

EXPLANATORY STATEMENT

Telstra Corporations Act 1991

Telstra Corporations (Ownership—Interests in Shares) Regulations 2018

Authority

The Governor-General has made the *Telstra Corporation (Ownership—Interests in Shares) Regulations 2018* (the Regulations) under Section 42 and Subsections 8BN (1) and (5) of the *Telstra Corporation Act 1991* (the Telstra Act). Section 42 of the Telstra Act provides that the Governor-General may make Regulations prescribing matters required or permitted to be prescribed by the Telstra Act, or necessary or convenient to be prescribed for carrying out or giving effect to the Telstra Act. Subsections 8BN (1) and (5) of the Telstra Act allow the Governor-General to make Regulations requiring Telstra to provide information to the Minister about specific ownership matters.

Subsection 33(3) of the *Acts Interpretation Act 1901* relevantly provides that where an Act confers a power to make an instrument of a legislative character (including regulations) the power shall be construed as including a power to repeal any such instrument. The Regulations repeal the *Telstra Corporation (Ownership – Interests in Shares) Regulations 1997* (the sunseting Regulations).

Purpose and Operation

The Telstra Act imposes limits on the ownership of Telstra shares by foreign persons. The ownership rules are set out in Part 2A of the Telstra Act.

Section 8BG of the Telstra Act specifies that a group of foreign persons cannot hold a particular type of stake in Telstra of more than 35 per cent, and an individual foreign person cannot hold more than 5 per cent of a particular stake in Telstra.

Paragraph 9(1)(d) of the Schedule to the Telstra Act specifies that, for the purposes of the ownership provisions, an interest of a prescribed kind in a share, held by prescribed persons, must be disregarded. The Regulations prescribe these matters, with the purpose of ensuring that Australian citizens and other types of entities are not unintentionally caught by the foreign ownership restrictions in the Telstra Act.

The Regulations provide for exemptions from the foreign ownership provisions under the following categories, in certain circumstances:

- Trustees, managers etc. of investment funds
- Agents
- Brokers
- Indirect interest-holders
- Telstra employees
- Associates of foreign persons

The sunseting Regulations are due to sunset on 1 April 2019. Following a review of the sunseting Regulations and public consultation, it was determined that the Regulations remain necessary and continue to be required. Restrictions on Telstra's foreign ownership continue to apply in the Telstra Act. As a result, the Regulations continue to be required to provide clarity about the sorts of interests in shares that can be discounted by Telstra when it monitors its foreign shareholdings. Non-compliance with the foreign ownership provisions could lead to Telstra's management and directors facing civil and criminal penalties. If the Regulations are allowed to lapse, there would also be no clear path for Telstra to report to the Minister on an unacceptable foreign-ownership situation, or for the Minister to require such reports.

The Regulations remake the sunseting Regulations with changes to reflect current drafting practice, and remove spent clauses relating to previous Telstra sale schemes. The Regulations do not prescribe any new kinds of interest in a share, or related prescribed persons.

The Regulations are a legislative instrument for the purposes of section 8 of the *Legislation Act 2003*.

The notes on the provisions of the new Regulations are set in [Attachment A](#).

Consultation

On behalf of the Minister for Communications and the Arts, the Department of Communications and the Arts (the department) undertook a public consultation process on the Regulations. The department provided the draft Regulations to key stakeholders via email and published the draft Regulations on the department's website for comment. The stakeholders who were contacted directly include relevant Government Departments, consumer groups, peak bodies and industry. The department received no submissions.

Regulation Impact Statement

The Office of Best Practice Regulation considered that remaking the sunseting Regulations without substantial changes is not likely to have more than a minor and/or machinery regulatory impact on business, community organisations and individuals. As such, a Regulatory Impact Statement is not required (see OBPR reference ID 24327).

Statement of Compatibility with Human Rights

A statement of compatibility with human rights for the purposes of Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* is set out at [Attachment B](#).

Notes on the provisions of the *Telstra Corporations (Ownership—Interests in Shares) Regulations 2018*

Part 1 – Preliminary

Section 1 – Name

Section 1 provides for citation of the Regulations as the *Telstra Corporation (Ownership—Interests in Shares) Regulations 2018*.

Section 2 – Commencement

This section provides for the Regulations to commence on the day after they are registered on the Federal Register of Legislation.

Section 3 – Authority

Section 3 provides that the Regulations are made under the *Telstra Corporation Act 1991*.

