



AUSTRALIAN COMPETITION  
& CONSUMER COMMISSION

# Uniti joint functional separation undertaking

Consultation paper

September 2020

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# 1. Overview

On 25 August 2020, amendments to the *Telecommunications Act 1997* (Telecommunications Act) came into effect that enable superfast fixed line broadband network operators serving residential customers to operate on a functionally separated basis (rather than a structurally separated basis).

In particular, network operators are now able to voluntarily submit either standard functional separation undertakings or joint 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.

On 2 September 2020, Uniti Group Limited (Uniti) submitted a joint functional separation undertaking and a supporting submission in accordance with section 151C of the Telecommunications Act.

Under section 151G of the Telecommunications Act, the ACCC is required to undertake a public consultation for a period of no less than 15 business days before deciding whether to accept or reject a joint functional separation undertaking. Subject to stakeholders' views, the ACCC is minded to accept Uniti's undertaking.

The ACCC seeks comments from interested stakeholders on Uniti's undertaking. We welcome comments on any aspect of the undertaking, having regard to Uniti's supporting submission.

The purpose of this consultation paper is to provide relevant background together with an overview of the undertaking, the legislative framework for ACCC assessment of joint functional separation undertakings and details on how to make a submission. A copy of Uniti's joint functional separation undertaking is provided on the [ACCC's website](#).

## 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.

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

## 2.1. Timetable for this consultation

The ACCC requests written submissions on Uniti's joint functional separation undertaking by no later than **COB 30 September 2020**.

After considering submissions from interested parties, the ACCC proposes to publish a final decision to accept or reject Uniti's undertaking by mid-October 2020.

## 2.2. Making a submission

The ACCC encourages industry participants, other stakeholders and the public more generally to consider and make submissions on Uniti's joint functional separation undertaking 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 the widest possible participation in the public inquiry.

The ACCC has published a [guideline](#)<sup>1</sup> explaining 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 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 [duncan.mcglynn@acc.gov.au](mailto:duncan.mcglynn@acc.gov.au) or [ed.seymour@acc.gov.au](mailto:ed.seymour@acc.gov.au).

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](#).

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

## 3. Functional separation undertaking

### 3.1. Legislative regime

The provisions to be included in joint functional separation undertakings are specified in the Telecommunications Act under subsection 151C(2).

The undertaking must:

(a) *identify:*

(i) *one or more (but not all) of those persons as the wholesaler or wholesalers for the purposes of the undertaking; and*

(ii) *the remaining person or persons as the retailer or retailers for the purposes of the undertaking; and*

(b) *provide that a wholesaler will not supply a local access line service to a person unless the person is a wholesale customer; and*

(c) *provide that a retailer will not supply a local access line service to a person unless the person is a retail customer; and*

(d) *provide that a wholesaler will, to the extent specified in the undertaking, ensure that the wholesaler's workers will perform their duties exclusively for the wholesaler<sup>2</sup>; and*

(e) *provide that a retailer will, to the extent specified in the undertaking, ensure that the retailer's workers will perform their duties exclusively for the retailer<sup>3</sup>; and*

(f) *provide that a wholesaler will, to the extent specified in the undertaking, ensure that the workers who<sup>4</sup>:*

(i) *are engaged by persons other than the wholesaler; and*

(ii) *perform duties for the wholesaler;*

*are different from the workers who:*

(iii) *are engaged by persons other than the wholesaler; and*

(iv) *perform duties for a retailer; and*

(g) *provide that a retailer will, to the extent specified in the undertaking, ensure that the workers who<sup>5</sup>:*

(i) *are engaged by persons other than the retailer; and*

(ii) *perform duties for the retailer;*

*are different from the workers who:*

(iii) *are engaged by persons other than the retailer; and*

(iv) *perform duties for a wholesaler; and*

(h) *provide that a wholesaler will ensure that no director of the wholesaler is a director of a retailer; and*

(i) *provide that a retailer will ensure that no director of the retailer is a director of a wholesaler; and*

