

EXPLANATORY STATEMENT

Telecommunications Act 1997

Telecommunications (Functional Separation Requirements Determination—Further Extension of Period) Instrument 2011

Issued by the authority of the Minister for Broadband, Communications and the Digital Economy

OVERVIEW

The *Telecommunications (Functional Separation Requirements Determination—Further Extension of Period) Instrument 2011* (the Instrument) is made by the Minister under subclause 75(5B) of Schedule 1 to the *Telecommunications Act 1997* (the Act). The Instrument extends the period within which a functional separation requirements determination (FSRD) must come into force to the period ending on 31 December 2011. Extending the period to this date further extends the period by six months from when the FSRD was required to come into force under the *Telecommunications (Functional Separation Requirements Determination—Extension of Period) Instrument 2011*. That instrument extended the period by three months (to 30 June 2011) from when the FSRD was required to come into force under subclause 75(5).

Background

The Australian telecommunications market is characterised by a very strong and highly integrated incumbent, Telstra. Telstra owns the only copper network connecting almost every house, the largest cable and mobile networks, and a 50 per cent stake in Foxtel, Australia's largest subscription television provider.

The National Broadband Network (NBN) will deliver a wholesale-only, open access telecommunications market structure, which will transform the competitive dynamics in the Australian telecommunications industry.

Consistent with the market structure that will be delivered through the NBN, Part 33 of the Act provides a framework for Telstra to voluntarily structurally separate.

If Telstra does not voluntarily structurally separate, the Act requires the functional separation of Telstra under Part 9 of Schedule 1 to the Act. Functional separation is a regulatory tool that has been used successfully in other countries such as the United Kingdom and New Zealand and can be used by telecommunications regulators within the European Union, to address the underlying incentives that fixed-line incumbents have to favour their own retail businesses.

Under clause 76 of Part 9 of Schedule 1 to the Act, Telstra will (except in certain specified circumstances) be required to submit a draft Functional Separation Undertaking (FSU) to the Minister. The draft FSU must contain certain elements, as provided for under clause 73, and comply with key principles which are set out under

clause 74. The draft FSU must also include specific matters which have been set out by the Minister in the FSRD as provided for under clause 75.

Under clause 77, the Minister would consider the draft FSU submitted by Telstra, undertake public consultation and consult the ACCC. The Minister would then approve, vary or replace the draft FSU. The draft FSU would then become a final FSU. Telstra would be required to comply with the final FSU with compliance being a carrier licence condition.

The timeframe for making an FSRD

Under subclause 75(5) of Part 9 of Schedule 1 to the Act, the Minister must ensure that an FSRD comes into force within 90 days after the commencement of this provision on 1 January 2011. On 25 March 2011, the Minister extended the period within which the FSRD must come into force to 30 June 2011.

As it is the Government's preferred outcome for Telstra to voluntarily structurally separate, the Act gives priority to a structural separation process over the functional separation process. This is facilitated by the Minister, under subclause 75(5B), extending or further extending the 90-day period within which he is required to make the FSRD referred to in subclause 75(5), so long as the extension, or the total of the extensions, does not exceed 18 months. Extending this period allows Telstra to concentrate on preparing its structural separation undertaking (SSU) rather than having to prepare at the same time both an SSU and an FSU. Under subclause 75(5D), the Minister is required to table a copy of the instrument made under subclause 75(5B) in each House of the Parliament within 15 sitting days after making the instrument.

Conditions on the Minister extending the timeframe for making an FSRD

Subclause 75(5C) provides that the Minister may only extend or further extend the period within which an FSRD must come into force if:

- Telstra satisfies the Minister that it is preparing an SSU (see paragraph 75(5C)(a)); or
- Telstra has given an SSU to the ACCC, but the ACCC has not decided whether to accept the undertaking (see paragraph 75(5C)(b)); or
- Telstra has given the ACCC an SSU, which has been accepted by the ACCC subject to the occurrence of certain events within a specified period, the undertaking is not in force and the period has not ended (i.e. at least one of the specified events has not yet occurred) (see paragraph 75(5C)(c)); or
- an SSU is in force, which provides for Telstra to submit a draft migration plan to the ACCC, and either:
 - a) Telstra satisfies the Minister that it is in the process of preparing a draft migration plan (see paragraph 75(5C)(d)); or
 - b) Telstra has given a draft migration plan to the ACCC, but the ACCC has not yet made a decision as to whether to approve the draft migration plan (see paragraph 75(5C)(e)).

Telstra has satisfied the Minister that it is preparing an SSU

As provided for under paragraph 75(5C)(a), Telstra has satisfied the Minister that it is preparing an undertaking under section 577A of the Act.

Extending the period to 31 December 2011 provides time for the ACCC to consider and also for the Telstra shareholder vote on the agreements with NBN Co and the SSU and for any follow-up actions to implement the agreements necessary before the SSU comes into force.