

EXPLANATORY STATEMENT

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

Telecommunications Act 1997

Telecommunications (Migration Plan—Specified Matters) Instrument 2011

Authority, purpose and background

Subsection 577BC(2) of the *Telecommunications Act 1997* (the Act) sets out the requirements for a draft migration plan. It must specify the action that Telstra will take in relation to the steps involved in migrating fixed-line services that it supplies to customers from a network over which Telstra is in a position to exercise control to the national broadband network. It must also set out a timetable for the taking of that action, or a method for determining such a timetable.

In addition to the matters specified under subsection 577BC(2), a draft or final migration plan may contain provisions dealing with other matters specified by the Minister in a written instrument under subsection 577BC(3), and must not contain provisions dealing with matters set out in an instrument under subsection 577BC(4).

The *Telecommunications (Migration Plan—Specified Matters) Instrument 2011* (the Instrument) specifies for the purposes of subsection 577BC(3) the matters that provisions in a migration plan may deal with, and also specifies for the purposes of subsection 577BC(4) matters that provisions in a migration plan must not deal with. The effect of the Instrument is to clarify the scope of the migration plan to ensure that it is able to include provisions implementing all the migration plan principles set out in the *Telecommunications (Migration Plan Principles) Determination 2011* (Migration Plan Principles). In setting out matters that provisions in a migration plan must not deal with, the Instrument ensures that some measures that are not appropriate for inclusion in the migration plan but which could otherwise be argued to come within its potential scope, such as terms and conditions of access to the NBN, will not be addressed by the migration plan.

Subsection 577BC(7) of the Act provides that this Instrument is not a legislative instrument for the purposes of the *Legislative Instruments Act 2003*. The Instrument must be published on the website of the Department of Broadband, Communications and the Digital Economy—see subsection 577BC(6) of the Act.

Consultation

Drafts of five regulatory instruments which create the framework for Telstra's structural separation, including a draft of this Instrument, were released for public consultation for a period of 14 days on 1 June 2011.

In response, submissions were received from the Competitive Carriers' Coalition (CCC), Optus, Telstra, Australian Communications Consumer Action Network (ACCAN), Vodafone Hutchison Australia (VHA) and Herbert Geer (on behalf of iiNet, Internode and Adam Internet).

The Department of Broadband, Communications and the Digital Economy also consulted directly with Telstra, NBN Co Limited and the Australian Competition and Consumer Commission (ACCC) on the draft Instrument.

Details of the accompanying Instrument are set out in the Attachment.

ATTACHMENT**Details of the Telecommunications (Migration Plan—Specified Matters) Instrument 2011****Part 1—Preliminary****Section 1—Name of Instrument**

Section 1 sets out the title of the Instrument.

Section 2—Commencement

Section 2 provides that the Instrument commences on the later of the commencement of the Migration Plan Principles or the day after the Instrument is published on the website of the Department of Broadband, Communications, and the Digital Economy. The reason that the commencement of this Instrument is tied to the commencement of the Migration Plan Principles is that this Instrument uses a number of terms also used in the Migration Plan Principles, and relies on the definitions of those terms that are set out in the Migration Plan Principles (see subsection 3(3)).

Section 3—Definitions

Subsection 3(1) sets out definitions of key terms used in the Instrument. Subsection 3(3) provides that where the Instrument uses expressions that are also used in the Migration Plan Principles, those expressions have the same meaning in the two instruments, unless the contrary intention appears. Subsection 3(2) provides such a contrary intention with respect to the expression ‘no-order disconnection premises’, which is a term used in three places in the Migration Plan Principles, and is given a specific meaning for the purposes of this Instrument.

Part 2—Specified matters

Two notes are included after the heading to Part 2 to clarify the legislative basis to the Instrument. Note 1 clarifies that subsection 577BC(3) provides the legislative basis to specifying additional matters which the migration plan may deal with, while note 2 specifies that subsection 577BC(4) provides the legislative basis for specifying which matters a migration plan must not contain.

Section 4—Specified matters that a migration plan may deal with

Section 4 sets out matters that the migration plan may deal with in a table. The specified matters at items 1-39 of the table at section 4 identify matters addressed in the Migration Plan Principles, ensuring that the migration plan is able to include provisions implementing all the Migration Plan Principles.

The effect of item 40 is that the migration plan may contain provisions dealing with any other matter which is necessary or convenient to give effect to the Migration Plan Principles. This provision provides considerable flexibility to the way in which the Migration Plan Principles

can be implemented via the migration plan whilst ensuring that all the Migration Plan Principles are implemented.

Section 5—Specified matters that a migration plan must not deal with

Section 5 sets out the matters that the migration plan must not deal with. Those matters include:

- the operation of section 152AR of the *Competition and Consumer Act 2010* (CCA) (which sets out standard access obligations) with regard to the supply of declared services by Telstra over the NBN;
- terms and conditions relating to the supply to Telstra of fibre services (note that ‘fibre services’ is a defined term in the Migration Plan Principles, meaning the carriage services which are, or are to be supplied by NBN Co over the NBN Co fibre network);
- terms and conditions relating to access to eligible services supplied by Telstra over the NBN; and
- the imposition of charges, either in the form of one-off or ongoing charges, with respect to the provision of access to a declared service supplied by Telstra.

Given the special status given to an in-force migration plan in Part XIC of the CCA (see for example paragraph 152AR(4)(f) and sections 152BCCA and 152BDCA), section 5 ensures that the migration plan may not deal with these matters.