(j) *provide that<sup>6</sup>:*

(i) *the wholesaler or wholesalers; and*

(ii) *the retailer or retailers;*

*will, to the extent specified in the undertaking, have separate:*

(iii) *operational support systems; and*

(iv) *business systems; and*

(v) *communications systems; and*

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<sup>2</sup> An extent specified under paragraph (d) may be a nil extent (subsection 151C(3))

<sup>3</sup> An extent specified under paragraph (e) may be a nil extent (subsection 151C(3))

<sup>4</sup> An extent specified under paragraph (f) may be a nil extent (subsection 151C(3))

<sup>5</sup> An extent specified under paragraph (g) may be a nil extent (subsection 151C(3))

<sup>6</sup> An extent specified under paragraph (j) may be a nil extent (subsection 151C(3))

- (vi) accounts; and
- (k) *provide that a wholesaler will publish on the wholesaler'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 wholesaler offers to supply local access line services to the following:*
    - (iii) *a retailer;*
    - (iv) *its wholesale customers or prospective wholesale customers; and*
- (l) *provide that a wholesaler 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 wholesaler's website at the time when the request was made; and*
- (m) *provide that a wholesaler will ensure that information provided by its wholesale customers (other than the retailer or retailers) is not disclosed to any of the retailers; and*
- (n) *provide that a retailer will ensure that it does not obtain, access or use information provided to any of the wholesalers by the wholesaler's wholesale customers; and*
- (o) *provide that a retailer will ensure that information provided to the retailer by a carrier or carriage service provider, other than:*
  - (i) *information provided by a wholesaler; or*
  - (ii) *information of a kind specified in a determination under subsection (15)<sup>7</sup>;*
    - is not disclosed to any of the wholesalers; and*
- (p) *provide that a wholesaler will ensure that it does not obtain, access or use information provided to any of the retailers by a carrier or carriage service provider, other than:*
  - (i) *information provided by a wholesaler; or*
  - (ii) *information of a kind specified in a determination under subsection (15)<sup>8</sup>; and*
- (q) *provide that a wholesaler will use the same customer interface<sup>9</sup> for dealings between:*
  - (i) *the wholesaler; and*
  - (ii) *the wholesaler's wholesale customers (other than the retailer or retailers);*
    - as the wholesaler uses for dealings between:*
    - (iii) *the wholesaler; and*
    - (iv) *a retailer; and*
- (r) *contain such other provisions (if any) as are specified in a determination under subsection (16); and*
- (s) *not contain a provision of a kind specified in a determination under subsection (17).*

Note: A joint 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).

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<sup>7</sup> Subsection 151C(15) allows for the ACCC to determine one or more kinds of information for the purposes of subsections 151C(2)(o) and (p).

<sup>8</sup> Subsection 151C(15) allows for the ACCC to determine one or more kinds of information for the purposes of subsections 151C(2)(o) and (p).

<sup>9</sup> 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.

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 joint undertaking may state that other provisions of the undertaking are also fundamental provisions.<sup>10</sup> A breach of a fundamental provision may be grounds for the ACCC to revoke a person's functional separation undertaking.

Q1. Does Uniti's joint functional separation undertaking satisfy the legislative requirements?

## 3.2. Undertaking provisions in detail

Capitalised terms are defined in Part A clause 1 of Uniti's undertaking.

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

Under Part C clause 1.3, Uniti commits that its Retailers and Wholesalers will operate their businesses under separate brands. A Retailer will not use a brand or trade mark in its business if that brand or trade mark is used by a Wholesaler in its business and vice versa.

Under Part C clause 2.3, Uniti undertakes that staff of the Consumer and Business Enablement business unit and the Wholesale and Infrastructure business unit will be located in premises that are physically separate from staff of the other business unit. Staff may be located in the same building but Uniti will implement security measures that prevent a staff member of one business unit from gaining access to the premises where staff of the other business unit are located. An exception is made for approved meetings between staff of the business units provided that the visiting staff member is accompanied while in the premises of the other business unit.

Part C clause 2.7 provides that Uniti may conduct open group events such as companywide staff briefings, social functions, and other team events attended by staff from each of the business units to encourage a team culture. Uniti undertakes to ensure that no Protected Information is shared or disclosed at any group events.

