

EXPLANATORY STATEMENT

Approved by the Australian Competition and Consumer Commission

Telecommunications Act 1997

Telecommunications (Deemed Functional Separation Undertaking) Amendment Determination 2024 (No. 1)

Authority

The Australian Competition and Consumer Commission (**the ACCC**) has made the *Telecommunications (Deemed Functional Separation Undertaking) Amendment Determination 2024 (No. 1)* (**the Instrument**) under subsection 151B(1) of the *Telecommunications Act 1997* (**the Telecommunications Act**) and in accordance with subsection 33(3) of the *Acts Interpretation Act 1901* (**the AIA**).

Under subsection 151B(1) of the Telecommunications Act, the ACCC may, by legislative instrument, determine a set of terms for a 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 33(3) of the AIA relevantly provides that where an Act confers a power to make a legislative instrument, the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

Overview of the Instrument

The Instrument amends the *Telecommunications (Deemed Functional Separation Undertaking) Determination 2020* (**the Deemed Functional Separation Undertaking**) to include stronger obligations to ensure that the corporation's wholesale and retail business units are operating on an arm's-length basis and to promote competition in dependent retail markets. The Instrument also includes enhanced transparency and reporting obligations that will allow for more effective regulatory oversight of the corporation's compliance with the obligations in the undertaking by the ACCC.

Purpose and operation of the Instrument

On 14 May 2020, the Parliament passed the *Telecommunications Legislation Amendment (Competition and Consumer) Act 2020*. This Act amended the Telecommunications Act including by giving superfast fixed line network operators the option of operating on a functionally separated basis, rather than a structurally separated basis as had been previously required. 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.

In October 2020, pursuant to subsections 151A(13) and 151B(1) of the Telecommunications Act, the ACCC made the Deemed Functional Separation Undertaking. The ACCC was satisfied that the Deemed Functional Separation Undertaking would promote the long-term interests of end-users of

carriage services or of services supplied by means of carriage services by reducing the disproportionate regulatory cost burden on operators of eligible networks.

In December 2020, pursuant to subsection 151C(15) of the Telecommunications Act, the ACCC made the *Telecommunications (Permitted Information Sharing for Joint Functional Separation Undertakings) Determination 2020*. Section 6 of this instrument specifies the kinds of information that may be shared between retailers and wholesalers bound by a joint functional separation undertaking to a similar effect to that enabled by section 9 of the Deemed Functional Separation Undertaking. Relevantly, as a result of the public consultation undertaken by the ACCC, the kinds of information specified in this instrument were of a wider scope than that specified by section 9 of the Deemed Functional Separation Undertaking.

In March 2021, pursuant to subsection 151A(13) of the Telecommunications Act and subsection 33(3) of the AIA, the ACCC made the *Telecommunications (Deemed Functional Separation Undertaking) Amendment Determination 2021 (No. 1)* to ensure consistency of regulatory treatment of persons subject to functional separation undertakings. The ACCC amended section 9 of the Deemed Functional Separation Undertaking by expanding the kinds of information specified so as to duplicate the kinds of information specified in section 6 of the *Telecommunications (Permitted Information Sharing for Joint Functional Separation Undertakings) Determination 2020*.

In January 2024, pursuant to subsection 151B(1) of the *Telecommunications Act* and subsection 33(3) of the AIA, the ACCC made the Instrument to include stronger obligations to ensure that the corporation's wholesale and retail business units are operating on an arm's-length basis and to promote competition in dependent retail markets. The Instrument also includes enhanced transparency and reporting obligations that will allow for more effective regulatory oversight of the corporation's compliance with the obligations in the undertaking by the ACCC.

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*.

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 retail level competition by providing wholesale customers greater assurance that the corporation bound by the Deemed Functional Separation Undertaking is operating its wholesale and retail business units on an arm's-length basis. In addition, the Instrument will enable the ACCC to better monitor compliance with the Deemed Functional Separation Undertaking.

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

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.

Documents incorporated by reference

The Instrument does not incorporate any document by reference.

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 9 November 2023, the ACCC released a consultation paper that also included a draft version of the Instrument for comment and which sought views from interested stakeholders on the stronger obligations in the Deemed Functional Separation Undertaking to ensure that the corporation's wholesale and retail business units are operating on an arm's-length basis and to promote competition in dependent retail markets. Interested stakeholders were invited to make submissions to the ACCC by 7 December 2023. The consultation paper and draft version of the Instrument was available on the ACCC's website and was sent to recipients of the ACCC's Communications Information Network email subscription list.

The ACCC did not receive any submissions to the consultation paper.

Regulatory impact assessment

A preliminary assessment of the proposal to make the Deemed Functional Separation Undertaking was conducted by the Office of Impact Analysis (OIA), for the purposes of determining whether a Regulation Impact Statement (RIS) would be required. OIA advised that a RIS would not be required as the Deemed Functional Separation Undertaking is machinery in nature (OIA ID: 23957).

