



Superfast broadband network class exemption and deemed functional separation undertaking

Consultation paper

June 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) (Tel Act) 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 Tel 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 from the requirement to operate on a wholesale-only basis. However, any such exemption does not remove the requirement for these operators to offer access to a wholesale service on non-discriminatory terms.

The new laws come into effect on 26 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.

In this consultation we are seeking views from stakeholders 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
- the classes of corporations to which deemed undertakings should apply.

2. Introduction

2.1. Background

In 2014, an independent panel of experts released its report into the NBN market and regulation (the Vertigan Review), which outlined the panel’s findings following its cost-benefit analysis and review of the regulatory arrangements for the NBN.

On 11 December 2014, in response to that report, the Government released its ‘Telecommunications Regulatory and Structural Reform’ paper, in which the Government proposed a number of reforms (known as the ‘level playing field’ reforms) to provisions in Parts 7 and 8 of the Tel Act. Those parts of the Tel Act had mandated that owners of superfast broadband services provide, by law, a wholesale Layer 2 bitstream service, and also required owners of superfast broadband networks to operate on a wholesale-only basis (unless exempted).

The TLA Act gives effect to the Government’s reform proposals.

First, the TLA Act gives superfast network operators the option of operating on a functionally separated basis, including via a deemed functional separation undertaking. It also allows the ACCC to make class exemptions from the separation requirements. Another notable provision introduced by the TLA Act is the removal of lines serving small business customers from the separation requirements.

The TLA Act also repeals Part 7 of the Tel Act, thereby removing the provisions requiring superfast network operators to supply a layer 2 bitstream service. The requirement to provide wholesale access to such a service is now largely covered by the Local Bitstream Access Service (LBAS) and SBAS Superfast Bitstream Access Service (SBAS) declarations made by the ACCC.

What is a superfast carriage service?

Under section 142A of the Tel Act, a superfast carriage service means a carriage service where:

- the carriage service enables the end-users to download communications; and
- the download transmission speed of the carriage service is normally 25 megabits per second or more; and
- the carriage service is supplied using a line to premises occupied or used by an end-user.

What are the carrier separation rules?

Following the recent amendments to the Tel Act, the 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 operating 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.

Deemed undertaking

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 will be 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 Tel Act requires that it will apply to all its local access lines servicing 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).

Class exemption

The ACCC is empowered to determine a ***class exemption*** to exempt smaller network operators from the Part 8 structural or functional separation requirements that they would otherwise need to comply with. This is designed to reduce the cost burden on smaller networks in participating in the superfast broadband market.

A network operator that has elected to be bound by a class exemption is still subject to wholesale access and non-discrimination rules in the supply of a Layer 2 bitstream service or a designated carriage service specified by the ACCC, as well as any additional conditions and limitations specified in the class exemption.

2.2. Timetable for this consultation

The ACCC requests written submissions by **COB Friday 17 July 2020**.

After considering submissions from interested parties, the ACCC proposes to:

- publish a finalised Superfast Broadband Network Separation Obligations (Class Exemption) Instrument by mid-August 2020.
- publish a draft Deemed Standard Functional Separation Undertaking Instrument by mid-August 2020. We will provide an opportunity for comment on this draft instrument before proceeding to finalise this instrument by late September 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 Superfast Broadband Network Separation Obligations (Class Exemption) Instrument together with the other issues set out in this consultation and draft position paper.

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 [guideline](#)¹ 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. Class exemption

The ACCC proposes to make a determination implementing a class exemption (as outlined in section 2 above) to which a person included in a specified class of persons may elect to be bound. For the purposes of this consultation, we have prepared a draft class exemption instrument that we consider accords with the relevant provisions of the Tel Act, and have provided our preliminary assessment of whether making a class exemption instrument would promote the long term interest of end users (LTIE). The draft instrument is provided at **Annex A**.

3.1. Legislative regime

The ACCC has the power to make determinations under section 143A of the Tel Act implementing an exemption from the Tel Act's separation requirements for a particular class of persons.

