



Superfast broadband network draft deemed functional separation undertaking

Consultation paper

August 2020

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1. Overview

The *Telecommunications Legislation Amendment (Competition and Consumer) Act 2020* (TLA Act) received Royal Assent on 25 May 2020. Among other provisions, it amends the *Telecommunications Act 1997* (Cth) to enable superfast fixed line broadband networks serving residential customers to operate on a functionally separated basis (rather than a structurally separated basis).

In particular, the TLA Act inserts a process into Part 8 of the Telecommunications Act, under which network operators will be able to voluntarily submit functional separation undertakings to the Australian Competition and Consumer Commission (ACCC) for approval. This is intended to provide greater commercial flexibility for superfast network operators and promote infrastructure-based competition.

In addition, the ACCC is empowered to determine a standard functional separation undertaking (known as a 'deemed' undertaking) that an eligible corporation can choose to be bound by instead of submitting its own customised voluntary undertaking.

The ACCC may also make determinations exempting small network operators by class from the requirement to operate on a wholesale-only basis.

The new laws come into effect on 25 August 2020, which is the day after the end of the period of three months beginning on the date the TLA Act received Royal Assent.

We issued a consultation paper in June 2020 seeking stakeholder views on:

- a draft instrument for the exemption for small networks including the class of persons to whom it should apply and any other conditions and limitations
- the nature and extent of potential functional separation provisions for deemed undertakings and the classes of corporations to which deemed undertakings should apply.

The ACCC issued a final class exemption instrument and accompanying explanatory statement on 25 August 2020.

In this consultation we are seeking views from stakeholders on a draft deemed undertaking instrument including the proposed class of corporations to which it should apply. The instrument is provided at Annex A to this consultation paper.

2. Introduction

2.1. Background

Under the recent amendments to the Telecommunications Act, carrier separation rules require controllers of a line capable of supplying superfast carriage services serving residential customers to supply wholesale access on non-discriminatory terms and either be structurally separated or operate according to a functional separation undertaking unless they are covered by a range of exemptions (the separation requirements).

There are two types of functional separation undertaking that can be submitted to the ACCC – a standard functional separation undertaking given by a single corporation; and a joint functional separation undertaking given by two or more corporations.

The **deemed standard functional separation undertaking** provision under section 151B gives the ACCC the power to make a determination whereby corporations included in a specified class of corporations can choose to be bound by the terms of the determination instead of submitting a standard or joint functional separation undertaking for approval under section 151A. In effect, this is a model undertaking that eligible parties can choose to adopt.

This provision is designed to reduce the compliance costs for smaller providers. Providers that elect to be bound by the terms of a deemed undertaking will not have to go to the expense of preparing customised individual undertakings themselves.

If a corporation provides a voluntary functional separation undertaking that is approved by the ACCC or elects to be bound by a deemed functional separation undertaking, the Telecommunications Act requires that it will apply to all its local access lines serving residential customers (i.e. new lines as well as existing lines, including any pre-1 January 2011 lines notwithstanding these are generally exempt from the separation requirements). Regardless of whether an operator is subject to structural or functional separation, it is also subject to non-discrimination rules in the supply of its wholesale access services.

Other changes to Part 8 remove some previous exemptions from the separation requirements (such as the 1 km or less extension rule for pre-2011 networks) as well as provide for some new ones (such as lines in new real estate developments within the footprint of an existing exempt network and lines serving small business customers).

2.2. Timetable for this consultation

The ACCC requests written submissions in response to the draft undertaking instrument by **COB 15 September 2020**.

After considering submissions from interested parties, the ACCC proposes to publish a final deemed functional separation undertaking instrument by mid-October 2020.

2.3. Making a submission

The ACCC encourages industry participants, other stakeholders and the public more generally to consider and make submissions on the draft deemed functional separation undertaking instrument and related issues raised in this consultation paper.

We have provided questions in the paper to guide responses, but stakeholders should feel free to respond on any matter of concern.

To foster an informed and consultative process, all submissions will be considered as public submissions and will be posted on the ACCC's website. Interested parties wishing to submit commercial-in-confidence material to the ACCC should submit both a public and a commercial-in-confidence version of their submission. The public version of the submission should clearly identify the commercial-in-confidence material by replacing the confidential material with an appropriate symbol or 'c-i-c'.

The ACCC expects that claims for commercial-in-confidence status of information by parties will be limited in nature in order to allow widest possible participation in the public inquiry.

The ACCC has published a [guideline¹](#) with the process that parties should follow when submitting confidential information to communications inquiries by the ACCC. The [ACCC-AER information policy: the collection, use and disclosure of information](#) also sets out the

¹ ACCC, *Confidentiality Guideline for submitting confidential material to ACCC communications inquiries*, April 2014.

general policy of the ACCC and the Australian Energy Regulator (AER) on the collection, use and disclosure of information. Both policies are available on the ACCC website.

