



## **Functional Separation Undertaking**

given by Myport Pty Ltd to the Australian Competition and Consumer Commission under section 151A of the *Telecommunications Act 1997* (Cth).

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## 1 Definitions and interpretation

### 1.1 Definitions

In this Undertaking, unless the contrary intention appears:

- (1) **ACCC** means the Australian Competition and Consumer Commission.
- (2) **Act** means the *Telecommunications Act 1997* (Cth).
- (3) **Business Day** means a day that is not a Saturday, Sunday or any other day which is a public holiday or a bank holiday in the place where an act is to be performed.
- (4) **Effective Date** means that date specified in clause 3.1.
- (5) **Expiry Date** means that date specified in clause 4.
- (6) **Gigafy** means Myport Pty Ltd (ACN 121 129 280).
- (7) **Gigafy Retail** has the meaning in clause 6.1(1).
- (8) **Gigafy Wholesale** has the meaning in clause 6.1(2).
- (9) **Protected Information** means confidential or commercially sensitive information (as the context requires):
  - (a) relating to a wholesale customer (other than Gigafy Retail), or a customer of a wholesale customer, and which Gigafy Wholesale obtains for the purpose of, or in the course of, supplying services to that wholesale customer; or
  - (b) which Gigafy Retail obtains from a carrier or a carriage service provider (other than Gigafy Wholesale) for the purpose of, or in the course of, acquiring services from that carrier or carriage service provider.
- (10) **Regulatory Event** means any statute or statutory instrument that:
  - (a) repeals Part 8 of the Act; or
  - (b) amends the requirements for a functional separation undertaking under the Act.
- (11) **Related Body Corporate** has the meaning given in the *Corporations Act 2001* (Cth).
- (12) **Retail Activities** has the meaning in clause 8.1.
- (13) **Shared Corporate Services** means corporate services which are provided to support the general functions of Gigafy, such as:
  - (a) corporate governance and senior executive leadership by the Chief Executive Officer and the executive Board of Gigafy;
  - (b) finance, accounting and treasury;
  - (c) human resources;
  - (d) legal, regulatory and media/public relations;

- (e) marketing communications;
- (f) internal IT support services;
- (g) board support and corporate strategy;
- (h) procurement and facilities management; and
- (i) any other services that are ancillary or related to the services described above.

(14) **Undertaking** means this document, including any schedule, appendix, or annexure to it.

(15) **Wholesale Activities** has the meaning in clause 8.2.

1.2 A term or expression used in this Undertaking, which is defined in the Act, but is not defined in clause 1.1 has the meaning given to it in the Act.

### 1.3 Interpretation

- (1) In this Undertaking, reference to:
- (a) one gender includes the others;
  - (b) the singular includes the plural and the plural includes the singular;
  - (c) a person includes a body corporate;
  - (d) a party includes the party's executors, administrators, successors and permitted assigns;
  - (e) a thing includes the whole and each part of it separately;
  - (f) a statute, regulation, code or other law or a provision of any of them includes:
    - (i) any amendment or replacement of it; and
    - (ii) another regulation or other statutory instrument made under it, or made under it as amended or replaced.
- (2) The words "including", "such as", "particularly" and similar expressions are not used as, nor are intended to be, interpreted as words of limitation.
- (3) Where a word or expression is given a particular meaning, other parts of speech and grammatical forms of that word or expression have a corresponding meaning.
- (4) Headings and any table of contents or index are for convenience only and do not form part of this Undertaking or affect its interpretation.
- (5) If an act must be done on or by a specified day which is not a Business Day, it must be done instead on or by the next Business Day.

## 2 Application

2.1 This Undertaking is given by Gigafy to the ACCC under section 151A(1) of the Act and relates to the supply by Gigafy of local access line services.

## 3 Effective date

3.1 This Undertaking comes into force on 15 February 2024 (**Effective Date**).

## 4 Expiry date

This Undertaking will expire on the date that is 5 years after the Effective Date, unless otherwise varied or revoked.

## 5 Revocation of the Undertaking

If a Regulatory Event occurs, Gigafy will meet with the ACCC to discuss the implications of the Regulatory Event and Gigafy may:

- (1) request the ACCC, in writing, to revoke this Undertaking (in which case, Gigafy will indicate to the ACCC why this Undertaking is no longer required, appropriate or necessary).
- (2) propose amendments to this Undertaking, or propose a new Undertaking, to address the Regulatory Event which the ACCC will consider in accordance with the Act.