Section 4 – Schedules

Section 4 specifies that each instrument is amended or repealed as set out in the applicable items in the Schedules concerned. There is only one Schedule to the Regulations and it lists the *Telstra Corporation (Ownership – Interests in Shares) Regulations 1997* (the sunseting Regulations), which are due to sunset on 1 April 2019 (as mentioned above). The effect of section 4 (by reference to Schedule 1) is to repeal the whole of the sunseting Regulations with effect from the date the Regulations (as the replacement) commence.

Section 5 – Definitions

A note accompanies section 5 to guide readers to certain words used in the Regulations that are defined in the Telstra Act (sale-scheme trustee, Telstra, Telstra sale scheme, and unacceptable foreign-ownership situation).

Section 5 defines five key terms used in the Regulations.

In particular, the term ‘investment fund’ is defined as a unit trust (but excluding a discretionary trust), a statutory fund of a life insurance company within the meaning of the *Life Insurance Act 1995*, a superannuation entity or an exempt public superannuation scheme within the meaning of the *Superannuation Industry (Supervision) Act 1993*. This definition is intended to cover the major forms of managed public investments.

Subsection 5(2) sets out a list of key expressions used in the Regulations (such as associate, company, share, foreign person) which have the same meaning as in the Schedule to the Telstra Act.

Section 6 – Beneficial Interest in the capital or income of investment fund

Section 6 explains the circumstances in which a person is taken to hold a beneficial interest in the capital or income of an investment fund. The prescription in section 6 applies regardless of the remoteness of the interest, the way in which the interest arose or the fact that the exercise of a right conferred by the interest is, or is capable of being, made subject to some kind of restriction.

Part 2 – Giving of information

Part 2 specifies circumstances when Telstra must give information to the Minister regarding ownership matters.

Section 7 – Purposes of Part 2

Section 7 outlines the purpose of Part 2, that is, making provision for and in relation to requiring a person to give information to the Minister that is relevant to an ownership matter, for the purposes of paragraph 8BN(1)(b) of the Telstra Act.

Section 8 – Information about unacceptable foreign-ownership situations

Section 8 outlines circumstances when Telstra must give the Minister written notice that an unacceptable foreign-ownership situation may exist. This will arise if Telstra has reason to believe that a situation of that kind may exist, and the Minister has directed Telstra to give notices of that kind. Section 8 also provides that the Minister's direction may require that notice is to be given under particular circumstances, in a particular manner and within a certain time period. However, this cannot be a time earlier than 14 days after the direction is given.

Section 8 also requires that the notice Telstra provides to the Minister, must include the following information:

- the reason for the belief
- the steps taken, or intended to be taken, by Telstra to determine whether, in fact, the unacceptable foreign-ownership situation does exist
- the steps intended to be taken by Telstra to remedy the unacceptable foreign-ownership situation, if that situation does exist

Section 9 – Other Information about Ownership Matters

Section 9 provides that the Minister may require Telstra, by written notice, to give written information about an ownership matter. Section 9 also provides that the written notice from the Minister may require the information to be given in a particular manner and within a certain time. However, this time cannot be earlier than 14 days after the notice is given.

Section 9 requires that Telstra must comply with the Minister's notice within the time period mentioned in the notice. If no time period is mentioned, Telstra must comply before the end of 14 days after the notice is received.

Part 3 – Interests in shares that are to be disregarded

Section 10 – Purpose of Part 3

Section 10 expresses the object of Part 3, that is, to prescribe the kinds of interests and persons who hold those kinds of interests (under paragraph 9(1)(d) of the Schedule to the Telstra Act) that must be disregarded for the purposes of the ownership provisions.

Section 8BG of the Telstra Act states that an ‘unacceptable foreign-ownership situation’ exists in relation to Telstra if:

- there is a group of foreign persons who hold, in total, a particular type of stake in Telstra of more than 35% or
- there is or are one or more foreign persons each of whom holds a particular type of stake in Telstra of more than 5%

Clause 11 of the Schedule to the Telstra Act specifies that a stake of a particular type that a person holds is the aggregate of:

- the direct control interest in Telstra of a type held by that person and
- the direct control interest in Telstra of the same type held by associates of that person

Clause 12 of the Schedule to the Telstra Act specifies 4 types of ‘direct control interests’ in Telstra as the percentage of:

- paid-up share capital of the company
- voting power in the company
- rights to distributions of capital or profits on winding-up of the company and
- rights to distributions of capital or profits other-wise than on winding-up of the company

Section 11 – Trustees, managers etc. of investment funds

Section 11 provides clarity that particular interests in shares are prescribed in circumstances where the interest may be ancillary to a person’s role in relation to investment funds.