The ACCC prefers to receive submissions in electronic form, either in PDF or Microsoft Word format which allows the submission text to be searched.

Submissions should be emailed to:

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Alternatively, to reduce the costs and complexity of engagement, we have provided a web form to allow a short submission to be made in response to the consultation paper without the need to construct a full written submission. This form is available on the ACCC's [Consultation Hub](#).

3. Deemed standard functional separation undertaking

The ACCC intends to make a determination whereby corporations within a specified class of corporations may elect to be bound by the determination in place of submitting an individual standard or joint functional separation undertaking (as outlined in section 2 above).

In our June 2020 consultation paper we outlined the legislative provisions for a deemed undertaking and some preliminary views on matters for which we have some discretion in making the instrument. After considering submissions from stakeholders, we have prepared a draft deemed functional separation instrument for further consultation (Annex A).

Below we provide an overview of the legislative provisions, what our views in the consultation paper were and how we have modified these views in preparing the draft undertaking instrument following the consideration of submissions.

3.1. Legislative regime

The provisions to be included in deemed undertakings are specified in the Telecommunications Act (in reference back to the relevant parts of subsection 151A(2) that apply to standard functional separation undertakings), namely:

The undertaking must:

- (a) *provide that the person will maintain:*
 - (i) *a single wholesale business unit; and*
 - (ii) *a single retail business unit; and*
- (b) *provide that the person will maintain arm's length functional separation between:*
 - (i) *the person's wholesale business unit; and*
 - (ii) *the person's retail business unit; and*
- (c) *provide that the person will ensure that:*
 - (i) *the terms and conditions relating to price or a method of ascertaining price; and*
 - (ii) *other terms and conditions;*

on which the person's wholesale business unit supplies local access line services to the person's retail business unit are documented; and

- (d) provide that the person will, to the extent specified in the undertaking, ensure that the workers who perform their duties for the person's wholesale business unit are different from the workers who perform their duties for the person's retail business unit;² and
- (e) provide that the person will, to the extent specified in the undertaking, ensure that there are separate:
 - (i) operational support systems; and
 - (ii) business systems; and
 - (iii) communications systems; and
 - (iv) accounts;

for:

 - (v) the person's wholesale business unit; and
 - (vi) the person's retail business unit;³ and
- (f) provide that the person will publish on the person's website:
 - (i) the terms and conditions relating to price or a method of ascertaining price; and
 - (ii) other terms and conditions;

on which the person's wholesale business unit offers to supply local access line services to the following:

 - (iii) the person's retail business unit;
 - (iv) the person's wholesale customers or prospective wholesale customers; and
- (g) provide that the person will:
 - (i) if requested to do so by a wholesale customer or prospective wholesale customer, supply a local access line service to the wholesale customer or prospective wholesale customer; and
 - (ii) do so on the terms and conditions that were published on the person's website at the time when the request was made; and
- (h) provide that the person will ensure that information provided to the person's wholesale business unit by the person's wholesale customers is not disclosed to the person's retail business unit; and
 - (i) provide that the person will ensure that the person's retail business unit does not obtain, access or use information provided to the person's wholesale business unit by the person's wholesale customers; and
 - (j) provide that the person will ensure that information provided to the person's retail business unit by a carrier or carriage service provider (other than information of a kind specified in a determination under subsection (13)) is not disclosed to the person's wholesale business unit;⁴ and
 - (k) provide that the person will ensure that the person's wholesale business unit does not obtain, access or use information provided to the person's retail business unit by a carrier or carriage service provider (other than information of a kind specified in a determination under subsection (13));⁵ and
- (l) provide that the person will use the same customer interface⁶ for dealings between:

² An extent specified under paragraph (d) may be a nil extent (subsection 151A(3))

³ An extent specified under paragraph (e) may be a nil extent (subsection 151A(3))

⁴ Subsection 151A(13) allows for the ACCC to determine one or more kinds of information for the purposes of paragraphs 151A(2)(j)&(k).

⁵ Subsection 151A(13) allows for the ACCC to determine one or more kinds of information for the purposes of paragraphs 151A(2)(j)&(k).

⁶ A customer interface is defined under the legislation as an interface for the purposes of:

- (a) ordering; and
- (b) provisioning; and
- (c) billing; and

- (i) the person's wholesale business unit; and
 - (ii) the person's wholesale customers;
as the person uses for dealings between:
 - (iii) the person's wholesale business unit; and
 - (iv) the person's retail business unit; and
- (m) contain such other provisions (if any) as are specified in a determination under subsection (14)⁷...

Note: A standard functional separation undertaking is supplemented by section 151ZF (which requires eligible services to be supplied on a non-discriminatory basis) and section 151ZG (which requires related activities to be carried on on a non-discriminatory basis).

The legislation provides for fundamental provisions that must be included in the undertaking. These provisions are shown in *italics* in the extract of the Telecommunications Act above. In addition, the ACCC can specify that other provisions of the undertaking are also fundamental provisions.⁸ A breach of a fundamental provision may be grounds for the ACCC to revoke a person's election to be bound by a deemed functional separation undertaking (see section 3.2.10 below).

