

## CONSULTATION DRAFT



Australian Government

Department of Communications,  
Information Technology and the Arts

## Explanatory Statement

*Trade Practices Act 1974*

### **Australian Competition and Consumer Commission (Accounting Separation—Telstra Corporation Limited) Direction (No. 1) 2003 (Amendment No. 1 of 2007)**

Issued by the authority of the Minister for Communications, Information Technology and the Arts (the Minister).

#### **Overview**

The *Australian Competition and Consumer Commission (Accounting Separation—Telstra Corporation Limited) Direction (No. 1) 2003* (the Principal Direction) implemented the Government's accounting separation framework. In 2005 the Australian Government announced the introduction of operational separation for Telstra, and also indicated that it would review accounting separation to consider which elements might overlap with, or be replaced by, operational separation. Following this review, on 27 June 2007 the Minister announced that most of the accounting separation framework would be revoked. The Australian Competition and Consumer Commission (Accounting Separation – Telstra Corporation Limited) Direction (No. 1) 2003 (Amendment No. 1 of 2007) (the Amending Direction) implements the Australian Government's decision.

#### **Legislative basis**

The Principal Direction is made under subsections 151BUAA(1), 151BUAA(1B) and 151CMA(1) of Part XIB of the *Trade Practices Act 1974* (the Act).

Subsection 151BUAA(1) enables the Minister to give written directions to the ACCC in relation to the exercise of its powers under section 151BU, 151BUDA, 151BUDB or 151BUDC of the Act.

Section 151BU allows the ACCC to make, by written instrument, record-keeping rules requiring one or more specified carriers or carriage service providers to keep and retain records, or to prepare reports consisting of information in those records. The rules made by the ACCC may also require those carriers or carriage service providers to give any or all of the reports to the ACCC.

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Sections 151BUDA, 151BUDB and 151BUDC apply to “Ministerially-directed reports” (i.e. reports that are prepared in accordance with a rule made as a result of a direction made by the Minister under section 151BUAA (see paragraph 151BUAA(3(d))). These sections relate to the disclosure of Ministerially-directed reports or extracts of reports to the public by the ACCC or by a carrier or carriage service provider.

Subsection 151BUAA(1B) enables the Minister to give written directions to the ACCC to prepare a specified kind of analysis of a series of Ministerially-directed periodic reports that it receives under the record-keeping rules.

Subsection 151BUAAA(1) of the Act provides that the Minister must take all reasonable steps to ensure that a “special Telstra direction” is given within 6 months of the commencement of the section 151BUAAA. Section 151BUAAA commenced on 19 December 2002. The Principal Direction, which was made on 19 June 2003, is the special Telstra direction that the Minister was required to make under section 151BUAAA.

The Principal Direction, as amended by the Amending Direction, will continue to satisfy the definition of “special Telstra direction” provided in subsection 151BUAAA(2). Specifically, the Principal Direction, as amended by the Amending Direction, will:

- relate to Telstra’s wholesale and retail operations (see subclauses 4(1) and 5(1)) by requiring Telstra to prepare records and reports on its services to which the Regulatory Accounting Framework currently applies on a historic cost basis, as well as requiring Telstra to prepare records and reports that enable comparison of Telstra’s prices for the supply of wholesale services and retail services – paragraph 151BUAAA(2)(a);
- require the ACCC to exercise its record-keeping rule powers under section 151BU to require Telstra to keep and retain certain records, prepare certain reports and provide them to the ACCC (see subclauses 4(1) and 5(1)) – paragraph 151BUAAA(2)(b); and
- require the ACCC to exercise its powers under at least one of sections 151BUDA, 151BUDB and 151BUDC in relation to those reports (see subclause 4(5) and 5(5)) – paragraph 151BUAAA(2)(c).

Subsection 151BUAA(4) provides that a direction under section 151BUAA is a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901* (AIA). The Amending Direction is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*, and will be published on the Federal Register of Legislative Instruments.

## **Background**

The Principal Direction was issued by the Minister in 2003 with the primary aim of improving the transparency of Telstra’s wholesale and retail operations. The Principal Direction responded to claims from industry that Telstra may be discriminating between

the prices it charges itself for core interconnect services and those it charges its competitors who access its network.

The Australian Government considered that accounting separation would provide the ACCC with better costing information to identify possible discrimination and anti-competitive behaviour, and also that Telstra's competitors would have access to transparent price and non-price information in relation to the core services that are subject to Telstra's monopoly control, thereby assisting them in identifying possible cases of discrimination and in negotiating commercial agreements for access.

Telstra was required to prepare three main categories of reports:

1. records and reports in relation to each of the services of Telstra to which the Regulatory Accounting Framework applies on a historic cost and current cost basis;
2. records and reports that record the value of Telstra's internal supply of each of the "core services" as if Telstra had purchased the service concerned at a wholesale price based on the prices that Telstra charges access seekers for that service; and
3. records and reports that compare the outcomes of Telstra's performance for supply of specified wholesale services and specified retail services in accordance with key performance indicators for non-price terms and conditions.

The Principal Direction also required the ACCC to monitor and prepare, on a six-monthly basis, reports for the Minister on competition in the telecommunications industry in relation to the corporate segment of the business customer group.

### ***Reasons for Amending the Direction***

In September 2005 the Australian Government introduced operational separation for Telstra as part of a package of reforms to the competition framework. Operational separation was fully implemented on 1 December 2006. Operational separation aims to promote the principles of transparency and equivalence in the supply by Telstra of key eligible services to wholesale customers.