Q2. Are the above proposed separation requirements reasonable?

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

Uniti's commitments in relation to wholesale and retail activities are detailed in Part C clause 1.4 of the undertaking.

*(a) The Retailers will have principal control over and responsibility for the following in relation to the supply of eligible services to retail customers:*

*(i) retail marketing, sale and supply of broadband and voice services delivered over local access line services acquired from Wholesalers or from other third parties including NBN Co;*

*(ii) supply of other value-added services to retail customers including sale of access equipment to enable consumption of the services in clause 1.4(a)(i);*

<sup>10</sup> Subsection 151C(9) requires the joint undertaking to state that the provisions under section 151C paragraphs (2)(a), (b), (c), (h), (i), (k), (l), (m), (n), (o) and (p) are fundamental provisions, and that the undertaking may state that other provisions are also fundamental provisions.

*(iii) retail marketing, sale and supply of broadband and voice services delivered over wireless infrastructure owned and operated by the Retailers;*

*(iv) taking service orders from retail customers;*

*(v) responding to network and service complaints from retail customers;*

*(vi) retail billing; and*

*(vii) setting retail price and non-price terms and conditions (**Retail Activities**).*

*(b) The Wholesalers will have principal control over and responsibility for the following in relation to the supply of eligible services to the Retailers and other wholesale customers:*

*(i) network planning functions;*

*(ii) marketing, sale and supply of wholesale local access line service;*

*(iii) receipt of orders, service activation and provisioning;*

*(iv) processing and implementing requests to amend services or churn services in accordance with relevant industry codes;*

*(v) line fault detection, handling and rectification;*

*(vi) wholesale billing; and*

*(vii) setting wholesale price and non-price terms and conditions (**Wholesale Activities**).*

*(c) Each Retailer undertakes not to perform Wholesale Activities.*

*(d) Each Wholesaler undertakes not to perform Retail Activities.*

Q3. Is the allocation of the above activities to the wholesale and retail business units reasonable?

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

Uniti undertakes that:

- The Wholesalers and the Retailers will each engage separate and independent staff (Part C clause 2.1).
- Staff within each business unit will only be subject to management direction within their respective business unit (Part C clause 2.2).
- Corporate Shared Services staff must not divulge information obtained between the wholesale and retail business units (Part C clause 2.6).
- Protocols as specified in the undertaking will operate in relation to the sharing of information between business units by staff in these business units (Part C clause 6).
- Regular training will be undertaken by all relevant staff whose duties could result in them being concerned with conduct that may contravene Part C of the Undertaking (Part D clause 2).

Part C clause 2.5 provides that staff transfers are permitted subject to staff being aware of their obligations under the undertaking and all transfers being documented.

Q4. Is the degree of separation of personnel between wholesale and retail business units set out above reasonable?

Q5. Are the information-sharing restrictions on Corporate Shared Services staff and the training obligations reasonable?

### **3.2.4. Incentive structures for the wholesale and retail business units**

Uniti's commitments relating to incentive remuneration for staff in its wholesale and retail business units are set out in Part C clause 2.4.

The incentive remuneration for staff of a Retailer or Wholesaler will solely reflect the objectives and overall performance of their respective business unit. Uniti will not implement any incentive remuneration structures for Retailers and Wholesalers that directly reflects or is determined by the performance of the other business unit.

Part C clause 2.4 also provides for Uniti to implement variable incentive remuneration structures, including equity based incentive plans, which would reflect the overall performance of the Uniti group. The undertaking specifies that the Chief Executive of each business unit is eligible to participate in these incentive structures and the amount of variable remuneration will be determined by the past performance of their own business unit against Uniti group targets.

Q6. Are the incentive structures proposed above reasonable?

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

Uniti's commitments in relation to maintaining separate systems are set out in Part C clause 4.2.

Uniti undertakes that Wholesalers and Retailers will maintain separate and independent business and operating systems and, except as set out in clause 4.2(e), will operate physically separate IT systems and application.

Under clause 4.2(e) Uniti undertakes that, for systems and applications that do not operate on physically separate IT systems, each business unit will have a separate instance of the software or application with information barriers in place such as restricting each instance to staff of that business.