3.2. Implementation of the legislative provisions

3.2.1. The nature of separation of the retail and wholesale business units

June consultation paper

In our June consultation paper we proposed that to help achieve the objectives of the undertaking, the wholesale and retail business units:

- should have separate branding
- would need to be housed in physically separate office space sufficient to prevent day to day interaction between the staff in each space and staff assigned to each unit would not be able to access the other unit other than for purposes permitted under the undertaking, such as to attend meetings.

We also noted that functional separation does not require legal separation of the wholesale and retail business units.

Submissions

A number of stakeholders submitted that having physically separate office spaces would be difficult to accommodate for smaller providers.

-
- (d) service activation; and
 - (e) fault rectification;

in relation to the supply of local access line services.

⁷ Subsection 151A(14) states '*The Minister may, by legislative instrument, determine one or more provisions for the purposes of paragraph (2)(m).*'

⁸ Subsection 151A(9) requires the undertaking to state that the provisions under s 151A paragraphs (2)(a), (b), (c), (f), (g), (h), (i), (j) and (k) are fundamental provisions, and that the undertaking may state that other provisions are [also] fundamental provisions.

Draft deemed undertaking

In response to concerns raised in submissions the draft deemed undertaking allows for a shared office, but with physical separation of staff in the wholesale and retail business units such that they will not be able to engage in, or otherwise see or overhear, the work being conducted in each unit.

Q1. Would the above revised separation requirements present any major practical difficulties or costs for your business?

3.2.2. The activities that are to be included in the wholesale and retail business units

June consultation paper

In our June consultation paper, we envisaged that the wholesale business unit would undertake the following activities in supplying the retail business unit and other wholesale customers:

- network planning functions
- marketing, sale and supply of wholesale local access line services
- receipt of orders, service activation and provisioning
- processing and implementing requests to churn or for local number portability in accordance with relevant industry codes
- line fault detection, handling and rectification
- wholesale billing
- setting wholesale price and non-price terms and conditions

We envisaged that the retail business unit would undertake the following activities in the supply of retail customers:

- marketing, sale and supply of retail local access line services
- supply of other value-added services to retail customers
- taking service orders from retail customers
- responding to network and service complaints from retail customers
- retail billing
- setting retail price and non-price terms and conditions

We also indicated that a retail business unit would not be permitted to perform any activities of a wholesale business unit, and a wholesale business unit would not be permitted to perform any activities of a retail business unit.

Submissions

The submissions highlighted that retail business units typically assist in the technical aspects of the business in a more limited role than wholesale units. Retail business units often engage in a communication and referral role by responding to network and service complaints from retail customers. Several respondents noted that this technical assistance may extend to network planning and deployment and contended that it is reasonable to allow

retail input on these activities, and that they should not be the sole responsibility of the wholesale business unit.

Further clarification was also sought in regards to the distinction between the retail and wholesale functions in the supply of retail services and where each unit's role begins.

Draft deemed undertaking

The draft deemed undertaking makes some changes to the original designation of activities to provide a distinction between basic and more complex network and service complaints from retail customers, allowing the retail business unit to handle the former and the wholesale business unit to handle the latter. The wholesale business unit would also be expected to respond to all network and service complaints for the systems and applications for the retail business unit and other wholesale customers.

The draft deemed undertaking also permits retail input on network planning, provided it is made available to all RSPs on non-discriminatory terms along with some other drafting changes.

Q2. Would the allocation of the above activities to the wholesale and retail business units be suitable for your business?

3.2.3. The degree to which personnel may or may not be shared between the wholesale and retail business units

June consultation paper

In our June consultation paper, we envisaged that the deemed undertaking would require that:

- Separate personnel would be allocated to the wholesale and retail business units.
- Staff within each business unit would be subject to management direction only within their respective business unit.
- Any shared staff would be restricted to corporate services staff, who must not divulge information obtained between the wholesale and retail business units.
- Protocols as specified in the undertaking would be required to operate in relation to the sharing of information between business units by staff in these business units.
- Staff transfers would be permitted subject to staff being aware of their obligations under the undertaking and any such transfers being documented.
- Training would be required to be provided to all staff about their obligations under the undertaking.

Submissions

Some stakeholders raised concerns about duplicating the work of employees across the wholesale and retail business units which could impose impractical costs on smaller providers.

Clarification was also sought regarding the scope of responsibilities for corporate services, the training obligations and the protocols relating to information sharing.

Draft deemed undertaking

The draft deemed undertaking specifies that the business would be permitted to share staff for corporate services functions supporting the wholesale and retail business units including finance, human resources, legal and regulatory, IT support and facilities management. These staff would also be able to assist with business planning and investment approval processes in each unit.