The legislation specifies that a determination made under section 143A is subject to the following conditions and limitations:

- (a) the person must ensure that a designated carriage service is available for supply to wholesale customers, or prospective wholesale customers, of the person;
- (b) the person must not discriminate between the person's wholesale customers, or the person's prospective wholesale customers, in relation to the supply of designated carriage services;
- (c) the person must not discriminate in favour of itself in relation to the supply of designated carriage services;
- (d) the person must not, in carrying on any of the following activities, discriminate between the person's wholesale customers or the person's prospective wholesale customers:
 - (i) developing a new eligible service;
 - (ii) enhancing an eligible service;
 - (iii) extending or enhancing the capability of a facility or telecommunications network by means of which an eligible service is, or is to be, supplied;

- (iv) planning for a facility or telecommunications network by means of which an eligible service is, or is to be, supplied;
 - (v) an activity that is preparatory to the supply of an eligible service;
 - (vi) an activity that is ancillary or incidental to the supply of an eligible service;
 - (vii) giving information to service providers about any of the above activities;
- (e) the person must not discriminate in favour of itself in relation to the carrying on of any of the following activities:
- (i) developing a new eligible service;
 - (ii) enhancing an eligible service;
 - (iii) extending or enhancing the capability of a facility or telecommunications network by means of which an eligible service is, or is to be, supplied;
 - (iv) planning for a facility or telecommunications network by means of which an eligible service is, or is to be, supplied;
 - (v) an activity that is preparatory to the supply of an eligible service;
 - (vi) an activity that is ancillary or incidental to the supply of an eligible service;
 - (vii) giving information to service providers about any of the above activities;
- (f) such other conditions and limitations as are specified in the determination.

As the non-discrimination obligations under subsections 143A(3)(b)-(e) largely mirror the non-discrimination arrangements under sections 152AXC and 152AXD of the CCA, the ACCC proposes to treat these non-discrimination conditions and limitations in accordance with our Part XIC non-discrimination guidelines issued pursuant to section 152CJH of the CCA.²

Before making a determination implementing a class exemption, the ACCC must have regard to the following:

- (a) whether the determination promotes the long term interests of end users of carriage services or of services supplied by means of carriage services; and
- (b) the matters (if any) specified in a [ministerial] determination under subsection [143A](9); and
- (c) such other matters (if any) as the ACCC considers relevant.

3.2. The bounds of the class exemption

Under the provisions of s 143A, the ACCC can determine the bounds of class exemptions in a number of ways. This includes by specifying:

- a class of persons who can elect to be bound by an exemption
- the maximum number of residential customers³ to which the relevant person or group of associated persons supplies fixed line carriage services
- the designated carriage service to which particular continuing conditions and limitations under the legislation will apply
- other conditions and limitations in the class exemption determination itself.

These are considered in turn below.

² <https://www.accc.gov.au/regulated-infrastructure/communications/national-broadband-network-nbn/non-discrimination-under-part-xic/guideline>

³ Defined under s.161 to include home-based small businesses.

3.2.1. Class of persons

In our draft instrument we have defined the class of persons by the number of residential customers to whom a person or group of associated persons is supplying fixed line carriage services to up to the current maximum threshold of 2,000 services (see further below). However, we note that this provision does allow us to specify a class more narrowly within the threshold number set by the legislation or subsequent regulation. It could for example mean that we further restrict the class of persons to supply of fixed line services in particular geographic locations or to below a threshold number of residential superfast broadband customers supplied if that were to promote the LTIE and other relevant considerations.

Q1. Should the ACCC specify a class of persons other than for the maximum number of residential customers being supplied with fixed line services?

3.2.2. Maximum number of residential customers being supplied with fixed line services

A person can only benefit from a class exemption if that person or an associated group of persons supplies fixed line carriage services to no more than 2,000 residential customers, or a higher number of no more than 12,000 if specified in the regulations.⁴ For immediate purposes, a specified class of persons must have 2,000 residential fixed line customers or less to benefit from a class exemption.

The new provisions pursuant to the TLA Act have narrowed the scope of relevant customers under the Part 8 separation requirements to largely exclude small business customers. The new provisions apply only to residential customers, which include customers who are home-based businesses.⁵ This means that all other businesses are not considered when calculating the customer threshold.

