

EXPLANATORY STATEMENT

Approved by the Australian Competition and Consumer Commission

Telecommunications Act 1997

Telecommunications (Deemed Functional Separation Undertaking) Determination 2020

Authority

The Australian Competition and Consumer Commission (**the ACCC**) has made the *Telecommunications (Deemed Functional Separation Undertaking) Determination 2020 (the Instrument)* under subsections 151A(13) and 151B(1) of the *Telecommunications Act 1997 (the Telecommunications Act)*.

Under subsection 151B(1) of the Telecommunications Act, the ACCC may, by legislative instrument, determine a set of terms for a functional separation undertaking (**deemed functional separation undertaking**) that eligible corporations may elect to be bound by as if the corporation had given a standard functional separation undertaking in the terms set out in the determination.

Subsection 151A(13) of the Telecommunications Act empowers the ACCC to determine by legislative instrument one or more kinds of information provided by carriers and carriage service providers to a corporation's retail business unit that may be disclosed to its wholesale business unit for the purposes of paragraphs 151A(2)(j) and (k) of the Telecommunications Act. Paragraph 151B(1A)(a) requires the deemed functional separation undertaking to comply with, among others, paragraphs 151A(2)(j) and (k).

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 standard or joint functional separation undertaking for the ACCC's approval.

Subsection 151B(1) of the Telecommunications Act provides that the ACCC may, by legislative instrument, make a determination setting out the terms for a deemed functional separation undertaking. Once made, corporations within the class of corporations specified in the determination can elect to be bound by the deemed functional separation undertaking rather than lodging a standard functional separation undertaking with customised terms for the ACCC's approval.

For the purposes of the Instrument, the ACCC has determined that the specified class of corporations to which this Instrument applies and who can elect to be bound by the Instrument is a corporation that supplies superfast carriage services to no more than 50,000 residential customers using local access lines where that corporation is in a position to exercise control of those local access lines. Pursuant to paragraph 151B(1)(a) of the Telecommunications Act, a corporation must be included in this specified class of corporations to elect to be bound by the deemed functional separation undertaking. Should a corporation's circumstances change such that it exceeds the residential customer threshold it has 14 days to notify the ACCC of the change.

For corporations that elect to be bound by the Instrument, the obligations apply to the corporation in respect of its supply of superfast carriage services and other eligible services to residential customers

using local access lines where the corporation is in a position to exercise control of those local access lines.

Subsection 151B(1A) of the Telecommunications Act provides that a functional separation undertaking covered by a determination made under subsection 151B(1) must comply with paragraphs 151A(2)(a) to (m) and subsections 151A(9), (10) and (11) of the Telecommunications Act. Subsection 151B(1B) of the Telecommunications Act provides that the functional separation undertaking must not contain a provision of a kind specified in a determination under subsection 151A(15). At the time of making the Instrument, there were no Ministerial determinations in force under subsection 151A(15) of the Telecommunications Act.

Subsection 151A(13) of the Telecommunications Act empowers the ACCC to determine one or more kinds of information for the purposes of paragraphs 151A(2)(j) and (k), which the deemed functional separation undertaking must comply with. Paragraphs 151A(2)(j) and (k) prohibit information provided by carriers and carriage service providers to a corporation's retail business unit from being disclosed to, or obtained, accessed or used by, its wholesale business unit, unless otherwise determined by the ACCC by legislative instrument. Pursuant to subsection 151A(13), the Instrument determines the kind of information that may be disclosed, obtained, accessed or used under paragraphs 151A(2)(j) and (k) of the Telecommunications Act, for the purpose of enabling the corporation's retail business unit to obtain equivalent offers from its wholesale business unit. The Instrument determines that the excepted information for the purpose of paragraphs 151A(2)(j) and (k) of the Telecommunications Act is information that constitutes:

- wholesale pricing;
- other terms and conditions; and
- network coverage information

Pursuant to sections 151ZF and 151ZG of the Telecommunications Act, persons who elect to be bound by the Instrument are required to supply local access line Services, as defined in section 142A, and related activities on a non-discriminatory basis.