## 6 Identification of Gigafy Retail and Gigafy Wholesale

6.1 For the purpose of this Undertaking:

- (1) **Gigafy Retail** means the single Gigafy retail business unit, functionally separate from Gigafy wholesale operations as per this Undertaking.
- (2) **Gigafy Wholesale** means the single Gigafy wholesale business unit, functionally separate from Gigafy retail operations as per this Undertaking.

## 7 Arm's length functional separation

7.1 Gigafy will maintain a single wholesale business unit (Gigafy Wholesale) and a single retail business unit (Gigafy Retail) from the Effective Date until the Expiry Date.

7.2 Gigafy will maintain arm's length functional separation between Gigafy Retail and Gigafy Wholesale by ensuring that those business units have separate and dedicated functions and activities as set out in clause 8.

7.3 Gigafy Retail and Gigafy Wholesale will receive Shared Corporate Services, or the benefit of Shared Corporate Services subject to the restrictions in clause 20.4.

## 8 Activities

8.1 Gigafy Retail will undertake the following **Retail Activities**:

- (1) marketing, sale and supply of local access line services to retail customers and prospective retail customers;
- (2) supply of other value-added services to retail customers;
- (3) taking of service orders from retail customers for activation and provisioning;
- (4) processing and implementing requests to amend or disconnect services from retail customers;

- (5) billing of retail customers;
- (6) setting of retail prices and non-price terms and conditions; and
- (7) responding to network and service escalations from retail customers.

8.2 Gigafy Wholesale will undertake the following **Wholesale Activities**:

- (1) marketing, sale and supply of local access line services to wholesale customers and prospective wholesale customers;
- (2) receipt of orders from wholesale customers, service activation and provisioning;
- (3) billing of wholesale customers;
- (4) processing and implementing requests to connect or disconnect services from wholesale customers;
- (5) processing and implementing requests to amend services or churn services in accordance with relevant industry codes;
- (6) setting of wholesale prices, non-price terms and conditions, and promotions;
- (7) responding to network, systems and service escalations from Gigafy Retail and wholesale customers;
- (8) processing and implementing requests for local number portability;
- (9) technical network infrastructure planning, design, implementation and support services; and
- (10) line fault detection, handling and rectification.

8.3 Gigafy undertakes that:

- (1) Gigafy Retail will not perform Wholesale Activities; and
- (2) Gigafy Wholesale will not perform Retail Activities.

**9 Separate Branding**

- 9.1 Gigafy Retail and Gigafy Wholesale will each operate their respective business units under separate branding.
- 9.2 Gigafy Wholesale will operate under the existing Gigafy brand.
- 9.3 Gigafy Retail will operate under a Gigafy Retail brand (eg, Myport) that will be distinct from the Gigafy Wholesale brand and not include the word 'Gigafy' or any variation of it.

**10 Staff of Gigafy Wholesale and Gigafy Retail**

- 10.1 Except to the extent provided in clause 7.3, Gigafy will ensure that the workers who perform their duties for Gigafy Wholesale are different from the workers who perform their duties for Gigafy Retail.
- 10.2 Notwithstanding the exception in clause 10.1, Gigafy will ensure that:
  - (1) The staff of Gigafy Wholesale will not be subject to senior management direction by the leadership of Gigafy Retail.
  - (2) The staff of Gigafy Retail will not be subject to senior management direction by the leadership of Gigafy Wholesale.