As noted above, we have prepared a draft instrument that specifies the class of persons who can elect to be bound by the class exemption as a person or an associated group of persons that supplies fixed-line carriage services up to the current maximum threshold of 2,000 services. In the ACCC's preliminary view, this would promote the LTIE for the reasons detailed in section 3.3 of this consultation paper.

As an alternative, the instrument could be drafted to provide for automatic extension of the maximum threshold of fixed line carriage services to any higher number subsequently determined by the Minister under regulation. We consider this could be accommodated by the ACCC making an assessment, in advance of any such regulation, that an exemption up to a maximum of 12,000 residential fixed line carriage services would promote the LTIE.

Q2. Would you favour an exemption instrument that allowed for an automatic extension of the 2,000 services to any maximum threshold of fixed line carriage services subsequently determined by the Minister under regulation?

⁴ Subsections 143A(1)(d), (1)(e), (2)(d) and (2)(e) of the Tel Act

⁵ The key criteria for determining when a customer is a home-based business are that most or all of the work of the business is carried out at the residence of an individual; or the business does not occupy any premises other than the residence of the individual (see Explanatory Memorandum of the TLA Act, p. 132 and section 161 of the Tel Act).

Q3. For the purposes of the above, do you consider that the LTIE would be promoted by a class exemption at the maximum threshold of 12,000 residential fixed line carriage services that can be specified by regulation?

Q4. If you operate a superfast broadband network, please provide the number of residential customers being supplied with superfast broadband local access services and the total number you reasonably forecast to supply within the next 5 years (this information can be supplied on a commercial-in-confidence basis if desired).

3.2.3. Designated carriage service

A small network provider who elects to be subject to a class exemption must ensure that a designated carriage service is available for supply to wholesale customers or prospective wholesale customers.

A designated carriage service is defined under section 142BD of the Tel Act as a Layer 2 bitstream service. The ACCC is also given the power to specify a carriage service as a designated carriage service in a class exemption, but this is not necessary to make a valid determination. However, by specifying a designated carriage service the ACCC is able to set the bounds of the conditions and limitations of the exemption specified in the legislation to such a service.

If the ACCC does specify a designated carriage service, that carriage service must meet the criteria specified in subsection 142BD(3) of the Tel Act, which is summarised as follows:

- The carriage service enables end-users to download communications.
- The download transmission speed of the carriage service is normally 25 megabits per second or more (i.e. a superfast carriage service).
- The carriage service is supplied using a line to premises occupied or used by an end-user.
- There is in force a declaration under subsection 152AL(3) of the *Competition and Consumer Act 2010* (Cth) that relates to the carriage service.

These criteria enable us to specify the services covered by the LBAS and the SBAS declarations as a designated carriage service.

Our draft exemption instrument specifies either the LBAS and/or SBAS (as the case may be) as a designated carriage service. This is because we consider these services are the most likely services for which the applicable conditions and limitations will still be required to promote competition where network operators elect to be bound by the class exemption determination.

Q5. Should the ACCC specify a designated carriage service (other than a Layer 2 Bitstream Service) for the ongoing conditions and limitations of the exemption? If, yes, would the services covered by the LBAS and/or SBAS declarations make a suitable designated carriage service?

3.2.4. Other conditions and limitations

The ACCC also has the power in making a class exemption to specify other conditions and limitations on its effect (i.e. requirements that must be complied with if a network operator

elects to be bound by the class exemption). This could, for example, include a requirement to provide the ACCC information on network expansion plans or reporting on compliance with the conditions and limitations. Our draft exemption instrument has not specified any other conditions and limitations.

Q6. Should the ACCC specify any other conditions and limitations of the exemption?

3.2.5. Non-compliance with a class exemption condition or limitation

Contraventions of the conditions or limitations of a class exemption determination are subject to civil penalty provisions and associated pecuniary penalties.⁶

3.3. Long term interests of end-users (LTIE)

As noted above, in deciding to implement a class exemption along with its conditions and limitations, the ACCC must be satisfied that it will promote the LTIE of carriage services or of services supplied by means of carriage services.