For communications systems, Uniti commits to maintain separate systems for emails, but will operate a single website and domain for external communications and a shared intranet system which segregates communications within business units by requiring passwords.

Under Part C clause 4.3, Uniti undertakes that the Wholesalers and the Retailers will prepare and maintain separate financial accounts, to an EBITDA level including separate revenue, expenditure, capital expenditure, receivables and payables registers or books of account.

Q7. Are the separation of systems and applications proposed above reasonable?

### **3.2.6. 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**

Uniti's commitments regarding disclosure of information (Part C clause 6.3) are consistent with the legislative provisions<sup>11</sup> with the exception of clause 6.3(b)(ii)(B), which permits information as specified in clause 6.1 to be shared.

*A Retailer will not share information obtained from its retail customers with a Wholesaler, and a Wholesaler will not share information obtained from its retail customers (other than a Retailer) with a Retailer, except to the extent:*

- (a) such parties exchange information for the purposes of a Retailer acquiring services from a Wholesaler (including exchanging wholesale pricing and other terms and conditions offered by other carriers and carriage service providers for the purpose of enabling a Retailer to seek equivalent offers and terms from a Wholesaler); or*
- (b) a Retailer obtains the following information from a carrier or service provider and shares it with the Wholesale & Infrastructure business unit:*
  - (i) certain information, opinions or recommendations with regards to industry regulation;*
  - (ii) certain information useful in managing business operations in times of emergency (for example, events under COVID-19 and bushfire conditions); and*
  - (iii) requests for access to wholesale business unit infrastructure to provide network resiliency or protection solutions in particular times or generally.*

In its supporting submission, Uniti explains that the sharing of such information (which does not include Protected Information) would potentially promote effective, efficient and improved industry regulation and network operations, and would not give rise to any unfair commercial advantage being afforded to either the Retail or the Wholesale & Infrastructure business unit. Uniti submits that sharing this information would promote the long term interests of end users.

Q8. Are the information-sharing provisions above reasonable?

### **3.2.7. Fundamental provisions**

In Part C clause 8, Uniti states that each of the undertakings in Part C are fundamental provisions for the purposes of section 151C(9) of the Telecommunications Act. Under section 151W(6)(b) of the Telecommunications Act, if any person that is a party to the joint functional separation undertaking has breached a fundamental provision of the undertaking, the ACCC may, by written notice given to each of the persons who gave the undertaking, revoke the undertaking.

Other commitments in the undertaking, such as Part D which sets out the measures to be taken by Uniti Group to promote and facilitate compliance with the undertaking and monitoring of compliance, are not designated as fundamental provisions. They are, nevertheless, binding commitments on Uniti.

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<sup>11</sup> Subsections 151C(2)(m) – (p) of the *Telecommunications Act 1997*

### 3.2.8. Further provisions

Under Part D clauses 3 and 4, Uniti undertakes:

- To prepare a Compliance Plan setting out the actions to be taken by the Wholesalers and the Retailers for the purpose of ensuring compliance with the undertaking
- To provide the ACCC with a copy of the Compliance Plan, and any variation, within three months of the date that the undertaking comes into force.
- That each Wholesaler and Retailer will give the ACCC Compliance Reports that relate to its compliance with the undertaking in a form approved by the ACCC.
- That the Compliance Reports will be prepared and provided on an annual basis within 30 days of each anniversary of the date of provision of the first Compliance Plan and will relate to the previous 12 month period.
- That each Compliance Report will include a summary of:
  - the total number of residential superfast local access lines that are supplied by the relevant Retailer or Wholesaler;
  - details of the relevant Retailer or Wholesaler's compliance with the provisions and other specific obligations under the undertaking;
  - details of the relevant Retailer or Wholesaler's compliance with sections 151ZF and 151ZG of the Telecommunications Act;
  - any instances of non-compliance, the reasons the relevant Retailer or Wholesaler has not complied and actions taken or being taken to rectify or address these; and
  - any complaints received from wholesale customers in relation to the relevant Retailer or Wholesaler's compliance with provisions or obligations under the undertaking and actions taken in response.

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