Statement of compatibility with human rights

Subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* requires the rule-maker in relation to a legislative instrument to which section 42 (disallowance) of the *Legislation Act 2003* applies to cause a statement of compatibility with human rights to be prepared in respect of that legislative instrument.

The statement of compatibility set out below has been prepared to meet that requirement.

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) Amendment Determination 2024 (No. 1)*

Section 1 – Name

This section provides for the Instrument to be cited as the *Telecommunications (Deemed Functional Separation Undertaking) Amendment Determination 2024 (No. 1)*.

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 151B(1) of the *Telecommunications Act 1997*.

Section 4 – Amendment

Section 4 provides that the instrument specified in Schedule 1 is amended as set out in the item in that Schedule.

Schedule 1 – Amendments (Section 7 – Terms of deemed functional separation undertaking)

Schedule 1 amends section 7 of the *Telecommunications (Deemed Functional Separation Undertaking) Determination 2020* by including stronger obligations to ensure that the wholesale and retail business units of a corporation that has elected to be bound by the Deemed Functional Separation Undertaking are operating on an arm's-length basis and to promote competition in dependent retail markets. These amendments also include enhanced transparency and reporting obligations for a corporation that has elected to be bound by the Deemed Functional Separation Undertaking that will allow for more effective regulatory oversight of the corporation's compliance with the obligations in the undertaking by the ACCC.

Item 1

Item 1 adds subsection 7(3A) to the Deemed Functional Separation Undertaking and provides that a corporation that elects to be bound by the Deemed Functional Separation Undertaking will prepare the pricing documentation referred to in subsection 7(3) of the *Telecommunications (Deemed Functional Separation Undertaking) Determination 2020* in a manner that allows a direct comparison between the price related terms on which the corporation's wholesale business unit supplies the corporation's retail business unit and the price related terms on which the corporation's retail business unit supplies its retail customers. The corporation must list each short-term and long-term discount, credit or rebate arrangement that the corporation's wholesale business unit has offered to the corporation's retail business unit, including the name of the arrangements, the relevant amounts, the qualifying conditions and the offer period.

Explanatory Statement to the Telecommunications (Deemed Functional Separation Undertaking) Amendment Determination 2024 (No. 1)

Item 1 adds subsection 7(3B) to the Deemed Functional Separation Undertaking and provides that a corporation that elects to be bound by the Deemed Functional Separation Undertaking will promptly update the pricing documentation referred to in subsection 7(3) of the *Telecommunications (Deemed Functional Separation Undertaking) Determination 2020* each time that the corporation changes its wholesale or retail prices, including any short-term or long-term discounts or offers.

Item 2

Item 2 adds subsection 7(6A) to the Deemed Functional Separation Undertaking and provides that a corporation that elects to be bound by the Deemed Functional Separation Undertaking will ensure that for the avoidance of doubt, the published terms and conditions relating to price or a method of ascertaining price referred to in subsection 7(6) of the *Telecommunications (Deemed Functional Separation Undertaking) Determination 2020* will include each short-term and long-term discount, credit or rebate arrangement that the corporation's wholesale business unit has offered to the corporation's retail business unit.

Item 2 adds subsection 7(6B) to the Deemed Functional Separation Undertaking and provides that a corporation that elects to be bound by the Deemed Functional Separation Undertaking will promptly update its published terms and conditions each time that the corporation changes its wholesale or retail prices, including any short-term or long-term discounts or offers.

Item 2 adds subsection 7(6C) to the Deemed Functional Separation Undertaking and provides that the corporation must promptly notify all wholesale customers in writing each time that the corporation updates its price related terms and conditions.

Item 3

Item 3 adds subsection 7(12A) to the Deemed Functional Separation Undertaking and provides that a corporation that elects to be bound by the Deemed Functional Separation Undertaking will ensure that for the avoidance of doubt, the customer interface referred to in subsection 7(12) of the *Telecommunications (Deemed Functional Separation Undertaking) Determination 2020* must provide the same functionality for wholesale customers and the corporation's retail business unit in respect of local access line services and must provide wholesale customers with access to the same set of local access lines that the corporation provides to its retail business unit.

Item 4

Item 4 adds subsection 7(14A) to the Deemed Functional Separation Undertaking and provides that a corporation that elects to be bound by the Deemed Functional Separation Undertaking will include a copy, in each of the compliance reports referred to in subsection 7(14) of the *Telecommunications (Deemed Functional Separation Undertaking) Determination 2020*, of each document setting out the terms and conditions on which the corporation's wholesale business unit supplied local access lines services to the corporation's retail business unit, and each published wholesale standard form of agreement in effect during the reporting period.