## **11 Staff locations**

- 11.1 Subject to the exceptions set out in clause 11.3, the staff engaged by Gigafy Retail and Gigafy Wholesale will be separated via premises (or parts of premises) that are physically separated. However, such staff are not required to be located in separate buildings.
- 11.2 Subject to the exceptions set out in clause 11.3, Gigafy Wholesale and Gigafy Retail will each take measures to ensure the physical separation of their respective staff is such that workers within:
- (1) Gigafy Retail are unable to access, engage in, see or overhear the work being conducted by Gigafy Wholesale; and
  - (2) Gigafy Wholesale are unable to access, engage in, see or overhear the work being conducted by Gigafy Retail.
- 11.3 Subject to the information sharing obligations in clause 20, the exceptions include:
- (1) in respect of Gigafy Wholesale, a staff member of Gigafy Wholesale being authorised to enter the parts of premises where staff of Gigafy Retail are located for the purposes of meeting with a staff member of Gigafy Retail, provided that Gigafy Wholesale staff member is accompanied by a Gigafy Retail staff member to the extent practicable while in the premises (or parts of premises); and
  - (2) in respect of Gigafy Retail, a staff member of Gigafy Retail being authorised to enter the parts of premises where staff of Gigafy Wholesale are located for the purposes of meeting with a staff member of Gigafy Wholesale, provided that Gigafy Retail staff member is accompanied by a Gigafy Wholesale staff member to the extent practicable while in the premises (or parts of premises).

## **12 Staff transfers**

- 12.1 Staff may only transfer between Gigafy Retail and Gigafy Wholesale if:
- (1) the relevant staff member has been made aware of their obligations under this Undertaking, including through training conducted in accordance with this Undertaking; and
  - (2) such transfer is appropriately documented (e.g. by way of a register).

## **13 Remuneration**

- 13.1 Subject to clause 13.2, Gigafy may implement incentive remuneration structures based in whole or part on the overall performance of Gigafy.
- 13.2 Gigafy will not implement any incentive remuneration structures:
- (1) for staff of Gigafy Retail, which directly reflect or are determined by the performance of Gigafy Wholesale; and
  - (2) for staff of Gigafy Wholesale, which directly reflect or are determined by the performance of Gigafy Retail.

## **14 Shared Corporate Services Staff**

- 14.1 Staff engaged in Shared Corporate Services will not be subject to senior management direction by the leadership of Gigafy Retail or Gigafy Wholesale.
- 14.2 The employing entity for Shared Corporate Services staff will be Gigafy.

14.3 Shared Corporate Services staff will provide services to Gigafy Retail and Gigafy Wholesale in accordance with this Undertaking and subject to the restrictions in clause 10.1, 10.2 and 20.4.

**15 Gigafy companywide events**

15.1 Gigafy may conduct customary corporate group events, including Gigafy-wide staff briefings, social functions, and other team events such as those aimed at encouraging the development of a team culture. Such events will be open to and may be attended by staff of both Gigafy Wholesale and Gigafy Retail. Protected Information is not to be shared or disclosed at these events.

**16 Separate systems and accounts**

16.1 Except to the extent specified in clause 16.2, Gigafy will ensure that Gigafy Wholesale and Gigafy Retail will have separate:

- (1) operational support systems;
- (2) business support systems; and
- (3) communications systems.

16.2 To the extent the systems referred to in clause 16.1 are not separate, access restrictions (including information barriers) and information sharing protocols will be established and maintained in respect of those systems to prevent the sharing of information between Gigafy Wholesale and Gigafy Retail (or Gigafy Retail and Gigafy Wholesale), in accordance with clause 20.

16.3 Gigafy will not maintain separate accounts.

**17 Documenting pricing**

17.1 Gigafy will ensure that the terms and conditions relating to price or a method of ascertaining price, and other terms and conditions on which Gigafy Wholesale supplies local access line services to Gigafy Retail are documented.

17.2 Gigafy will prepare the documentation referred to in clause 17.1 in a manner that allows the price related terms and conditions on which Gigafy Wholesale supplies local access line services to Gigafy Retail to be directly compared with the price related terms on which Gigafy Retail supplies its customers when using the local access line services, including by:

- (1) preparing a table of price related terms in the same form as Gigafy Retail's published table of retail pricing offers and specifying all tariffs, including monthly charge, set up fee, early termination charge and minimum cost, along with any data/usage terms and conditions, such as included usage amount and method to calculate any excess usage charge; and
- (2) listing each short-term and long-term discount, credit or rebate arrangement that Gigafy Wholesale has offered to Gigafy Retail, and specifying the name of the arrangement, relevant amounts, qualifying conditions and offer period.

17.3 Gigafy will promptly update the documentation referred to in clause 17.1 each time that there is:

- (1) any change in the price related terms and conditions that Gigafy Wholesale offers to Gigafy Retail, including a change to its short term or long-term discount, credit or rebate arrangements offered to one or more sites; or



- (2) any change in the price related terms and conditions that Gigafy Retail offers to its customers, including a change to its short term or long-term discount, credit or rebate arrangements offered to one or more sites.