The question of whether a class exemption promotes the LTIE must be determined in the same manner as it is determined for the purposes of Part XIC of the CCA.⁷ Accordingly, the ACCC must have regard to the extent to which the class exemption is likely to result in the achievement of the following three objectives:

- promoting competition in markets for listed services
- achieving any-to-any connectivity in relation to carriage services that involve communication between end-users, and
- encouraging the economically efficient use of, and the economically efficient investment in, infrastructure.

3.3.1. Promoting competition

When considering whether a determination is likely to result in the promotion of competition in the relevant markets, our approach is to:

- identify and define the relevant market/s
- assess the current state of competition in those markets; and
- consider the likely future state of competition in those markets with and without the class exemption.

Identifying and defining the relevant market/s enables the ACCC to analyse the effectiveness of competition with and without the class exemption. In the present case, the primary purpose of market analysis is to shed light on how the class exemption may affect competition.

The ACCC considers the relevant markets to be those for the supply of wholesale and retail superfast broadband services to residential premises. We consider there may be sub-markets limited to particular geographic locations corresponding with the reach of particular networks.

⁶ Section 143B of the Tel Act.

⁷ Section 142BA of the Tel Act,

Given the considerable operational and financial burden that may be imposed on small providers by the structural and functional separation requirements, the ACCC's preliminary view is that a class exemption as specified in the draft exemption instrument is likely to promote entry and investment by new providers of small networks. This will help promote competition. Further we consider that competition will continue to be safeguarded by the legislated conditions and limitations of the exemption, particularly as applied to a person's or group of associated persons' proposed designated carriage services of LBAS and/or SBAS (as the case may be). Our view is that for lower speed broadband and voice services that fall outside these designated services, mobile services should serve as a competitive constraint.

Q7. Would competition in the markets for the supply of wholesale and retail superfast broadband services to residential customers be promoted by the draft class exemption instrument?

Q8. Could this be aided by any further conditions or limitations on the exemption?

Q9. What substitute services should the ACCC consider as part of its assessment?

Q10. Would competition continue to be promoted if the exemption threshold were allowed to rise to 12,000 services in line with any subsequent regulation made by the Minister?

3.3.2. Achieving any-to-any connectivity

The CCA provides that any-to-any connectivity is achieved if, and only if, each end-user who is supplied with a carriage service that involves communications between end-users is able to communicate, by means of that service, or a similar service, with each other, whether or not they are connected to the same network.

The ACCC notes that the achievement of any-to-any connectivity is particularly relevant when considering services that require interconnection between different networks. When considering other types of services (such as carriage services which are inputs to an end-to-end service), the ACCC will generally give this criterion less weight.

We do not consider that a class exemption in relation to the superfast broadband network separation rules has any bearing on any-to-any connectivity.

Q11. Do you agree that implementing a class exemption will have no impact on achieving any-to-any connectivity?

3.3.3. Economically efficient use of, and economically efficient investment in, infrastructure

In considering whether a class exemption will encourage increased incentive for the economically efficient use of, and economically efficient investment in, infrastructure, the ACCC must have regard to the following:

- Whether it is, or is likely, to become, technically feasible for the services to be supplied and charged for, having regard to:
 - (i) the technology that is in use, available or likely to become available; and
 - (ii) whether the costs that would be involved in supplying, and charging for, the services are reasonable or likely to become reasonable; and

- (iii) the effects, or likely effects, that supplying and charging for, the services would have on the operation or performance of telecommunications networks
- The legitimate commercial interests of the supplier or suppliers of the services, including the ability of the suppliers to exploit economies of scale and scope.
- The incentives for investment in infrastructure, including:
 - the infrastructure by which the services are supplied
 - any other infrastructure by which the services are, or are likely to become, capable of being supplied.

The higher level objective of the economically efficient use of, and economically efficient investment in, infrastructure requires consideration of the three components of efficiency, namely productive efficiency, allocative efficiency and dynamic efficiency.