We will also provide further detail about information sharing protocols and the nature of staff training. For wholesale and retail staff, training should cover obligations not to divulge information between business units except as permitted by the undertaking. For corporate services staff, this training should cover obligations not to divulge information between the wholesale and retail business units and to maintain separation of access to information technology and applications as provided for in the undertaking.

Q3. Would the allocation of personnel between wholesale and retail business units proposed above be suitable for your business? Please provide details.

Q4. Are the proposed information sharing restrictions and training obligations reasonable?

3.2.4. Incentive structures for the wholesale and retail business units

June consultation paper

To maintain the appropriate incentives for the functionally separate business units to conform with the requirements of the undertaking, in our June consultation paper, we considered the following governance arrangements would be desirable:

- The manager of the wholesale and retail business units should have the same level of seniority within the organisation.
- Any remuneration related to business performance will be related to the performance of the business unit in which the applicable personnel are based.
- The retail and wholesale business units would undertake separate business planning and investment approval processes.

Submissions

Multiple stakeholders stated that it would not be feasible for managers of the wholesale and retail business units to be of the same level of seniority, particularly where the units are of significantly different size.

Draft deemed undertaking

The draft deemed undertaking retains the previously proposed governance arrangements with the exception of the requirement for the managers of the wholesale and retail business units to have the same level of seniority within the organisation.

Q5. Would your business have any difficulties introducing the proposed revised incentive structures?

3.2.5. To what extent the undertaking specifies separate systems and accounts

June consultation paper

The legislation contemplates that wholesale and retail business units may be required to have separate:

- (i) operational support systems; and
- (ii) business systems; and
- (iii) communications systems; and
- (iv) accounts.

In our June consultation paper, we expressed a preference for wholesale and retail business units to operate physically separate IT systems and applications.

However, we indicated that if the ACCC was presented with evidence during our consultation that to maintain separate IT systems would be cost prohibitive, we might be prepared to allow the same systems to be used, subject to barriers being put in place that do not allow information held by each business unit to be accessed or shared between business units. We indicated this may still require separate application software to be employed by each business unit and other information security measures.

Submissions

Many stakeholders submitted that operating physically separate IT systems and applications across the wholesale and retail business units would not be feasible for smaller providers due to the significant costs involved. Multiple stakeholders submitted as an alternative that shared IT systems and applications should be allowed, subject to putting appropriate information barriers and restrictions in place to prevent information being shared between business units.

Draft deemed undertaking

Having had regard to submissions, we have not included a requirement in the draft deemed undertaking for wholesale and retail business units to operate physically separate IT and communications systems and applications. Shared systems and applications would be able to be used for IT and communications on the condition that access restrictions are put in place to prevent the sharing of protected information.

Q6. Are the revised IT and communications systems and application separation requirements feasible for your business?

3.2.6. Whether other provisions should be considered fundamental provisions

June consultation paper

In our June consultation paper, we advised that the ACCC was inclined to include all the provisions as fundamental provisions, subject to legitimate concerns being expressed by those corporations likely to elect to be bound by a deemed undertaking, that it would be too costly to conform with these provisions in complete or partial form.

Submissions

Responses to this question were divided, with some stakeholders supporting the proposed inclusion of all provisions as fundamental provisions and others calling for a deemed undertaking that determined which provisions were fundamental provisions based on the size of the business. The latter group raised concerns that treating all provisions as fundamental provisions could impose onerous terms on smaller operators that reduced the appeal of electing to be bound by a deemed undertaking.

Draft deemed undertaking

The draft deemed undertaking specifies that all of the provisions are fundamental provisions. However, the ACCC has recognised the concerns raised and proposes to make a single deemed undertaking with less burdensome requirements than initially proposed. The proposed deemed undertaking is targeted towards smaller providers by only applying to corporations with up to a total of 50,000 superfast residential lines counting all members of any associated group.

Q7. Would you object to all the revised provisions being treated as fundamental provisions?

3.2.7. What information obtained by the retail business unit from other carriers or carriage service providers can be shared with, or accessed by the wholesale business unit

June consultation paper

The legislation provides that the ACCC may by legislative instrument, determine the kinds of information provided by another carrier or carriage service provider to the person's retail business unit that may be shared with, or accessed by, the person's wholesale business unit.⁹

We expressed the view in our June consultation paper that the information shared should be confined to wholesale pricing and other terms and conditions offered by other carriers and carriage service providers for the purpose of enabling the retail business to seek equivalent offers and terms from the wholesale business unit.

Submissions

Several submissions noted that the information sharing protocols should be expanded and should not be confined to wholesale pricing and other terms and conditions for the purpose of enabling the retail business unit to seek equivalent offers and terms from the wholesale business unit.

In particular, some stakeholders submitted that there should not be a restriction on retail business units sharing other carriers' network coverage information and information which was publicly available or aggregated information which was not specific to an individual carrier or carriage service provider.

One submission contended that retail business units should be able to share information, opinions or recommendations with regards to industry regulation and information useful in managing business operations in times of emergency.