Subsection 11(1) provides that a person’s interest in a share is prescribed if an interest exists solely as a result of an action taken in relation to an investment fund:

- in the interest holder’s capacity as a trustee or manager of an investment fund or
- in the interest-holder’s capacity in administering a statutory fund within the meaning of the *Life Insurance Act 1995* or
- because the interest-holder has a custodial responsibility in relation to the fund

For the purposes of subsection 11(1), subsection 11(2) provides that the interest-holder is a prescribed person if the investment fund is a substantially Australian investment fund.

Subsection 11(3) provides that a substantially Australian investment fund is one that, in the reasonable opinion of the interest-holder, is a fund in which:

- no more than 40% of policyholder liabilities of the statutory fund are owed to foreign persons (in the case of a life insurance company, in its administration of a statutory fund within the meaning of the *Life Insurance Act 1995*) and
- in any other case, a beneficial interest in less than 40% of the capital, and 40% of the income for distribution, is held by foreign persons

Section 12 – Agents

Section 12 provides that a person's interest in a share is prescribed if the interest exists solely as a result of the person acting in their capacity as depository or custodian for, or nominee of, another person. This includes the depository for issue of Telstra American Depository Shares.

Section 12 also provides that an interest-holder is a prescribed person if the interest-holder does not hold a beneficial interest in the share or, have authority, by proxy or any other arrangement with the holder of the beneficial interest in the share, to exercise in a discretionary way the voting rights attached to the share.

Section 13 – Brokers

Section 13 provides that a person's interest in a share is prescribed if the interest exists solely as a result of an action taken by the person in their capacity as a broker in securities in the ordinary course of business and on the express instruction of a client.

Section 13 also provides that the interest-holder is a prescribed person if the interest-holder does not hold a beneficial interest in the share or, have authority, by proxy or any other arrangement with the holder of the beneficial interest in the share, to exercise in a discretionary way the voting rights attached to the share.

Section 14 – Indirect interest-holders

Section 14 provides that a person's interest in a share is prescribed if the interest exists solely as a result of the person being a shareholder in a company other than Telstra that is not a 'foreign person' within the meaning of the *Foreign Acquisitions and Takeovers Act 1975*. Section 14 also provides that the interest-holder described in subsection 14(1) is a prescribed person.

Section 15 – Telstra employees

Section 15 provides that a person's interest in a share is prescribed if the interest arose solely as a result of participation in a Telstra employee share plan administered by Telstra for its employees. This applies where the person is also not directly or indirectly controlled by a foreign person, does not act in concert with a foreign person

and is not accustomed or under an obligation, formal or informal, to act in accordance with directions, instructions or wishes of a foreign person. Section 15 also provides that the interest-holder is a prescribed person if the interest-holder is not a foreign person.

Section 16 – Australian associates of a foreign person – no action in concert etc.

Section 16 provides that a person's interest in a share is of a prescribed kind, even though the person is an associate of a foreign person, if the person:

- is not directly or indirectly controlled by a foreign person and
- does not act in concert with a foreign person and
- is not accustomed or under an obligation, formal or informal, to act in accordance with directions, instructions or wishes of a foreign person

Section 16 also provides that the interest-holder is a prescribed person if the interest-holder is not a foreign person.

Section 17 – Associates of a foreign person – action in concert etc.

Section 17 applies to an interest in a share held by a person (the "primary interest-holder"). An interest in a share is prescribed if when, after being counted for the ownership provisions in determining the stake of the primary interest-holder and any substantive foreign associate, it would also be counted, except for the operation of this section, in determining an irrelevant associate's stake.

Section 17 also provides that the primary interest-holder is a prescribed person.

A person is an 'irrelevant associate' if all of the following conditions are met:

- the primary interest-holder is an associate of the person and
- the primary interest-holder is not directly or indirectly controlled by the person and
- the primary interest-holder does not act in concert with the person and
- the primary interest-holder is not accustomed or under an obligation, formal or informal, to act in accordance with directions, instructions or wishes of the person

Section 18 – Australian associates of a foreign person – avoidance of double counting

Section 18 provides that a person's interest is prescribed when, after being counted once for the ownership provisions in determining the total of the stakes of a particular type that a group holds in Telstra, the interest could, except for the operation of the section, be counted more than once.

Section 18 also provides that the interest-holder is a prescribed person if the interest-holder is not a foreign person.