The ACCC has the power to revoke a person's election to be bound by a deemed undertaking in particular circumstances. Under subsection 151B(7), the ACCC can revoke an election if any of the following occurs:

- (i) the person has breached a fundamental provision of the undertaking;
- (ii) the person has contravened section 151ZF or 151ZG;
- (iii) the ACCC is satisfied that the person has an unsatisfactory compliance record in relation to functional separation.

If the ACCC provides written notice to a person that revokes that person's election to be bound by the deemed undertaking, the ACCC expects the revocation take effect such that the person will become structurally separated within 12 months. Prior to providing any written notice of revocation, the ACCC would provide the person with a notice of its intention to revoke and afford the person at least 15 business days to make a submission in relation to the ACCC's intention to revoke.

Long Term Interests of End-users

In deciding whether to accept a standard functional separation undertaking in accordance with section 151A of the Telecommunications Act, pursuant to subsection 151J(2), 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; and
- the matters (if any) specified in a Ministerial determination that was in force under subsection 151J(3) at the time the undertaking was given; and
- such other matters (if any) as the ACCC considers relevant.

The ACCC has considered these factors in its development of the Instrument given that the deemed functional separation undertaking offers a set of model terms for eligible corporations to elect to be bound by as though the corporation had submitted a standard functional separation undertaking pursuant to section 151A of the Telecommunications Act.

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 is satisfied that the Instrument will promote competition by providing less costly separation obligations and greater regulatory certainty for smaller superfast network operators, which will allow them to offer better prices and services in wholesale and retail markets.

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

The ACCC is satisfied that the Instrument will reduce the disproportionate regulatory cost burden on operators of networks with no more than 50,000 superfast broadband residential customers of being structurally separated. This will better enable them to invest in their networks and improve the quality of services provided to end-users.

The Instrument also helps to reduce the regulatory cost on these operators by enabling them to accept the model terms of the deemed functional separation undertaking instead of developing their own functional separation undertaking.

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

- the ACCC's ability to set terms and conditions of access including wholesale prices for declared services; 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 broadband networks for some customer segments where these wireless networks are available.

At the time of developing the Instrument, there were no Ministerial determinations in force under subsection 151J(3) for the ACCC to have regard to.

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.

The Determination also incorporates any determinations made pursuant to subsections 151A(14) and 151A(15) of the Telecommunications Act as in force from time to time. No such determinations were in force at the time the Instrument was made.

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 5 June 2020, the ACCC released a consultation paper that sought views from stakeholders on the nature and extent of potential functional separation provisions for deemed undertakings and the classes of corporations to which deemed undertakings should apply. Interested stakeholders were invited to make submissions to the ACCC by 17 July 2020. The ACCC received 13 submissions in total from small network operators, larger carriers and the Australian Communications Consumer Action Network. The consultation paper and all public submissions are available on the ACCC's website.

The ACCC also hosted two industry briefings for network operators by videoconference on 17 and 18 June 2020 that discussed the issues relevant to the making of deemed undertakings among other regulatory matters.

On 25 August 2020, the ACCC released a subsequent consultation paper addressing feedback on the first consultation paper that also included a draft version of the Instrument for comment. Interested stakeholders were invited to make submissions to the ACCC by 15 September 2020. The ACCC received submissions from Aussie Broadband, Connected Australia and NBN Co. The consultation paper and all public submissions are available on the ACCC's website.

The Instrument incorporates the following suggestions from submissions to the second consultation paper:

- amending the activities each business unit will undertake such that all network complaints are handled by the wholesale business unit and the retail business unit handles service complaints that do not require any action by the wholesale business unit;
- broadening the scope of corporate service functions that can be performed by shared staff to include marketing and other ancillary services; and
- clarifying the definition of protected information that cannot be shared between the wholesale and retail business units.

The ACCC had regard to all submissions received before making the Instrument.

