EXPLANATORY STATEMENT

Telecommunications Act 1997

Telecommunications (Operational Separation - Designated Services) Determination (No. 1) 2005

Issued by the authority of the Minister for Communications, Information Technology and the Arts

OVERVIEW

The Telecommunications (Operational Separation - Designated Services) Determination (No. 1) 2005 (the Determination) is made by the Minister under subclause 50A(1) of the Telecommunications Act 1997 (the Telecommunications Act). The Determination specifies certain telecommunications services as ‘designated services’ for the purposes of operational separation as set out in Part 8 of Schedule 1 to the Telecommunications Act.

Background

Schedule 11 to the Telecommunications Legislation Amendment (Competition and Consumer Issues) Act 2005 (the T(CCI) Act) amends the Telecommunications Act to provide for the implementation of operational separation of Telstra by way of a standard carrier licence condition. Schedule 11 to the T(CCI) Act commences on the earlier of Proclamation, or six months from Royal Assent (item 13 in the table in subsection 2(1) of the T(CCI) Act).

On 15 December 2005, the Governor-General proclaimed 1 January 2006 as the date on which Schedule 11 to the T(CCI) Act commences. The Proclamation is a legislative instrument for the purposes of the Legislative Instruments Act 2003 (LIA), and was registered on the Federal Register of Legislative Instruments on 20 December 2005.

Subsection 4(1) of the Acts Interpretation Act 1901 (AIA) provides that, where an Act (or part of an Act) confers power to make an instrument of a legislative character then, unless the contrary intention appears, the power may be exercised and anything may be done for the purpose of exercising the power or bringing the instrument into effect, before the Act (or that part of the Act) comes into effect. Subsection 4(2A) of the AIA provides that, where an instrument is made under subsection 4(1), the instrument may provide that the instrument commences on a specified date that is not earlier than the date on which the Act (or the part of the Act) under which the instrument is made commences. Relying on subsection 4(1) of the AIA, this Determination was made and will be registered on the Federal Register of Legislative Instruments prior to Schedule 11 of the T(CCI) Act commencing. Consistent with subsection 4(2A) of the AIA, clause 2 of the Determination specifies that the Determination commences on 1 January 2006 – the same date that Schedule 11 to the T(CCI) Act commences.
Purpose of determining an eligible service as a designated service

The aim of operational separation is to promote the principles of transparency and equivalence in relation to the supply by Telstra of wholesale eligible services. This aim will be achieved by the implementation of measures contained in the draft operational separation plan, to be drafted by Telstra and provided to the Minister for approval within 90 days of the commencement of Part 8 (as required by clause 52 of Schedule 1 to the Telecommunications Act).

Paragraph 48(2)(a) of Schedule 1 to the Telecommunications Act provides that one of the objects of Part 8 of that Schedule is to promote a principle of equivalence in relation to the supply by Telstra of designated services to Telstra’s wholesale customers and Telstra’s retail business units. Under subclause 50A(1) of Schedule 1 to the Telecommunications Act, the Minister for Communications, Information Technology and the Arts (the Minister) may specify an ‘eligible service’ as a ‘designated service’ for the purposes of Part 8 of Schedule 1. ‘Eligible service’ has the same meaning in Part 8 of Schedule 1 as in section 152AL of the Trade Practices Act 1974 (TPA). Section 152AL of the TPA provides that an eligible service is a listed carriage service (as defined by the Act) or a service that facilitates the supply of a listed carriage service. The purpose of the Determination is to specify a number of eligible services as designated services for the purposes of Part 8 of Schedule 1 to the Act.

The designated services will be relevant to the draft operational separation plan prepared by Telstra which, if approved by the Minister, will become a final operational separation plan. Subclause 51(1) of Schedule 1 to the Telecommunications Act provides that a draft or final operational separation plan must be directed towards the achievement of the aims and objects of Part 8 of that Schedule, and must contain provisions requiring Telstra to report on its compliance with a final operational separation plan and to arrange an independent audit of its compliance. In addition, paragraph 51(1)(d) provides that an operational separation plan must comply with such requirements as are specified by the Minister in a written determination. The Minister is expected to make a determination under paragraph 51(1)(d) – the Telecommunications (Requirements for Operational Separation Plan) Determination (No. 1) 2005 – contemporaneously with the making of this Determination.