## **18 Publication of Gigafy Wholesale terms and conditions**

18.1 Gigafy will publish on its website:

- (1) the terms and conditions relating to price or a method of ascertaining price; and
- (2) other terms and conditions,

on which Gigafy Wholesale offers to supply local access line services to:

- (3) Gigafy Retail; and
- (4) Gigafy's wholesale customers or prospective wholesale customers.

18.2 For the avoidance of doubt, the published terms and conditions relating to price or a method of ascertaining price will include all short-term or long-term discounts, credits or rebates that apply to Gigafy Wholesale's offers to supply local access line services.

18.3 Gigafy will promptly update its published terms and conditions each time that there is any change in the price related terms and conditions, or other terms and conditions, that Gigafy Wholesale offers either to Gigafy Retail or wholesale customers, including any change to its short term or long-term discount, credit or rebate arrangements.

18.4 Gigafy will ensure that wholesale customers are promptly notified in writing each time that it updates its published terms and conditions.

## **19 Requirement to supply**

19.1 Gigafy undertakes that if requested to do so by a wholesale customer or prospective wholesale customer, Gigafy Wholesale will:

- (1) supply a local access line service to the wholesale customer or prospective wholesale customer; and
- (2) do so on the terms and conditions that were published on Gigafy Wholesale's website (as applicable) at the time when the request was made.

## **20 Information sharing obligations**

20.1 *Undertakings regarding sharing information*

- (1) Gigafy will ensure that information provided to Gigafy Wholesale by Gigafy's wholesale customers (other than Gigafy Retail) is not disclosed to Gigafy Retail.
- (2) Gigafy will ensure that Gigafy Retail does not obtain, access or use information provided to Gigafy Wholesale by Gigafy's other wholesale customers.
- (3) Gigafy will ensure that information provided to Gigafy Retail by a carrier or carriage service provider is not disclosed to Gigafy Wholesale. This does not apply to information of a kind specified in a determination under section 151A(13) of the Act.
- (4) Gigafy will ensure that Gigafy Wholesale does not obtain, access or use information provided to Gigafy Retail by a carrier or carriage service provider. This does not apply to information of a kind specified in a determination under section 151A(13) of the Act.

20.2 Subject to clause 20.1, Gigafy Retail is permitted to:

- (1) share information provided to it by a carrier or carriage service provider that constitutes:
  - (a) terms and conditions relating to price or a method of ascertaining price in respect of the provision of a local access line service on a wholesale basis;
  - (b) other terms and conditions relating to provision of a local access line service on a wholesale basis; or
  - (c) current or proposed network coverage information including maps and network ownership information relating to the provision of a local access line service on a wholesale basis;with Gigafy Wholesale for the purposes of Gigafy Retail obtaining an equivalent offer from Gigafy Wholesale in respect of a local access line service on a wholesale basis; and
- (2) share with Gigafy Wholesale the following information obtained from a carrier or carriage service provider:
  - (a) practices, procedures or other guidance relating to the maintenance and continuity of business operations in emergency scenarios;
  - (b) a request to access the infrastructure of Gigafy Wholesale for the purpose of maintaining network resilience or the continuity of business operations; and
  - (c) practices, procedures or other guidance relating to compliance with relevant regulatory obligations.

20.3 *Steps to prevent sharing of information between Gigafy Wholesale and Gigafy Retail*

Gigafy undertakes that Gigafy Retail and Gigafy Wholesale will take the following steps to restrict the sharing of information:

- (1) maintain separate systems, to the extent provided for in clause 16;
- (2) ensure staff are separated to the extent provided for in clause 11;
- (3) implement information sharing protocols that reflect the prohibitions in the Undertaking on the sharing of information; and
- (4) all Gigafy Wholesale and Gigafy Retail staff (including any contractors) will receive training to ensure information sharing protocols are understood.

20.4 *Restrictions on staff providing Shared Corporate Services*

- (1) Staff providing Shared Corporate Services (including any contractors):
  - (a) must not divulge any Protected Information to Gigafy Retail or Gigafy Wholesale (as applicable) in the course of providing services;
  - (b) are subject to information sharing protocols to ensure that information is not shared between Gigafy Retail and Gigafy Wholesale; and
- (2) will receive relevant training to ensure information sharing protocols are understood.