Regulatory impact assessment

A preliminary assessment of the proposal to make the Instrument was conducted by the Office of Best Practice Regulation (**OBPR**), for the purposes of determining whether a Regulation Impact Statement (**RIS**) would be required. OBPR advised that a RIS would not be required as the Instrument is 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 subsections 151A(13) and 151B(1) of the *Telecommunications Act 1997* to reduce the cost burden of functional separation on smaller networks participating in superfast broadband markets. The Instrument prescribes a model set of terms for a functional separation undertaking that eligible corporations may elect to be bound by. Under subsection 151A(13), the Instrument specifies information provided by carriers and carriage service providers to a corporation's retail business unit that may be disclosed to its wholesale business unit for the purposes of paragraphs 151A(2)(j) and (k).

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 (Deemed Functional Separation Undertaking) Determination 2020*

Section 1 – Name

This section provides for the Instrument to be cited as the *Telecommunications (Deemed Functional Separation Undertaking) 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 subsections 151A(13) and 151B(1) 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 – Deemed standard functional separation undertaking

This section is largely based on subsection 151B(1) of the *Telecommunications Act 1997*, which sets out the requirements of a deemed standard functional separation undertaking. In effect, this is a model undertaking that a specified class of persons can choose to be bound by instead of submitting a standard functional separation undertaking for approval under section 151A of the *Telecommunications Act 1997*.

This section provides that the specified class of corporations to which this Instrument applies in accordance with paragraph 151B(1)(a) of the *Telecommunications Act 1997* is a class of corporations

that supplies superfast carriage services to no more than 50,000 residential customers using local access lines where those corporations are in a position to exercise control of those local access lines.

Section 7 – Terms of deemed standard functional separation undertaking

Subsection 7(1) of the Instrument replicates paragraph 151A(2)(a) of the *Telecommunications Act 1997* and provides that a person who elects to be bound by the Instrument will maintain a single wholesale business unit and a single retail business unit.

Paragraph 7(1)(a) of the Instrument specifies that a person who elects to be bound by the Instrument must have separate branding for its wholesale business unit and its retail business unit.

Paragraph 7(1)(b) of the Instrument specifies the activities that the wholesale business unit will undertake in supplying the retail business unit and other wholesale customers.

Paragraph 7(1)(c) of the Instrument specifies the activities that the retail business unit will undertake in supplying retail customers.

Subsection 7(2) of the Instrument provides that a person who elects to be bound by the Instrument will maintain arm's length functional separation between its wholesale business unit and retail business unit in accordance with paragraph 151A(2)(b) of the *Telecommunications Act 1997*. It specifies the measures that must be taken to ensure that arm's length functional separation is maintained and the governance arrangements that must apply.

Subsection 7(3) of the Instrument replicates paragraph 151A(2)(c) of the *Telecommunications Act 1997* and provides that a person who elects to be bound by the Instrument will document the terms and conditions relating to price or a method of ascertaining price and other conditions on which the wholesale business unit supplies local access line services to the retail business unit.

Subsection 7(4) of the Instrument specifies the extent to which a person who elects to be bound by the Instrument will have separate personnel allocated to its wholesale business unit and retail business unit in accordance with paragraph 151A(2)(d) of the *Telecommunications Act 1997*. It allows for the use of shared workers to carry out corporate and ancillary services functions. Shared staff would also be able to assist with business planning and investment approval processes in each business unit. The subsection also requires training for all of the corporation's workers in respect of the corporation's obligations under the Instrument. For wholesale and retail business unit staff, training should include the obligations not to divulge protected information between business units except as permitted by the Instrument. For shared staff, this training should include obligations not to divulge protected information between the wholesale and retail business units and to maintain separate access to information technology and applications for these business units as provided for in the Instrument. The subsection also allows for workers to transfer between the retail and wholesale business units, subject to those workers being made aware of the corporation's obligations under this Instrument.

