

Commonwealth of Australia

Telecommunications Act 1997

**Telecommunications (Acceptance of Undertaking
about Structural Separation—Matters)
Instrument 2011**

I, STEPHEN MICHAEL CONROY, Minister for Broadband, Communications and the Digital Economy, make the following Instrument under subsection 577A(7) of the *Telecommunications Act 1997*.

Dated 23 June 2011

STEPHEN CONROY

Minister for Broadband, Communications and the Digital Economy

1 Name of Instrument

This Instrument is the *Telecommunications (Acceptance of Undertaking about Structural Separation—Matters) Instrument 2011*.

2 Commencement

This Instrument commences on the day after it is published on the Department's website in accordance with subsection 577A(22) of the Act.

3 Definitions

(1) In this Instrument:

Act means the *Telecommunications Act 1997*.

eligible service has the same meaning as in section 152AL of the *Competition and Consumer Act 2010*.

national broadband network has the same meaning as in section 577BC of the Act.

NBN Co has the same meaning as in section 577BC of the Act.

network business unit means a business unit of Telstra that supplies the following in relation to eligible services:

- (a) fault detection, handling and rectification;

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(b) service activation and provisioning.

retail business unit means a business unit by which Telstra deals with its retail customers.

wholesale business unit means a business unit by which Telstra deals with its wholesale customers.

- (2) In this instrument, **independent telecommunications adjudicator** has the same meaning as in section 152EQ of the *Competition and Consumer Act 2010*.
- (3) For the purposes of subsection (2), assume that Division 3 of Part 1 of Schedule 1 to the *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act 2010* has commenced.

Note By virtue of paragraph 46(1)(b) of the Acts Interpretation Act 1901, the following expressions have the same meaning as in the Act:

- ACCC
- *designated day*
- *equivalence*
- *fixed-line carriage service*
- *regulated service*
- *Telstra*

4 Matters to which the ACCC must have regard

For the purposes of paragraph 577A(6)(a) of the Act, the ACCC must have regard to each of the following matters in deciding whether to accept an undertaking given by Telstra under section 577A of the Act:

- (a) the Government's policy objective of improving the accessibility and quality of broadband services for consumers in Australia, including those in regional, rural and remote areas;
- (b) the Government's support for a form of structural separation whereby Telstra will progressively migrate fixed-line carriage services that it supplies to retail customers to the national broadband network as that network is rolled out;
- (c) the expected distribution of the long-term economic benefits for different types of consumers in different geographic areas that would occur as a result of the undertaking coming into force;
- (d) the conduct that would be authorised under section 577BA of the Act as a consequence of the ACCC's acceptance of the undertaking or the undertaking coming into force;

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- (e) whether the undertaking provides for the ACCC to be given written copies of all contracts, arrangements or understandings entered into by Telstra in order for it to comply with the undertaking;
- (f) whether the undertaking requires Telstra to implement a governance framework that:
 - (i) ensures appropriate oversight by Telstra of its compliance with the undertaking; and
 - (ii) requires regular reporting by Telstra to the ACCC on Telstra's compliance with the undertaking; and
 - (iii) provides that the ACCC may consult with wholesale customers and other stakeholders about Telstra's compliance with the undertaking; and
 - (iv) provides that the ACCC may, for the purpose of such consultation, disclose information provided to it by Telstra in accordance with subparagraph (f)(ii) (other than information that is commercially confidential); and
 - (v) provides assurance to wholesale customers that Telstra is meeting its obligations under the undertaking;
- (g) whether the undertaking provides for the following matters relating to transparency and equivalence in relation to the supply by Telstra of regulated services:
 - (i) measures to provide sufficient transparency to enable the ACCC to provide assurance to stakeholders that the undertaking provides for equivalence in relation to terms and conditions relating to price or a method of ascertaining price;
 - (ii) organisational arrangements within Telstra that promote interim equivalence and transparency, including arrangements and measures set out in Schedule 1;
 - (iii) measurable standards for the equivalent supply of regulated services to Telstra's wholesale customers and retail business units and enforcement of those standards, including through service level guarantee payments;
 - (iv) effective measures to protect from unauthorised disclosure or use confidential information and commercially sensitive information that Telstra holds in relation to Telstra's wholesale customers, or in relation to customers of those wholesale customers or other end-users of services supplied by those

