



Information in support of 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 Executive Summary

- 1.1 Myport Pty Ltd T/A Gigafy (**Gigafy**) welcomes the opportunity to make this submission in support of its proposed standard Functional Separation Undertaking (**FSU**) submitted under section 151A(1) of the *Telecommunications Act 1997* (Cth) (**Act**).
- 1.2 The FSU provides that Gigafy will operate a single retail business unit and a single wholesale business unit on a functionally separated basis in compliance with the requirements of Part 8 of the Act.
- 1.3 The purpose of this submission is to provide further information to assist the ACCC in its decision to accept or reject the FSU. Having regard to the criteria for accepting a functional separation undertaking, Gigafy submits that the FSU promotes the long-term interests of end-users (**LTIE**).
- 1.4 To achieve alignment with the requirements under the Act, Gigafy has incorporated aspects of FSUs previously accepted by the ACCC as well as the ACCC's Deemed Functional Separation Undertaking. Gigafy has also included some bespoke solutions in the FSU to recognize Gigafy's unique business circumstances. Gigafy considers that these bespoke solutions (identified in this submission) are appropriate and, by reducing separation costs, will ultimately promote the LTIE.
- 1.5 Consistent with the TPG Undertaking, Gigafy has reserved the right to withdraw the FSU if Gigafy is no longer required to have an FSU at some point in the future.
- 1.6 Unless otherwise stated, defined terms in this submission have the same meaning as in the FSU.

2 Previous functional separation undertakings accepted by the ACCC

- 2.1 Gigafy submits that the proposed FSU complies with each of the legislative obligations in section 151A of the Act.
- 2.2 To ensure alignment with the requirements of the Act, Gigafy has incorporated aspects of three key documents in drafting the FSU:
- (1) the Telecommunications (Deemed Functional Separation Undertaking) Determination 2020 (**Deemed Undertaking**);
 - (2) Uniti Group's Functional Separation Undertaking, which was accepted by the ACCC on 21 October 2020 (**Uniti Undertaking**); and
 - (3) TPG Group's Functional Separation Undertaking, which was accepted by the ACCC on 7 April 2022 (**TPG Undertaking**). For Simplicity, Gigafy has adopted similar drafting as the TPG Undertaking, which also used similar drafting to the Uniti Undertaking.
- (collectively referred to as the **Existing Undertakings**).
- 2.3 Where applicable, Gigafy has used the same drafting and reasoning as one of the Existing Undertakings.
- 2.4 In this way, Gigafy submits that most of the provisions of this FSU are consistent with drafting that the ACCC has already accepted as reasonable and appropriate and should therefore satisfy the criteria set out in section 151J of the Act.
- 2.5 However, given that Gigafy is a unique business, Gigafy has been required to adopt some bespoke solutions to reflect Gigafy's different circumstances. The Uniti Undertaking and the TPG Undertaking also contained features that were directed at TPG and Uniti's respective circumstances, and which have required modification when applied to Gigafy's circumstances.

- 2.6 Specifically, Gigafy has sought to reduce separation costs where such costs are disproportionate to the potential benefits of functional separation and where another solution could more effectively achieve the policy intent of the functional separation regime. This has resulted in some bespoke solutions as identified in this submission. By adopting these bespoke solutions, Gigafy has sought to maximise the efficient use of infrastructure in the LTIE.
- 2.7 Gigafy submits that these solutions should not raise any material concerns. However, Gigafy has provided greater detail on these solutions in this submission to provide the ACCC with confidence that no material issues arise and that the solutions are in the LTIE.

3 **Overview of key terms in the proposed FSU**

An overview of the key provisions in the proposed FSU is provided below.

3.1 **Effective Date**

The FSU is intended to come into effect on the day after the FSU is accepted by the ACCC (**Effective Date**).