The determination made under paragraph 51(1)(d) will include requirements that relate to all eligible services that Telstra supplies to wholesale customers. In addition, that determination will include requirements relating to price and non-price equivalence that will only apply to designated services.

Consultation undertaken in relation to the Determination

Under subclause 50A(5), the Minister must consult with Telstra before making a determination under subclause 50A(1). Telstra’s views were sought by the Minister throughout the drafting process. On 14 December 2005, the Minister released a draft version of the Determination for public comment. Comments provided by Telstra during
the drafting process were considered by the Minister in making the Determination. The views of other stakeholders, including the Australian Competition and Consumer Commission (ACCC), were also sought and considered by the Minister in making this Determination.

Notes on Clauses

Clause 1 - Name of Determination
Clause 1 provides that the Determination is the *Telecommunications (Operational Separation - Designated Services) Determination (No. 1) 2005.*

Clause 2 - Commencement
Clause 2 provides for the commencement of the Determination on 1 January 2006.

Clause 3 – Definitions
Clause 3 sets out key definitions for the purposes of the Determination.

A drafting note to clause 3 notes that several terms used in the Determination are defined in the Telecommunications Act, and have the same meaning in the Determination as they have in that Act.

Clause 4 – Designated services
Subclause 4(1) provides that the active declared services listed in the Schedule to the Determination, as well as the eligible service specified in clause 5, are determined as designated services.

Subclause 4(2) makes clear that where Telstra supplies its retail business units with an eligible service with similar characteristics to an active declared service specified in the Schedule, then regardless of how that eligible service is described, it is included within the definition of the active declared service and hence determined as a designated service. The definition of the terms ‘retail business unit’ and ‘business unit’ are given in clause 50 of Schedule 1 to the Telecommunications Act. A retail business unit of Telstra is a part of Telstra by which Telstra deals with its retail customers.

Subclause 4(2) also makes clear that the supply by Telstra to its retail business units of an active declared service combined or ‘bundled’ with another eligible service would not affect its inclusion as an active declared service or its determination as a designated service.

Clause 5 – Wholesale ADSL (Layer 2)
Subclause 5(1) provides that Wholesale ADSL Layer 2 is determined as a designated service.

Subclause 5(2) defines Wholesale ADSL Layer 2 for the purposes of the Determination. Wholesale ADSL Layer 2 is a carriage service that uses copper wire to carry data between the boundary of the end user’s premises and the local exchange, but not
necessarily to the exchange where the data traffic is aggregated and where Telstra’s network is interconnected with the network of a wholesale customer (a ‘point of interconnection’). This exchange will normally, but not necessarily, be located in the capital city of a State or Territory. The definition therefore recognises that the carriage of data to the exchange in the capital city may utilise other technologies or means of transmission. The reference to a ‘point of interconnection’ in subclause 5(2) is not intended to imply that Wholesale ADSL Layer 2 is not a carriage service that Telstra supplies to its retail business units. Instead, its purpose is to make clear the kind of exchange referred to in paragraph 5(2)(b).

Schedule - Active declared services determined as designated services

The Schedule lists those active declared services which, by virtue of clause 4, are determined as designated services by referring to the description of those services in the relevant ACCC declarations. The description of a designated service will therefore be affected by any changes or exceptions to the relevant ACCC declaration. ‘ACCC declaration’ is defined in clause 3, and means a declaration made by the ACCC under section 152AL of the TPA as in force from time to time. This means that a change to the description of a service described in an ACCC declaration will also change the description of the designated service. This will ensure that the concept of designated services, as applied in the operational separation plan, remains relevant and is consistent with the purpose of sections 151CP and 152EQ of the TPA. The effect of these provisions is that the ACCC must have regard to conduct that Telstra engages in to comply with a final operational separation plan in performing its functions, or exercising its powers under Parts XIB and XIC of the TPA.

The services specified in the Schedule are:

1. Domestic PSTN Originating Access Service as described in the ACCC declaration of that name;
2. Domestic PSTN Terminating Access Service as described in the ACCC declaration of that name;
3. Unconditioned Local Loop Service as described in the ACCC declaration of that name;
4. Local Carriage Service as described in the ACCC declaration of that name;
5. Line Sharing Service as described in the ACCC declaration of that name;
6. Domestic Transmission Capacity Service as described in the ACCC declaration of that name.