Part 4 – Application, saving and transitional provisions

Part 4 sets out one transitional rule, which provides for the continuity of certain things done under the sunseting Regulations for a particular purpose, to the extent that the Regulations – as a replacement – can accommodate such purposes. The effect of the transitional provision is for administrative convenience.

Section 19 – Things done under the *Telstra Corporation (Ownership – Interests in Shares) Regulations 1997*

Section 19 provides that if something was done for a particular purpose under the sunseting Regulations (e.g. a direction, notice, application, authorisation or other instrument) and that same thing can be done for that purpose under the Regulations, then the thing will continue to operate as if it had been done for that purpose under the Regulations. This transitional provision ensures that there is no need to remake past notices, directions, applications or authorisations done for the purposes of the sunseting Regulations, but only to the extent that the Regulations can accommodate such purposes.

Schedule 1 – Repeals

The Schedule lists the *Telstra Corporation (Ownership – Interests in Shares) Regulations 1997*, noting Section 4 is the operative provision that gives effect to the repeal of the sunseting Regulations.

ATTACHMENT B

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Telstra Corporation (Ownership—Interests in Shares) Regulations 2018

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The *Telstra Corporations Act 1991* (Telstra Act) imposes limits on the ownership of Telstra shares by foreign persons. Section 8BG of the Telstra Act specifies that a group of foreign persons cannot hold a particular type of stake in Telstra of more than 35 per cent, and an individual foreign person cannot hold more than 5 per cent of a particular stake in Telstra.

Paragraph 9(1)(d) of the Schedule to the Telstra Act specifies that, for the purposes of the ownership provisions, an interest of a prescribed kind in a share, held by prescribed persons, must be disregarded. The *Telstra Corporation (Ownership—Interests in Shares) Regulations 2018* (the Regulations) prescribe these matters, with the purpose of ensuring that Australian citizens and other types of entities are not unintentionally subject to the foreign ownership restrictions in the Telstra Act. The Regulations also provide the process for Telstra to undertake should an unacceptable foreign ownership situation arise.

Part 2 of the Regulations specifies circumstances when Telstra must give information to the Minister regarding ownership matters.

Human rights implications

Part 2 of the Regulations outlines the circumstances when Telstra must give the Minister written notice about an actual or potential unacceptable foreign-ownership situation. Part 2 does not require the Minister to request personal information from Telstra, however, there is nothing in Part 2 that would preclude the Minister from requesting personal information from Telstra. On this basis, Article 17 of the International Covenant on Civil and Political Rights (ICCPR) is engaged by the Regulations.

Article 17 prohibits arbitrary or unlawful interference with an individual's privacy, family, home or correspondence. The right to privacy includes respect for private and confidential information, particularly the collection, storing, use and sharing of such

information. The right to privacy may be subject to permissible limitations which are provided by law and are not arbitrary. The term unlawful means that no interference can take place except as authorised under domestic law. In order for limitations not to be arbitrary, they must seek to achieve a legitimate objective and be rationally connected (that is, effective to achieve) and proportionate to that objective.

The Regulations clearly provide authority, under law, that the Minister may request information from Telstra about ownership matters. Part 2 is specific in identifying the purpose for which this information can be requested and disclosed. The empowering provision in the Telstra Act (section 8BN) gives clear power for the regulations to provide for the collection of personal information. The scope of Part 2 is also the same as that of the equivalent provisions in the 1997 Regulations.

Part 2 of the Regulations aims to ensure compliance by Telstra with its foreign ownership obligations. The ownership obligations serve the national interest, by ensuring that Telstra (as a former Government entity with significant telecommunications infrastructure) remains under Australian control to the extent deemed appropriate in the Telstra Act. By allowing the Minister to obtain necessary information regarding an actual or potential foreign ownership situation, Part 2 of the Regulations represents a modest oversight arrangement that seeks to achieve the legitimate objective and is rationally connected to the objective.

Part 2 of the Regulations is proportionate to the objective and reasonable. Without relevant information, the Minister cannot satisfy the legitimate objective of ensuring compliance with Telstra's foreign ownership obligations. It would not be possible, in certain circumstances, to achieve the objective without collecting some information about identifiable individuals. The Regulations do not require the creation of a public register or the publishing of personal information. They do not override the Minister's obligations in relation to handling that information. Therefore, they do not interfere with the right to privacy of relevant individuals more than is necessary to achieve the legitimate objective.

Conclusion

This Legislative Instrument is compatible with human rights as it permissibly limits the right to privacy and does not raise any other human rights issues.

Minister for Communications and the Arts