However, Gigafy proposes the majority of the substantive commitments in the FSU should only come into effect 12 months after the Effective Date (the Implementation Date) for the following reasons:

- (1) Gigafy has not operated separate business units previously and as such must develop and implement all requirements under the FSU from the ground up;
- (2) Gigafy has been the only retailer on its network and must develop new systems, programs and processes to offer the same features to all retailers on a non-discriminatory basis;
- (3) Developing and implementing new software to support the functionally separate wholesale and retail operations may take some time;
- (4) Gigafy will need to secure scarce IT resources with which to assess, modify, build or purchase additional IT systems, services and licences;
- (5) Gigafy will need to transition employees to new systems;
- (6) Gigafy will require adequate time to implement functional separation between the employees of each business unit; and
- (7) Gigafy will need to provide appropriate staff training to ensure Gigafy complies with its obligations under the FSU.

Gigafy submits that a twelve-month lead time is a reasonable period for Gigafy to ensure compliance with its obligations, given the size of its business.

Importantly, Gigafy intends to implement software developments as part of the functional separation implementation to make the wholesale product offering more attractive to potential wholesale customers, which will result in the promoting the LTIE.

Gigafy notes that it will also be taking steps to implement the requirements of the FSU sooner where possible, and has included provision to supply the ACCC with a compliance plan prior to the Implementation Date and meet quarterly with the ACCC during the transition period.

Gigafy will also commit to providing wholesale and non-discriminatory access immediately from the Effective Date to:

- (1) All sites where it is the Statutory Infrastructure Provider on and from the

- Effective Date, and
- (2) Those sites that came into existence after the amendments to Part 8 of the Act took effect. These sites are listed in Appendix A of the FSU.

Gigafy considers a 12-month transition period to be appropriate for the reasons outlined above (including the size of Gigafy's business and the significant implementation work necessitated by Gigafy's FSU).

3.2 **Expiry date**

The FSU will expire in 5 years from the Effective Date, unless otherwise varied or revoked. The duration of the FSU is the same as accepted under the TPG Undertaking.

3.3 **Revocation or amendment of the FSU**

Gigafy reserves the right to request the ACCC to revoke the FSU:

- (1) at any time prior to the FSU coming into force; and
- (2) in the event of a Regulatory Event (as defined in the FSU).

A Regulatory Event includes a statute or statutory instrument, which repeals Part 8 of the Act or amends the requirements for a standard functional separation undertaking under the Act.

The revocation rights are practically necessary given any repeal or amendment to the legislation may require that Gigafy reevaluate or adapt its obligations under the FSU, and consistent with those accepted under the TPG Undertaking.

3.4 **Functional separation between wholesale and retail businesses**

The proposed FSU contains practical measures to ensure compliance with legislative obligations and achieving the policy intent of the functional separation regime while recognising the complexity of Gigafy's business. The key components of functional separation are discussed below:

- (1) ***Separation of retail and wholesale activities between Gigafy Retail and Gigafy Wholesale***

Retail and wholesale activities are defined broadly in the FSU and have been based on similar definitions used in the Deemed Undertaking and the TPG Undertaking.

Gigafy has submitted the same separation of activities as included in the TPG Undertaking accepted by the ACCC (with necessary differences to reflect the separate business units instead of separate entities).

- (2) ***Separate branding***

Gigafy intends to use the existing Gigafy brand as the branding for Gigafy Wholesale.

Gigafy intends to utilize a distinctly separate brand for Gigafy Retail. The Gigafy Retail brand will not include the word 'Gigafy' or any variation of it.

- (3) ***Employment arrangements***

Subject to certain exceptions for Shared Corporate Services, the FSU provides that the workers who perform their duties for Gigafy Wholesale are different from the workers who perform their duties for Gigafy Retail. This applies equally to staff providing services to Gigafy that are not engaged by the respective wholesale or retail entity (e.g. third party contractors).

The FSU also requires the staff of Gigafy Retail and Gigafy Wholesale to be physically separate from each other. This does not require the staff to be in separate premises. However, as a small business Gigafy does not have separate premises and submits that it can achieve the same goals by implementing separation via physical partitions within the same premises and through the information sharing obligations in the FSU.