We consider that the key efficiency gain of a class exemption for networks up to the current maximum threshold of 2,000 services arises from the avoidance of disproportionate costs of structural or functional separation that would otherwise apply to these networks. This should help to promote ongoing investment in these networks, and continued provision of superfast broadband services to consumers connected to them. These outcomes will better accord with the legitimate business interests of smaller network providers.

Q12. Will the draft class exemption instrument promote the economically efficient use of, and economically efficient investment in, infrastructure?

Q13. Would this continue to be the case if the exemption threshold were allowed to rise to 12,000 services in line with any subsequent regulation made by the Minister?

3.4. Other relevant matters

In making an exemption the ACCC is able to take account of other matters it considers relevant. We consider that the key matters of interest to us are captured under the LTIE test outlined in section 3.3 above.

Q14. Are there any other matters not captured under the LTIE test that the ACCC should take into account in deciding to make an exemption?

4. 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).

4.1. Legislative regime

The provisions to be included in deemed undertakings are specified in the Tel 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;⁸ 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;⁹ 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;¹⁰ 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

⁸ An extent specified under paragraph (d) may be a nil extent (subsection 151A(3))

⁹ An extent specified under paragraph (e) may be a nil extent (subsection 151A(3))

¹⁰ Subsection 151A(13) allows for the ACCC to determine one or more kinds of information for the purposes of subsections 151A(2)(j)&(k).

service provider (other than information of a kind specified in a determination under subsection (13));¹¹ and

- (l) provide that the person will use the same customer interface¹² for dealings between:
 - (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)¹³...

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 Tel Act above. In addition, the ACCC can specify that other provisions of the undertaking are also fundamental provisions.¹⁴ 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 4.2.10 below).

As several of the provisions are fairly high level in nature, we expect that further detail will need to be specified in the undertaking. This is discussed below.

4.2. Undertaking provisions in detail

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

We propose that to help achieve the objectives of the undertaking, the wholesale and retail business units would have separate branding.

We also consider that they would need to be housed in physically separate office space sufficient to prevent day to day interaction between the staff in each space.

Further, we expect that 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.

Functional separation does not require legal separation of the wholesale and retail business units.

¹¹ Subsection 151A(13) allows for the ACCC to determine one or more kinds of information for the purposes of subsections 151A(2)(j)&(k).

¹² A customer interface is defined under the legislation as an interface for the purposes of:

- (a) ordering; and
- (b) provisioning; and
- (c) billing; and
- (d) service activation; and
- (e) fault rectification;

in relation to the supply of local access line services.

¹³ Subsection 151A(14) states '*The Minister may, by legislative instrument, determine one or more provisions for the purposes of paragraph (2)(m).*'

¹⁴ 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.

Q15. Would the above proposed separation requirements present any major practical difficulties or costs for your business?

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

We expect 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

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

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.

Q16. Would the allocation of the above activities to the wholesale and retail business units be suitable for your business?

Q17. If not, what would be a more suitable allocation of activities between wholesale and retail business units for your business?

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

The ACCC expects 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.

Q18. Would the allocation of personnel between wholesale and retail business units proposed above be suitable for your business? Please provide details.

Q19. If not, what would be a more suitable allocation of personnel between wholesale and retail business units?

Q20. Are the proposed information sharing restrictions and training obligations reasonable?

4.2.4. Incentive structures for the wholesale and retail business units

To maintain the appropriate incentives for the functionally separate business units to conform with the requirements of the undertaking, we consider 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.

Q21. Would your business have any difficulties introducing the proposed incentive structures?

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

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.

Our preference is that wholesale and retail business units would operate physically separate IT systems and applications.

However, if we are presented with evidence during our consultation that to maintain separate IT systems would be cost prohibitive, we may 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. This may still require separate application software to be employed by each business unit and other information security measures.

Q22. What degree of separation of IT systems and applications would be feasible for your business?

4.2.6. Whether other provisions should be considered fundamental provisions

The ACCC is 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.

Q23. Would you object to all provisions being treated as fundamental provisions? If so, which ones wouldn't you wish to see included and why?