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wholesale customers, which Telstra obtains for the purposes of, or in the course of, supplying wholesale carriage services to those wholesale customers;

- (v) equivalent notification to Telstra's wholesale customers and Telstra's retail business units of matters relating to Telstra's networks which affect the delivery or operational quality of regulated services;
 - (vi) effective mechanisms for the resolution of equivalence disputes between Telstra and its wholesale customers;
 - (vii) measures to ensure that systems used for wholesale customers in relation to billing information, ordering, provisioning, fault reporting and fault rectification provide outcomes and functionality that are equivalent to the outcomes and functionality provided by systems used for those matters by Telstra's retail business units;
- (h) if, as part of the mechanisms for the resolution of equivalence disputes set out in the undertaking in accordance with subparagraph (g)(vi), the undertaking provides for the establishment of the independent telecommunications adjudicator—whether the undertaking requires the independent telecommunications adjudicator to have the organisational and governance arrangements set out in Schedule 2;
- (i) the Government's statement of expectations given to NBN Co dated 17 December 2010;
- (j) NBN Co's Corporate Plan 2011-2013 dated 17 December 2010;
- (k) the governance and operating framework for NBN Co, established by the *National Broadband Network Companies Act 2011* and the *Telecommunications Legislation Amendment (National Broadband Network Measures—Access Arrangements) Act 2011*.

**Schedule 1 Organisational arrangements that promote interim equivalence
and transparency**

- (1) Maintaining one or more wholesale business units and one or more network business units which are separate from Telstra's retail business units.

Staff to work principally for the business units they are engaged by

- (2) Subject to items (3), (5), (6) and (8) to (11) of this Schedule, measures that provide that:
- (a) staff who are engaged to work for Telstra's wholesale business units work principally for those business units; and
 - (b) staff who are engaged to work for Telstra's retail business units work principally for those business units; and
 - (c) staff who are engaged to work for Telstra's network business units work principally for those business units.

Wholesale business unit staff

- (3) Subject to item (11) of this Schedule, measures that prohibit staff who are engaged to work for Telstra's wholesale business units from undertaking any work for Telstra's retail business units.
- (4) Measures that ensure that any incentive remuneration scheme applying to staff who are engaged to work for Telstra's wholesale business units is solely based on the performance of wholesale business units, unless otherwise approved by the ACCC.

Network business unit staff

- (5) Subject to items (6) and (11) of this Schedule, measures that prohibit staff who are engaged to work for Telstra's network business units from undertaking any work for Telstra's retail business units.
- (6) Measures that provide that staff who are engaged to work for Telstra's network business units may, in the course of working for the network business units, undertake for the retail business units each of the following kinds of work:
- (a) fault detection, handling and rectification;
 - (b) service activation and provisioning;
 - (c) if the undertaking sets out any reasonable circumstances in which those staff may undertake another kind of work for the retail business units, and those circumstances apply—that kind of work;

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where the network business units have been requested by the retail business units to undertake that kind of work.

- (7) Measures that ensure that any incentive remuneration scheme applying to staff who are engaged to work for Telstra's network business units is solely based on the performance of network business units, unless otherwise approved by the ACCC.