Subsection 7(5) of the Instrument largely replicates paragraph 151A(2)(e) of the *Telecommunications Act 1997* and provides that a person who elects to be bound by the Instrument must ensure that there are access restrictions in place in respect of its systems and accounts to prevent the sharing of

protected information between the corporation's retail business unit with the corporation's wholesale business unit and the wholesale business unit with the corporation's retail business unit.

Subsection 7(6) of the Instrument replicates paragraph 151A(2)(f) of the *Telecommunications Act 1997* and provides that a person who elects to be bound by the Instrument will publish on its website the terms and conditions relating to price or a method of ascertaining price and other terms and conditions on which the wholesale business unit supplies local access services to a retailer or to its wholesale business customers.

Subsection 7(7) of the Instrument replicates paragraph 151A(2)(g) of the *Telecommunications Act 1997* and provides that a person who elects to be bound by the Instrument will if requested to do so by a wholesale customer or prospective wholesale customer, supply a local access line service to the wholesale customer or prospective wholesale customer on the terms and conditions that were published on the corporation's website at the time when the request was made.

Subsection 7(8) of the Instrument replicates paragraph 151A(2)(h) of the *Telecommunications Act 1997* and provides that a person who elects to be bound by the Instrument will ensure that information provided to the corporation's wholesale business unit by the corporation's wholesale customers is not disclosed to the corporation's retail business unit.

Subsection 7(9) of the Instrument replicates paragraph 151A(2)(i) of the *Telecommunications Act 1997* and provides that a person who elects to be bound by the Instrument will ensure that the corporation's retail business unit does not obtain, access or use information provided to the corporation's wholesale business unit by the corporation's wholesale customers.

Subsection 7(10) of the Instrument replicates paragraph 151A(2)(j) of the *Telecommunications Act 1997* and provides that a person who elects to be bound by the Instrument will ensure that information provided to the corporation's retail business unit by a carrier or carriage service provider, other than information of a kind specified in section 9 of the Instrument, is not disclosed to the corporation's wholesale business unit.

Subsection 7(11) of the Instrument replicates paragraph 151A(2)(k) of the *Telecommunications Act 1997* and provides that a person who elects to be bound by the Instrument will ensure that the corporation's wholesale business unit does not obtain, access or use information, other than information of a kind specified in section 9 of the Instrument, provided to the corporation's retail business unit by a carrier or carriage service provider.

Subsection 7(12) of the Instrument replicates paragraph 151A(2)(l) of the *Telecommunications Act 1997* and provides that a person who elects to be bound by the Instrument will ensure that the corporation uses the same customer interface, as defined in section 142A, for dealings between the wholesaler and the wholesaler's wholesale customers, and as the wholesaler uses for dealings between the wholesaler and its retail business unit.

Subsection 7(13) of the Instrument provides that a person who elects to be bound by the Instrument will ensure that it complies with any relevant requirements specified in determinations made under subsections 151A(14) and 151A(15) of the *Telecommunications Act 1997*.

Subsection 7(14) of the Instrument provides for annual compliance reporting to the ACCC in accordance with subsection 151A(10) of the *Telecommunications Act 1997*.

Subsection 7(15) of the Instrument provides for compliance plan reporting to the ACCC in accordance with subsection 151A(11) of the *Telecommunications Act 1997*. This requires the corporation to provide the ACCC with a written plan setting out the actions to be taken by the corporation for the purpose of ensuring it complies with subsections 7(1) to 7(13) of the Instrument within 3 months of the person electing to be bound by the Instrument.

Subsection 7(16) of the Instrument requires a corporation to which the Instrument applies to notify the ACCC in writing within 14 days if the residential services threshold set out in paragraph 6(a) has been exceeded.

Section 8 – Fundamental provisions

This section provides that subsections 7(1) to 7(12) of the Instrument are fundamental provisions in accordance with the meaning given by subsection 151A(9) of the *Telecommunications Act 1997*.

Section 9 – Determination of kinds of information

This section specifies the kind of information that is determined in accordance with subsection 151A(13) of the *Telecommunications Act 1997* to be specified information for the purpose of subsections 7(10) and 7(11) of the Instrument.