4.2.7. 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

As indicated above, 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.¹⁵

We consider that this information 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.

Q24. Is there any other information provided to a retail business unit by other carriers or CSPs that you consider would be appropriate to share or not share with a wholesale business unit?

4.2.8. Further provisions

Under the legislation, the deemed undertaking(s) are also to include provisions that require the corporations to provide the ACCC with compliance reports¹⁶ and compliance plans related to the undertaking.¹⁷ The compliance reports must be in a form approved in writing by the ACCC.

The ACCC expects that the corporation would develop a compliance plan that details the specific actions it will take to comply with the undertaking, including its compliance reporting to the ACCC. The ACCC is not required to approve these compliance plans.

¹⁵ Subsection 151A(13).

¹⁶ Subsection 151A(10).

¹⁷ Subsection 151A(11).

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

We would expect compliance reports to be provided on an annual basis from the date of provision of the first compliance plan. It is 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.

Q25. Do you have views on the timing and content of compliance plans and compliance reports to be provided pursuant to the undertaking?

4.2.9. 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. We consider it may be possible for the ACCC to use this provision to specify a number of classes to which different deemed undertakings apply, if need be.

The ACCC expects that the number of residential superfast broadband local access lines provided by a corporation would be a suitable means of distinguishing a relevant class of corporations.

It is our initial expectation that small (above the class exemption level) to medium sized corporations are most likely to elect to use a deemed undertaking rather than develop their own.

However we are interested in 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.

Q26. How and at what levels should the ACCC specify classes for the purpose of the deemed undertaking(s)? In answering this question we request that superfast network operators provide us with the total number of residential superfast broadband local access lines you currently have in place and the total number you reasonably forecast to have in place within the next 5 years (this information can be supplied on a commercial-in-confidence basis if desired).

Q27. Should the ACCC make a single deemed undertaking that should apply for corporations from one class or a number of undertakings that apply to a number of specified classes?

Q28. To the extent the ACCC has discretion under the legislation, what provisions should apply or not apply for particular classes of corporations?

4.2.10. 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;¹⁸
- (iii) the ACCC is satisfied that the person has an unsatisfactory compliance record in relation to functional separation

If by written notice given to a network operator we revoke that network operator's election to be bound by a deemed undertaking, we expect the network operator will then need to become structurally separated.

4.3. 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 on a non-discriminatory basis).

These mean 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.

Our preliminary view is that these provisions stand alone, and do 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 propose to include compliance with the provisions in the reporting requirements in relation to the undertaking.

Q29. Do you think the ACCC's proposed treatment of the non-discrimination provisions is reasonable?

¹⁸ 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.



Superfast Broadband Network Separation Obligations (Class Exemption) Instrument 2020

I, Rodney Graham Sims, Chairman of the Australian Competition and Consumer Commission (ACCC), make the following Instrument under subsections 143A(1) and (2) and subsection 142BD(2) of the *Telecommunications Act 1997* (the Act).

Under this Instrument, if:

- a) a person is included in a specified class of person in column 1 of the Schedule; and
- b) the person has, by written notice to the ACCC, elected to be bound by this determination; and
- c) the person has not, by written notice to the ACCC, cancelled the election,

the person will be EXEMPT from the separation requirements under sections 142C or 143 of the Act (as the case may be), subject to the conditions or limitations specified for that class of person in column 2 of the Schedule.

Pursuant to subsection 142BD(2) of the Act, this Instrument specifies as a designated carriage service the SBAS and/or LBAS supplied by the relevant class of persons specified in column 1 of the Schedule. The specification of a designated carriage service is applicable to particular conditions or limitations applying in column 2 of the Schedule.

This Instrument commences on the day after this Instrument is registered on the Federal Register of Legislation.

Dated 2020

Rodney Graham Sims **[DRAFT ONLY—NOT FOR SIGNATURE]**
Chairman of the Australian Competition and Consumer Commission

Definitions

Unless otherwise specified in this Instrument, words used in this Instrument have the same meaning as in the Act.

In this Instrument:

LBAS means a service defined under the Service Description under the Local Bitstream Access Service Declaration issued by the ACCC dated 24 February 2012.