⁹ Subsection 151A(13).

Draft deemed undertaking

We have considered submissions and have added other carriers' network coverage information to the allowed information sharing on the basis this could help to promote competition in the market. Our view is the other types of information suggested by submitters can probably be accessed by the wholesale business unit regardless.

Q8. Are the information sharing provisions reasonable?

3.2.8. Further provisions

Under the legislation, deemed undertaking(s) must also include provisions that require corporations to provide the ACCC with compliance reports¹⁰ and compliance plans related to the undertaking.¹¹ The compliance reports must be in a form approved in writing by the ACCC.

June consultation paper

We noted in our previous consultation paper that we would expect the corporation to develop a compliance plan that details the specific actions it would take to comply with the undertaking, including its compliance reporting to the ACCC, but that the ACCC would not be required to approve these compliance plans.

We noted that we would expect to receive a copy of the compliance plan after a corporation has elected to adopt the deemed undertaking. We considered that this could be provided within 3 months of such an election.

We also noted that we would expect compliance reports to be provided on an annual basis from the date of provision of the first compliance plan and envisaged that the reports would contain the following types of information:

- The total number of residential superfast local access lines that are supplied by the corporation (as evidence to confirm the corporation continues to belong to the relevant class of corporations)
- Details of the corporation's compliance with the provisions and other specific obligations under the undertaking and the non-discrimination provisions
- Any instances of non-compliance, the reasons the corporation has not complied and actions taken or being taken to rectify or address these
- Any complaints received from wholesale customers in relation to the corporation's compliance with provisions or obligations under the undertaking and actions taken in response.

Submissions

While the majority of stakeholders acknowledged the importance of compliance plans and agreed with annual compliance reports, some stakeholders submitted that compliance regimes can become onerous on smaller organisations and that the cost of compliance reports might be disproportionate on small businesses. Stakeholders did not raise concerns with the types of information that we envisaged the compliance reports containing and did not oppose the provision of compliance plans within three months of adopting the deemed undertaking.

¹⁰ Subsection 151A(10).

¹¹ Subsection 151A(11).

Draft deemed undertaking

Having considered submissions, we do not consider the provisions for compliance plans and annual compliance reports to be unduly onerous for providers. We have therefore adopted the compliance proposals that we envisaged in our previous consultation paper.

Q9. Do you have any views on the timing and content of compliance plans and compliance reports to be provided pursuant to the undertaking?

3.2.9. Classes

To enable corporations to elect to be bound by a deemed undertaking, the ACCC must specify the class of corporations to which the undertaking can apply.

June consultation paper

We noted in our previous consultation paper that we considered it might be possible for the ACCC to use this provision to specify a number of classes to which different deemed undertakings applied, if need be.

We indicated that the number of residential superfast broadband local access lines provided by a corporation could be a suitable means of distinguishing a relevant class of corporations.

It was our initial expectation that small (above the class exemption level) to medium sized corporations were most likely to elect to use a deemed undertaking rather than develop their own and we sought views about whether there should be any variation in these undertakings for different classes and if a further deemed undertaking should apply for larger corporations as defined by the number of local access lines they supply.

Submissions

Submissions from stakeholders generally supported a deemed undertaking being available for smaller entities, with larger entities having the option to submit customised functional separation undertakings.

Stakeholders generally supported our proposal to use the number of superfast broadband local access lines as a suitable means of distinguishing a relevant class of corporations.

Several stakeholders were receptive to a less onerous undertaking applying to smaller corporations and a more onerous one (more in line with the model we proposed in the previous consultation paper model) applying to larger corporations.

Some stakeholders expressed the view that a less onerous undertaking could apply to small carriers that do not fall within the class exemption but have less than a set threshold of residential customers on its own network and a more onerous undertaking could apply to carriers that have more than the set threshold of residential customers on their network.

One stakeholder submitted that there should be two separate deemed functional undertakings. A less onerous undertaking should apply to corporations with 50,000 or less residential customers and a more onerous undertaking that is more in line with the June consultation paper model should apply to corporations with more than 50,000 residential customers.

Draft deemed undertaking

Having regard to submissions, we consider that the class of corporations eligible for the deemed functional separation undertaking should be set at a maximum of 50,000 residential superfast local access lines.

Corporations within this class will be able to utilise the deemed functional separation undertaking and those that exceed this threshold would be required to submit a customised functional separation undertaking.

We consider that having one deemed functional separation undertaking set at a maximum of 50,000 residential superfast local access lines is more feasible than two levels of undertakings that are set at different thresholds. The deemed functional separation undertaking is less onerous than the original model we proposed and we consider that this should alleviate some of the concern raised by stakeholders.

The draft deemed undertaking provides that corporations that supply no more than 50,000 residential superfast local access lines can choose to be bound by the terms of the deemed functional separation undertaking. The legislation requires that functional separation will apply to all the corporation's superfast local access lines servicing residential customers (i.e. new lines as well as existing lines, including any pre-1 January 2011 lines).