(4) ***Shared Corporate Services***

The FSU lists Shared Corporate Services which will be offered centrally to both Gigafy Retail and Gigafy Wholesale. The Shared Corporate Services in the FSU include:

- (a) corporate governance and senior executive leadership (including by directors and senior executives)
- (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

The FSU adopts the same shared corporate services model and reasoning as the TPG Undertaking accepted by the ACCC, except for clarifying that Shared Corporate Services include corporate governance and senior executive leadership (including by directors and senior executives). Gigafy considers this clarification appropriate given that Gigafy Retail and Gigafy Wholesale will be separate business units within a single legal entity. Staff involved in Shared Corporate Services will still be subject to information sharing protocols, which will ensure that Protected Information is not shared between Gigafy Retail and Gigafy Wholesale.

(5) ***Separation of Gigafy systems***

The FSU provides that Gigafy Wholesale and Retail will have separate operational support systems, business systems and communications systems, to the extent that these systems can be practically separated. Where it is not possible to provide separate systems, user access management restrictions (including information barriers) underpinned by information sharing protocols will be put in place to prevent the sharing of Protected Information between Gigafy Retail and Gigafy Wholesale.

This approach is consistent with the TPG Undertaking accepted by the ACCC.

(6) ***Separate accounts***

Section 151A(3) of the Act permits Gigafy to submit an FSU that does not require separate accounts between Gigafy Retail and Gigafy Wholesale. Gigafy submits that separation of accounts is an overly burdensome requirement given Gigafy's relatively small size and given that Gigafy will remain a single legal entity (unlike TPG and Uniti). The other restrictions (including on information sharing and on separation of staff and systems) should be sufficient to ensure a sufficient degree of separation between the Gigafy Retail and Gigafy Wholesale.

Gigafy will not maintain separate accounts.

(7) ***Restrictions on sharing of information***

The FSU implements information sharing obligations, and specifically:

- (a) contains undertakings regarding the sharing of information, in line with the requirements in section 151A of the Act. Gigafy has used similar wording to that of the TPG Undertaking and follows the same reasoning that it complies with the policy intent of the legislation.; and
- (b) implements equivalent measures to prevent the sharing of information between Gigafy Wholesale and Retail as were accepted in the TPG Undertaking.

(8) ***Staff Compliance Training***

The FSU includes a requirement for Gigafy to ensure yearly practical training is undertaken by all relevant staff in regards to ensuring compliance with the undertaking. In addition Gigafy will ensure that training is provided as part of the induction of any new staff. Gigafy will provide the training via online modules or in-person workshops. Gigafy will implement a system to track and document employee completion of the training and submit records of this training as part of its annual Compliance Reports.

3.5 **Wholesale customer interfaces**

Under the FSU, Gigafy undertakes to use the same customer interface for dealings between Gigafy Wholesale and Gigafy's wholesale customers, as Gigafy uses for dealings between Gigafy Wholesale and Gigafy Retail. This has been drafted to comply with section 151A(2)(l) of the Act.

Gigafy Wholesale is permitted to use different customer interfaces for different products and services. If Gigafy Wholesale uses more than one customer interface, it must ensure that the aforementioned requirement (regarding the use of the same customer interface for wholesale customers and Gigafy Retail for the same dealings) is met.

We consider these obligations are consistent with, and permitted by, the Act and ensures that each customer interface does not discriminate in favour of Gigafy Retail, and follows the same wording as the TPG Undertaking.

3.6 **On-going compliance requirements**

As required under the Act, the FSU provides that:

- (1) Gigafy will prepare and submit Compliance Plans to the ACCC specifying how Gigafy will comply with the FSU, including submitting a draft compliance plan within 30 business days of the effective date and meeting with the ACCC quarterly during the Transition Period to discuss the implementation of the compliance plan; and
- (2) submit to the ACCC annual Compliance Reports.