the purpose of paragraphs 151C(2)(o) and (p) of the Telecommunications Act.

The Instrument determines that information relating to the provision of a local access line service on a wholesale basis that constitutes:

- terms and conditions relating to price or a method of ascertaining price;
- other terms and conditions; or
- current or proposed network coverage information including maps and network ownership information;

is specified for the purpose of paragraphs 151C(2)(o) and (p) of the Telecommunications Act, where that information is disclosed by a retailer to a wholesaler bound by the same joint functional separation undertaking for the purpose of obtaining an equivalent offer in respect of the provision of a local access line service on a wholesale basis.

The Instrument also determines that information that constitutes:

- practices, procedures or other guidance relating to the maintenance and continuity of business operations in emergency scenarios;
- a request to access the infrastructure of a wholesaler for the purpose of maintaining network resilience or the continuity of business operations; or
- practices, procedures or other guidance relating to compliance with relevant regulatory obligations

is specified for the purpose of paragraphs 151C(2)(o) and (p) of the Telecommunications Act.

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 *Legislation Act 2003*; and
- the *Telecommunications Act 1997*.

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

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*.

Prior to making the Instrument, the ACCC published a notice on its website on 13 November 2020 setting out the proposed Instrument and seeking feedback from interested stakeholders. The ACCC also directly notified those stakeholders who took part in consultation processes conducted in respect of other instruments recently made by the ACCC under Part 8 of the Telecommunications Act, seeking their feedback on the proposed Instrument. Interested stakeholders were invited to make submissions to the ACCC by 23 November 2020. The ACCC received one submission from Aussie Broadband. The consultation notice and public submission are available on the ACCC's website.

Aussie Broadband's submission supported the making of the proposed Instrument and provided suggestions for additional kinds of information to be subject to the operation of the proposed Instrument. The ACCC had regard to Aussie Broadband's submission, as well as other relevant information previously made available by stakeholders, before making the Instrument.

Regulatory impact assessment

A preliminary assessment of proposals to make legislative instruments under Part 8 of the Telecommunications Act, as amended by the *Telecommunications Legislation Amendment (Competition and Consumer) Act 2020*, was conducted by the Office of Best Practice Regulation (OBPR) for the purpose of determining whether a Regulation Impact Statement (RIS) would be required. OBPR advised that a RIS would not be required because such instruments were machinery in nature (OBPR ID: 23957).

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 subsection 151C(15) of the *Telecommunications Act 1997*. The Instrument specifies the kinds of information provided by carriers and carriage service providers to a retailer that may be disclosed to a wholesaler, or obtained, accessed or used by a wholesaler, where both parties are bound by the same joint functional separation undertaking, for the purposes of paragraphs 151C(2)(o) and (p) of the *Telecommunications Act 1997*.

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.

Notes to the *Telecommunications (Permitted Information Sharing for Joint Functional Separation Undertakings) Determination 2020*

Section 1 – Name

This section provides for the Instrument to be cited as the *Telecommunications (Permitted Information Sharing for Joint Functional Separation Undertakings) Determination 2020*.

Section 2 – Commencement

This section provides for the Instrument to commence on the day after it is registered on the Federal Register of Legislation.

The Federal Register of Legislation may be accessed free of charge at www.legislation.gov.au.

Section 3 – Authority

This section provides that the Instrument is made under subsection 151C(15) 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.

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 – Determination of kinds of information

This section specifies the kinds of information that are determined in accordance with subsection 151C(15) of the *Telecommunications Act 1997* to be specified information for the purpose of paragraphs 151C(2)(o) and (p) of the *Telecommunications Act 1997*.