The table below summarises the functional separations arrangements that would be available to different superfast broadband network operators in accordance with the operation of the class exemption and the currently proposed arrangements.

	Superfast Broadband Network Class Exemption Determination	Deemed Functional Separation Undertaking	Customised Functional Separation Undertaking
Separation obligation	No	Yes	Yes
Wholesale access	Yes	Yes	Yes
Non-discrimination	Yes	Yes	Yes
Number of fixed line services	2,000 residential services (up to 12,000 if specified in regulation)	Up to 50,000 superfast local access lines	More than 50,000 superfast local access lines*

*It is open to any fixed line network operator to submit a customised functional separation undertaking

Q10. Are you satisfied with the ACCC's proposed class of corporations eligible for the deemed functional separation undertaking? If you are not satisfied, please provide reasons and indicate what alternative class you would prefer to apply.

3.2.10. Breaches of the undertaking

The ACCC has the power to revoke a person's election to be bound by a deemed undertaking in particular circumstances. Under subsection 151B(7), we can revoke an election if any of the following occurs:

- (i) the person has breached a fundamental provision of the undertaking;
- (ii) the person has contravened section 151ZF or 151ZG;¹²
- (iii) the ACCC is satisfied that the person has an unsatisfactory compliance record in relation to functional separation

June consultation paper

We proposed in our previous consultation paper that if we revoked a network operator's election to be bound by a deemed undertaking, we expected the network operator would then need to become structurally separated.

Submissions

We did not receive any stakeholder submissions in relation to breaches of the undertaking.

Draft deemed undertaking

The legislation provides that the ACCC can revoke the person's election to be bound by the undertaking if:

- (a) The person has breached a fundamental provision of the undertaking;
- (b) The person has contravened section 151ZF or 151ZG of the Telecommunications Act; or
- (c) The ACCC is satisfied that the person has an unsatisfactory compliance record in relation to functional separation.

We expect that if the ACCC provides written notice to a person that revokes that person's election to be bound by the deemed undertaking, the person will need to become structurally separated within 12 months. Prior to providing any written notice of revocation, the ACCC would provide the person with a notice of its intention to revoke and afford the person 15 business days to make a submission in relation to the ACCC's intention to revoke.

3.3. Non-discrimination requirements

In addition to the functional separation undertaking provisions, persons must adhere to the non-discrimination provisions of section 151ZF (which requires eligible services to be supplied on a non-discriminatory basis) and section 151ZG (which requires related activities to be carried on a non-discriminatory basis).

This means that the price and non-price terms and conditions for the supply of local line access services and related activities by the person's wholesale business unit to its wholesale customers (i.e. RSPs) will need to be the same, except as permitted under these sections. Discrimination is permitted on the basis of differences in creditworthiness and repeated failures by the wholesale customer to comply with the terms and conditions. In addition, the person's wholesale business unit must not discriminate in favour of its retail business unit.

¹² Section 151ZF requires eligible services to be supplied on a non-discriminatory basis and section 151ZG requires related activities to be carried on a non-discriminatory basis.

June consultation paper

Our preliminary view was that these provisions were standalone, and did not need to be incorporated in a deemed undertaking.

The legislation nevertheless provides that a failure by a corporation to abide by these provisions is grounds for the ACCC to revoke a person's election to be bound by a deemed undertaking (see above) and we proposed to include compliance with the non-discrimination provisions of section 151ZF and 151ZG in the reporting requirements in relation to the undertaking.

Submissions

Stakeholders did not raise concerns with our proposal to include compliance with these provisions in the reporting requirements in relation to the undertaking and submitted that our proposed treatment of the non-discrimination provisions was reasonable.

Draft deemed undertaking

Under the legislation, a corporation that elects to be bound by the deemed undertaking is subject to the non-discrimination provisions in section 151ZF and 151ZG of the Telecommunications Act.

The draft deemed undertaking provides that the corporation must include any instances of non-compliance with the non-discrimination provisions in its annual compliance report.

The legislation also provides that a failure to abide by these non-discrimination provisions is grounds for the ACCC to revoke the undertaking.

3.4. The draft deemed undertaking instrument

Q11. Do you have any specific drafting comments on the draft deemed undertaking instrument provided at Annex A?

3.5. Other comments

Q12. Do you have any other comments on the deemed undertaking as detailed in this consultation paper not covered by previous questions?



Telecommunications (Deemed Functional Separation Undertaking) Determination 2020

The Australian Competition and Consumer Commission makes this Determination under subsections 151A(13) and 151B(1) of the *Telecommunications Act 1997*.

Dated:

Rodney Graham Sims
Chairman
Australian Competition and Consumer Commission

Australian Competition and Consumer Commission

1 Name

This is the *Telecommunications (Deemed Functional Separation Undertaking) Determination 2020*.

2 Commencement

This Determination commences at the start of the day after it is registered on the Federal Register of Legislation.