## **21 Wholesale customer interfaces**

21.1 Gigafy undertakes to use the same customer interface for dealings between Gigafy

Wholesale and Gigafy's wholesale customers (other than Gigafy Retail), as Gigafy uses for the dealings between Gigafy Wholesale and Gigafy Retail.

- 21.2 For the avoidance of doubt, Gigafy will ensure that the customer interface:
- (1) provides the same functionality to its wholesale customers and Gigafy Retail in respect of local access line services; and
  - (2) provides wholesale customers and Gigafy Retail with access to the same set of local access line services.
- 21.3 Gigafy Wholesale may use different customer interfaces for different products and services.
- 21.4 If Gigafy Wholesale uses more than one customer interface, Gigafy Wholesale must ensure that the requirements of clauses 21.1 and 21.2 are met for each customer interface.

## **22 Compliance Plans**

- 22.1 Gigafy will prepare a plan (**Compliance Plan**) setting out actions to be taken by Gigafy, for the purpose of ensuring that Gigafy complies with this Undertaking.
- 22.2 Gigafy will provide the ACCC with a draft Compliance Plan on the Effective Date (as provided for in clause 3.1).
- 22.3 Gigafy will provide the ACCC with a copy of its Compliance Plan within three months of the Effective Date (as provided in clause 3.1).
- 22.4 The ACCC may direct Gigafy to make changes to its Compliance Plan including to make specified additions, deletions or amendments to the actions to be taken.
- 22.5 The ACCC will consult with Gigafy prior to giving a direction under clause 22.4.
- 22.6 Gigafy will give the ACCC a copy of any variation to the Compliance Plan within 10 Business Days of implementing such variation.

## **23 Compliance reports**

- 23.1 Gigafy will give to the ACCC periodic reports (**Compliance Reports**) that:
- (1) relate to Gigafy's compliance with this Undertaking; and
  - (2) are in a form approved in writing by the ACCC.
- 23.2 In each of the Compliance Reports Gigafy will identify any instances arising during the reporting period in which there are reasonable grounds to believe that Gigafy may have contravened a provision of this Undertaking, including:
- (1) the date the conduct commenced
  - (2) a description of the nature and extent of the conduct
  - (3) the steps that Gigafy has taken or is taking to remedy the matter
  - (4) the steps that Gigafy has taken or is taking to prevent a reoccurrence
- 23.3 In each of the Compliance Reports Gigafy will include a copy of:
- (1) each document setting out the terms and conditions on which Gigafy Wholesale supplied local access line services to Gigafy Retail as referred to in clause 17

(2) each published wholesale standard form of agreement as referred to in clause 18 in effect during the reporting period.

23.4 The ACCC by notice in writing to Gigafy may direct Gigafy:

- (1) to include additional information to be contained in, or to provide documents that are to accompany, a Compliance Report; and/or
- (2) to give to the ACCC Compliance Reports on a different date and/or at a different frequency

23.5 The ACCC will consult with Gigafy before giving a direction under clause 23.4.

23.6 Gigafy will provide all reasonable assistance and respond to any reasonable request made by the ACCC for the purposes of audits undertaken by the ACCC to verify compliance with this Undertaking by the ACCC.

23.7 Unless otherwise directed by the ACCC under clause 23.4, each of the Compliance Reports will be provided within 30 days of 30 June and 31 December each calendar year.

## **24 Compliance Training**

24.1 Gigafy will ensure that yearly practical training is undertaken by all relevant staff whose duties could result in them being engaged in conduct that may contravene this Undertaking and Gigafy's obligations under Part 8 of the Act.

24.2 Gigafy (including Gigafy Retail and Gigafy Wholesale and staff providing Shared Corporate Services) will maintain written records of this training.

24.3 Gigafy will ensure that awareness of issues relating to compliance with this Undertaking forms part of the induction of any new Gigafy directors, executives, and staff whose duties could result in them being engaged in conduct that may contravene any part of this Undertaking.

## **25 Fundamental provisions**

25.1 The provisions in clauses 7.1, 7.2, 17.1, 18.1, 19.1, 20.1 and 20.4 of this Undertaking are fundamental provisions.