SBAS means a service defined under the Service Description under the Superfast Broadband Access Service Declaration issued by the ACCC dated 29 July 2016.

Schedule

Column 1	Column 2
<p><i>Persons belonging to class of persons specified in each item of this table may, by written notice to the ACCC, elect to be exempt from the separation requirements under sections 142C or 143 of the Act (as the case may be).</i></p>	<p><i>Conditions or limitations.</i></p>
<p>Persons who are not members of an associated group where the supply of fixed-line carriage services is to no more than 2,000 residential customers.</p>	<p>(a) the person must ensure that LBAS and/or SBAS (as the case may be) is available for supply to wholesale customers, or prospective wholesale customers, of the person;</p> <p>(b) the person must not discriminate between the person's wholesale customers, or the person's prospective wholesale customers, in relation to the supply of LBAS and/or SBAS (as the case may be);</p> <p>(c) the person must not discriminate in favour of itself in relation to the supply of LBAS and/or SBAS (as the case may be);</p> <p>(d) the person must not, in carrying on any of the following activities, discriminate between the person's wholesale customers or the person's prospective wholesale customers:</p> <ul style="list-style-type: none"> (i) developing a new eligible service; (ii) enhancing an eligible service; (iii) extending or enhancing the capability of a facility or telecommunications network by means of which an eligible service is, or is to be, supplied;

Column 1	Column 2
<p><i>Persons belonging to class of persons specified in each item of this table may, by written notice to the ACCC, elect to be exempt from the separation requirements under sections 142C or 143 of the Act (as the case may be).</i></p>	<p><i>Conditions or limitations.</i></p>
	<ul style="list-style-type: none"> (iv) planning for a facility or telecommunications network by means of which an eligible service is, or is to be, supplied; (v) an activity that is preparatory to the supply of an eligible service; (vi) an activity that is ancillary or incidental to the supply of an eligible service; (vii) giving information to service providers about any of the above activities; <p>(e) the person must not discriminate in favour of itself in relation to the carrying on of any of the following activities:</p> <ul style="list-style-type: none"> (i) developing a new eligible service; (ii) enhancing an eligible service; (iii) extending or enhancing the capability of a facility or telecommunications network by means of which an eligible service is, or is to be, supplied; (iv) planning for a facility or telecommunications network by means of which an eligible service is, or is to be, supplied; (v) an activity that is preparatory to the supply of an eligible service; (vi) an activity that is ancillary or incidental to the supply of an eligible service; (vii) giving information to service providers about any of the above activities.
<p>Persons who are members of an associated group of persons who together supply fixed-line carriage services to no more than 2,000 residential customers.</p>	<ul style="list-style-type: none"> (a) the person must ensure that LBAS and/or SBAS (as the case may be) is available for supply to wholesale customers, or prospective wholesale customers, of the person; (b) the person must not discriminate between the person's wholesale customers, or the person's prospective

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	<p>wholesale customers, in relation to the supply of LBAS and/or SBAS (as the case may be);</p> <p>(c) the person must not discriminate in favour of itself in relation to the supply of LBAS and/or SBAS (as the case may be);</p> <p>(d) the person must not, in carrying on any of the following activities, discriminate between the person's wholesale customers or the person's prospective wholesale customers:</p> <ul style="list-style-type: none"> (i) developing a new eligible service; (ii) enhancing an eligible service; (iii) extending or enhancing the capability of a facility or telecommunications network by means of which an eligible service is, or is to be, supplied; (iv) planning for a facility or telecommunications network by means of which an eligible service is, or is to be, supplied; (v) an activity that is preparatory to the supply of an eligible service; (vi) an activity that is ancillary or incidental to the supply of an eligible service; (vii) giving information to service providers about any of the above activities; <p>(e) the person must not discriminate in favour of itself in relation to the carrying on of any of the following activities:</p> <ul style="list-style-type: none"> (i) developing a new eligible service; (ii) enhancing an eligible service; (iii) extending or enhancing the capability of a facility or telecommunications network by means of which an eligible service is, or is to be, supplied;

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