Note: The Federal Register of Legislation may be accessed free of charge at www.legislation.gov.au.

3 Authority

This Determination is made under subsection 151B(1) of the *Telecommunications Act 1997*.

4 Definitions

In this Determination, unless the contrary intention appears:

Act means the *Telecommunications Act 1997*.

corporation has the meaning given by section 142A of the Act.

customer interface has the meaning given by section 142A of the Act.

fundamental provision has the meaning given by subsection 151A(9) of the Act.

local access line has the meaning given by section 76A of the Act.

local access line service has the meaning given by section 142A of the Act.

protected information means information of a kind that relates to a corporation's retail business unit or a corporation's wholesale business unit.

residential customer has a meaning affected by section 161 of the Act.

retail business unit has the meaning given by section 142A of the Act.

retail customer has the meaning given by section 142A of the Act.

standard functional separation undertaking means an undertaking under section 151A of the Act.

superfast carriage service has the meaning given by section 76 of the Act.

wholesale business unit has the meaning given by section 142A of the Act.

wholesale customer has the meaning given by section 142A of the Act.

worker has the meaning given by section 142A of the Act.

Note: A number of other terms used in this instrument are defined in the Act, including:

- ACCC;
- carrier; and
- carriage service provider.

5 References to other instruments

In this Determination, unless the contrary intention appears:

- (a) a reference to any other legislative instrument is a reference to that other legislative instrument as in force from time to time; and
- (b) a reference to any other kind of instrument or writing is a reference to that other instrument or writing as in force or in existence from time to time.

Note 1: For references to Commonwealth Acts, see section 10 of the *Acts Interpretation Act 1901*; and see also subsection 13(1) of the *Legislation Act 2003* for the application of the *Acts Interpretation Act 1901* to legislative instruments.

Note 2: All Commonwealth Acts and legislative instruments are registered on the Federal Register of Legislation.

Note 3: For paragraph (b), see subsection 589(2) of the Act.

6 Deemed standard functional separation undertaking

If:

- (a) a corporation that supplies superfast carriage services to no more than 50,000 residential customers using local access lines where that corporation is in a position to exercise control of those local access lines;
- (b) that corporation has, by written notice given to the ACCC, elected to be bound by this Determination;
- (c) that corporation has not, by written notice given to the ACCC, cancelled the election mentioned in paragraph (b); and
- (d) the ACCC has not revoked the election mentioned in paragraph (b) under subsection 151B(7) of the Act;

the Act has effect as if the:

- (e) corporation had given a standard functional separation undertaking in the terms set out in section 7;
- (f) ACCC had accepted the undertaking; and
- (g) undertaking had come into force when the election mentioned in paragraph (b) was given to the ACCC.

Note: For when a person is in a position to exercise control of a line, see section 155A of the Act.

7 Terms of deemed standard functional separation undertaking

- (1) The corporation will maintain a single wholesale business unit and a single retail business unit, including by:
 - (a) having separate branding for its wholesale business unit and its retail business unit; and
 - (b) in supplying the retail business unit and other wholesale customers, the wholesale business unit will undertake the:
 - (i) network planning functions with opportunity for input from the retail business unit and other wholesale customers;
 - (ii) marketing, sale and supply of local access line services to wholesale customers and prospective wholesale customers;
 - (iii) receipt of orders, service activation and provisioning;