Retail business unit staff

- (8) Subject to item (11) of this Schedule, measures that prohibit staff who are engaged to work for Telstra's retail business units from undertaking any work for Telstra's wholesale business units.
- (9) Subject to items (10) and (11) of this Schedule, measures that prohibit staff who are engaged to work for Telstra's retail business units from undertaking any work for Telstra's network business units.
- (10) Measures that provide that staff who are engaged to work for Telstra's retail business units may, in the course of working for the retail business units, undertake work for the network business units if:
- (a) the undertaking sets out any reasonable circumstances in which those staff may undertake a kind of work for the network business units; and
 - (b) the work is of that kind; and
 - (c) those circumstances apply; and
 - (d) the retail business units have been requested by the network business units to undertake that kind of work.

Services that any staff can work on

- (11) Measures that provide that, notwithstanding any other provision of this Schedule, staff engaged to work for:
- (a) Telstra's wholesale business units;
 - (b) Telstra's retail business units;
 - (c) Telstra's network business units;
- may engage in work relating to the supply of the following types of services:
- (d) services supplied outside of Australia;
 - (e) services supplied in Australia to customers outside of Australia;
 - (f) services in relation to disability products;

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- (g) emergency call services;
- (h) payphones and payphone carriage services;
- (i) other services which it is not technically or operationally efficient to supply across separate business units, and which are either:
 - (i) set out in the undertaking; or
 - (ii) approved by the ACCC from time to time;

provided that safeguards that will apply to the provision of such services to ensure that Telstra gains no unfair competitive advantage from the integration, supply or provision of such services are either:

- (iii) set out in the undertaking; or
- (iv) approved by the ACCC.

Resellers not prevented from being customers of Telstra's retail business units

- (12) For the avoidance of doubt, the organisational arrangements described in this Schedule are not intended to restrict or prevent a wholesale customer who resupplies Telstra services to a third person from choosing to be, with the agreement of a Telstra retail business unit, a customer of that Telstra retail business unit.

**Schedule 2 Organisational and governance arrangements for the
independent telecommunications adjudicator**

- (1) The independent telecommunications adjudicator (ITA) must be established as a company limited by guarantee.
- (2) The company Constitution must:
 - (a) provide for the appointment of a person approved by the ACCC to the position of Adjudicator, with the appointment and approval process for that position requiring;
 - (i) the ITA to nominate a person to the ACCC as the proposed Adjudicator; and
 - (ii) the ACCC to consult with wholesale customers and other stakeholders about the proposed appointment of that person as Adjudicator;
 - (b) vest in the Adjudicator the authority to resolve equivalence disputes between Telstra and its wholesale customers in relation to the supply by Telstra of regulated services;
 - (c) for this purpose, provide for the Adjudicator to receive, investigate and facilitate the resolution of complaints;
 - (d) in doing so, have regard to the law, good industry practice and what is fair and reasonable in all the circumstances;
 - (e) require the Adjudicator to pursue the objective of fair, just, economical and expeditious resolution;
 - (f) provide for Telstra to provide full access to the Adjudicator to its records, systems and personnel to facilitate expeditious investigation and resolution of complaints;
 - (g) provide for the Adjudicator to report to the ACCC in relation to any matter;
 - (h) provide for the Adjudicator to perform functions given to it under a final migration plan;
 - (i) provide for the Adjudicator to prepare and propose an annual budget to the Board setting out the resources and funding the Adjudicator considers necessary to meet his or her functions;

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- (j) require the Board to create a charter of independence which guarantees the independence of the Adjudicator and is to be approved by the ACCC.
- (3) The person selected as the Adjudicator:
- (a) must have relevant expertise in the technical and operational matters relating to telecommunications;
 - (ii) must not be, and must not have been in the two years prior to his or her appointment as Adjudicator, an employee, agent or consultant of Telstra;
- (4) The Adjudicator must have the powers necessary to fulfil the functions of the role, including the power to require reasonable remediation by Telstra of its wholesale processes.
- (5) The company Constitution may vest in the Adjudicator the authority to resolve disputes between Telstra and its wholesale customers in relation to other matters.
- (6) The company Constitution is to be in a form approved by the ACCC and not to be changed without the ACCC's approval.