When operational separation was introduced the Australian Government undertook to review accounting separation and identify which elements would be superseded by operational separation and could be discontinued. Subsequently, the Minister also announced a review of telecommunications regulatory reporting requirements as part of the Australian Government's response to the Report of the Taskforce on Reducing Regulatory burdens on Business (the Banks Report).

The Australian Government considered that it would be appropriate to make changes to the accounting separation arrangements so as to remove or streamline those elements which have been effectively superseded by operational separation, or whose continued implementation would require a significant expenditure of resources by the ACCC and industry. It was considered that making these changes would represent a significant reduction in industry reporting requirements.

The Amending Direction is intended to remove most of the reporting requirements. In particular, it will remove the requirements (on both the ACCC and Telstra) to report on non-price terms and conditions and on Telstra's current cost accounts. It will also remove the requirement on the ACCC to report on competition in the corporate segment of the industry.

The Amending Direction retains the requirements for Telstra to prepare and report on its services on a historic cost basis (and for the ACCC to publish these reports), and for Telstra to report on the value of its internal supply of services.

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DCITA has received advice on this matter from the ACCC. The ACCC supports the proposed changes to accounting separation. The Department has also consulted with Telstra.

Subsection 151BUAAA(3) of the Act provides that, before the Minister gives a special Telstra direction, the Minister must publish a draft of the direction, invite people to make submissions, and consider any submissions received within the time limit specified by the Minister when the draft was published. By virtue of subsection 33(3) of the AIA, this requirement also applies to any variation or revocation by the Minister of a special Telstra direction. In accordance with these requirements, the Department of Communications, Information Technology and the Arts published a draft of the Amending Direction (and a draft of this Explanatory Statement) on the Department's websites and invited interested parties to make submissions.

The Office of Best Practice Regulation has advised the Department that a regulation impact statement is not required for this Amendment, as the Amendment alleviates reporting requirements on industry and is machinery in nature.

## NOTES ON CLAUSES

### Clause 1—Name of Instrument

Clause 1 provides for the citation of the *Australian Competition and Consumer Commission (Accounting Separation – Telstra Corporation Limited) Direction (No. 1) 2003 (Amendment No. 1 of 2007)*.

### Clause 2—Commencement

Clause 2 provides that the Amending Direction commences on the day after it is registered on the Federal Register of Legislative Instruments.

### Clause 3—Variation

Clause 3 provides for the variation of the Principal Direction.

### ***Schedule—Amendment***

#### Item 1—Clause 3, definition of non-price terms and conditions

Item 1 of the Schedule makes a consequential amendment to clause 3 of the Principal Direction, necessary as a result of the amendment in item 3, below. The effect of item 1 is to remove the definition of “non-price terms and conditions”, which is no longer required as a result of the amendments made by item 3.

#### Item 2—Clause 4

The existing clause 4 in the Principal Direction is omitted and replaced by the new clause 4 in the Amending Direction. New clause 4 removes the requirements on Telstra to keep and retain records that enable the preparation of financial statements on a current cost account basis, and to prepare reports on a current cost account basis (new subclause 4(1)). Telstra will now be required simply to keep and retain records that enable the preparation of financial statements on an *historic* cost account basis, and to prepare reports on an *historic* cost account basis.

New subclause 4(2) sets out the periods that must be covered by future reports on a historic cost basis. This clause makes it clear that the Amending Direction is to be taken to have effect from the commencement of the 2007-08 financial year.

New subclauses 4(3) and 4(4) set out that the record-keeping rules on historic costs must require the reports to be provided to the ACCC at specific times consistent with Telstra’s requirement to lodge reports with ASIC under sections 319 and 320 of the *Corporations Act 2001*.

New subclause 4(5) requires the ACCC to make copies of the reports or copies of the financial statements (which are included in the reports) in respect of the core services available to the public as soon as practicable but by 1 month from the date that the ACCC receives the reports.

New subclause 4(6) states that a statement by the ACCC must accompany the copies of the reports or financial statements that the ACCC must make available to the public. This statement must deal with the accuracy of the reports and the extent to which the reports comply with the RAF, any other relevant record-keeping rules made by the ACCC (whether made for the purpose of the Direction or otherwise) and any direction by the ACCC under clause 8 of the Direction. The statement may include such qualifications that the ACCC considers necessary.

New subclauses 4(3)-(6) mirror the relevant provisions that are being replaced in the Principal Direction.

## Item 3—Clause 6

Clause 6 is to be omitted, removing the requirement on the ACCC to make record-keeping rules in relation to non-price terms and conditions, and thereby the requirements on Telstra to provide such reports and on the ACCC to publish these reports.

## Item 4—Clause 7

The existing clause 7 in the Principal Direction is omitted and replaced by the new clause 7 in the Amending Direction. New clause 7 makes consequential changes, necessary as a result of the amendment made to the Principal Direction by item 3. The effect of new clause 7 is to:

- remove references to clause 6 from clause 7 of the Principal Direction; and
- remove a redundant reference to reports prepared under clauses 4 and 5 from subparagraph 7(b)(i).

## Item 5—Clause 8

Item 5 makes a consequential change, necessary as a result of the amendment made by item 3, to remove a reference to clause 6 from clause 8 of the Principal Direction.

## Item 6—Clause 9

Clause 9 is to be omitted, removing the requirement on the ACCC to monitor, and prepare reports for the Minister, on competition in the telecommunications industry in relation to the corporate segment of the business customer group.