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- (iv) processing and implementing requests to churn or for local number portability;
 - (v) billing of wholesale customers;
 - (vi) setting of wholesale prices and non-price terms and conditions;
 - (vii) responding to all network and service complaints for the systems and applications for the retail business unit and other wholesale customers; and
 - (viii) responding to network and service complaints from retail customers that cannot be resolved by the retail business unit and other wholesale customers;
- (c) in supplying retail customers, the retail business unit will undertake the:
- (i) marketing, sale and supply of local access line services to retail customers and prospective retail customers;
 - (ii) supply of value-added services to retail customers;
 - (iii) taking of service orders from retail customers for activation and provisioning by the wholesale business unit;
 - (iv) billing of retail customers; and
 - (v) setting of retail prices and non-price terms and conditions.
- (2) The corporation will maintain arm's length functional separation between the corporation's wholesale business unit and the corporation's retail business unit including by:
- (a) taking measures to ensure that there is physical separation of workers in the corporation's offices so that workers within the:
 - (a) retail business unit are unable to access, engage in, see or overhear the work being conducted in the corporation's wholesale business unit; and
 - (b) wholesale business unit are unable to access, engage in, see or overhear the work being conducted in the corporation's retail business unit;
 - (b) ensuring that any remuneration of workers within the corporation's retail business unit and wholesale business unit that is related to the performance of the corporation, is only related to the performance of the particular business unit within which an affected worker is based; and
 - (c) ensuring that the corporation's retail business unit and wholesale business unit undertake separate business planning and investment approval processes.
- (3) The corporation will ensure that:
- (a) the terms and conditions relating to price or a method of ascertaining price; and
 - (b) other terms and conditions;
- on which the corporation's wholesale business unit supplies local access line services to the corporation's retail business unit are documented.
- (4) The corporation will ensure that its workers who perform their duties for the corporation's wholesale business unit are different from the workers who perform their duties for the corporation's retail business unit, including by:
- (a) the implementation of measures to ensure that workers from the corporation's wholesale business unit are only subject to management direction from within that business unit;
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- (b) the implementation and carrying out of training activities for all of the corporation's workers in respect of the corporation's obligations under this Determination;
 - (c) allowing for the use of shared workers who carry out corporate service functions including finance, human resources management, legal and information technology support services across the corporation's wholesale and retail business units, subject to the implementation of measures to ensure those workers do not divulge information between the corporation's wholesale and retail business units; and
 - (d) allowing workers to transfer between the corporation's retail and wholesale business units, subject to those workers being made aware of the corporation's obligations under this Determination and any such transfers being documented in writing.
- (5) The corporation will ensure that there are access restrictions in place in respect of its:
- (a) operational support systems;
 - (b) business systems,
 - (c) communications systems; and
 - (d) accounts;
- to prevent the sharing of protected information between the corporation's:
- (e) retail business unit with the corporation's wholesale business unit; and
 - (f) wholesale business unit with the corporation's retail business unit.
- (6) The corporation will publish on its website:
- (a) the terms and conditions relating to price or a method of ascertaining price; and
 - (b) other terms and conditions;
- on which the corporation's wholesale business unit offers to supply local access line services to:
- (c) the corporation's retail business unit; and
 - (d) the corporation's wholesale business customers or prospective wholesale business customers.
- (7) The corporation will:
- (a) if requested to do so by a wholesale customer or prospective wholesale customer, supply a local access line service to the wholesale customer or prospective wholesale customer; and
 - (b) do so on the terms and conditions that were published on the corporation's website at the time when the request was made.
- (8) The corporation will ensure that information provided to the corporation's wholesale business unit by the corporation's wholesale customers is not disclosed to the corporation's retail business unit.
- (9) The corporation will ensure that the corporation's retail business unit does not obtain, access or use information provided to the corporation's wholesale business unit by the corporation's wholesale customers;
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- (10) The corporation will ensure that information provided to the corporation's retail business unit by a carrier or carriage service provider, other than information of a kind specified in section 9, is not disclosed to the corporation's wholesale business unit.
 - (11) The corporation will ensure that the corporation's wholesale business unit does not obtain, access or use information, other than information of a kind specified in section 9, provided to the corporation's retail business unit by a carrier or carriage service provider.
 - (12) The corporation will use the same customer interface for dealings between:
 - (a) the corporation's wholesale business unit; and
 - (b) the corporation's wholesale customers;as the corporation uses for dealings between:
 - (c) the corporation's wholesale business unit; and
 - (d) the corporation's retail business unit.
 - (13) The corporation will comply with any relevant requirements specified in a determination made under subsection 151B(14) of the Act.
 - (14) The corporation will give the ACCC a written report, on or before 31 July each year, that sets out:
 - (a) the total number of residential customers that the corporation supplies superfast carriage services to using local access lines where the corporation is in a position to exercise control of those local access lines, as at 30 June of that year;
 - (b) a statement of compliance in respect of the corporation's compliance or otherwise with each of subsections 7(1) to 7(13) of this Determination and, where applicable, sections 151ZF and 151ZG of the Act, for the year ended 30 June;
 - (c) the details of, including the reasons for, and the action taken to address, any instances of the corporation's non-compliance with subsections 7(1) to 7(13) of this Determination and sections 151ZF and 151ZG of the Act during the year ended 30 June;
 - (d) the details of any complaints the corporation received from its wholesale customers during the year ended 30 June that assert the corporation's non-compliance with any of subsections 7(1) to 7(13) of this Determination and sections 151ZF and 151ZG of the Act; and
 - (e) the details of any action taken by the corporation in response to a complaint of a kind mentioned in paragraph (d).
 - (15) The corporation will:
 - (a) within 3 months of giving an election under paragraph 6(b), prepare, and give the ACCC a copy of, a written plan setting out the actions to be taken by the corporation for the purpose of ensuring it complies with subsections 7(1) to 7(13); and
 - (b) within 7 days of making any variation to the plan mentioned in paragraph (a), give the ACCC a copy of any such variation.

8 Fundamental provisions

Subsections 7(1) to 7(12) are fundamental provisions.

9 Determination of kinds of information

Information that constitutes:

- (a) wholesale pricing;
- (b) other terms and conditions; and
- (c) network coverage information;

as offered by carriers and carriage service providers to a corporation's retail business unit for the purpose of enabling the corporation's retail business unit to obtain equivalent offers from its wholesale business unit, is determined, pursuant to subsection 151A(13) of the Act, to be specified information for the purpose of subsections 7(10) and 7(11).

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