

EXPLANATORY STATEMENT

Approved by the Australian Competition and Consumer Commission

Telecommunications Act 1997

Telecommunications (Deemed Functional Separation Undertaking) Amendment Determination 2021 (No. 1)

Authority

The Australian Competition and Consumer Commission (**the ACCC**) has made the *Telecommunications (Deemed Functional Separation Undertaking) Amendment Determination 2021 (No. 1)* (**the Instrument**) under subsection 151A(13) of the *Telecommunications Act 1997* (**the Telecommunications Act**) and in accordance with subsection 33(3) of the *Acts Interpretation Act 1901* (**the AIA**).

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.

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.

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.

Subsection 151A(13) of the Telecommunications Act empowers the ACCC to determine, by legislative instrument, the kinds of information provided by a carrier or carriage service provider to a corporation's retail business unit that may be disclosed to, or obtained, accessed or used by that corporation's wholesale business unit as exceptions to paragraphs 151A(2)(j) and (k), respectively.

In October 2020, pursuant to subsections 151A(13) and 151B(1) of the Telecommunications Act, the ACCC made the *Telecommunications (Deemed Functional Separation Undertaking) Determination 2020* (**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. Section 9 of the Deemed Functional Separation Undertaking sets out the kinds of information, determined in accordance with subsection

151A(13) of the Telecommunications Act, to be specified information for the purpose of subsections 7(10) and 7(11) of the Deemed Functional Separation Undertaking.

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 February 2021, pursuant to subsection 151A(13) of the Telecommunications Act and subsection 33(3) of the AIA, 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*.

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 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*.

Prior to making the Instrument, the ACCC posted a consultation notice to its website on 18 December 2020 outlining the proposed amendments to the Deemed Functional Separation Undertaking. Interested stakeholders were invited to make submissions to the ACCC by 5 February 2021. The ACCC did not receive any submissions to the consultation notice.

Regulatory impact assessment

A preliminary assessment of the proposal to make the Deemed Functional Separation Undertaking 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 Deemed Functional Separation Undertaking is machinery in nature (OBPR 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.

Overview of the Instrument

Subsection 151B(1) of the *Telecommunications Act 1997* 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 1997*, the ACCC made such a determination - the *Telecommunications (Deemed Functional Separation Undertaking) Determination 2020 (the Deemed Functional Separation Undertaking)*.

The *Telecommunications (Deemed Functional Separation Undertaking) Amendment Determination 2021 (No. 1) (the Instrument)* amends the Deemed Functional Separation Undertaking to expand the kinds of information permitted to be shared between the retail and wholesale business units of a corporation bound by the Deemed Functional Separation Undertaking. The Instrument has been made pursuant to subsection 151A(13) of the *Telecommunications Act 1997* and subsection 33(3) of the *Acts Interpretation Act 1901*.

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 2021 (No. 1)*

Section 1 – Name

This section provides for the Instrument to be cited as the *Telecommunications (Deemed Functional Separation Undertaking) Amendment Determination 2021 (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 151A(13) 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 – Amendment

Schedule 1 amends section 9 of the *Telecommunications (Deemed Functional Separation Undertaking) Determination 2020* by expanding the kinds of information permitted to be shared between the retail and wholesale business units of a corporation that has elected to be bound by the *Telecommunications (Deemed Functional Separation Undertaking) Determination 2020*.