



AUSTRALIAN COMPETITION
& CONSUMER COMMISSION

Gigafy standard functional separation undertaking

Varied undertaking consultation

October 2023

Overview

On 25 August 2020, the *Telecommunications Act 1997* (**Telecommunications Act**) was amended to introduce the carrier separation rules. The amendments allow the ACCC to accept functional separation undertakings to permit vertically integrated network operators to offer wholesale and retail services. In deciding whether to accept an undertaking, the ACCC must have regard to, among other things, whether the undertaking will promote the long-term interests of end-users (**LTIE**).

On 13 June 2023, Myport Pty Ltd trading as Gigafy submitted a standard functional separation undertaking (**original undertaking**) to the ACCC pursuant to section 151A of the Telecommunications Act.

On 19 June 2023, the ACCC issued a [consultation paper](#) seeking comments from interested stakeholders on whether accepting Gigafy's original undertaking would be likely to promote the LTIE.

The ACCC received two submissions, from NBN Co and Superloop. The main concern raised in submissions related to Gigafy's proposed 12-month lead-in period. The submissions are summarised below and are available on the [ACCC's website](#).

On 20 September 2023, the ACCC gave Gigafy a Notice to vary its original undertaking under consideration in accordance with subsection 151K(2) of the Telecommunications Act. The Notice invited Gigafy to submit a varied undertaking to address some of the concerns raised in submissions. The Notice also invited Gigafy to provide enhanced transparency measures and stronger commitments to ensure its retail and wholesale business units are operated on an arm's length basis.

Gigafy submitted a varied undertaking in response to the Notice also on 20 September 2023. The Telecommunications Act requires the ACCC to conduct further consultation before deciding whether to accept or reject the varied undertaking.

The ACCC seeks comments from interested stakeholders on Gigafy's varied undertaking. A copy of Gigafy's varied undertaking and the ACCC's Notice to vary are provided on the [ACCC's website](#).

Summary of submissions

Lead-in period

A common theme to NBN Co and Superloop's submissions is that the proposed 12-month lead-in period is longer than an established provider such as Gigafy should need to complete functional separation.

Gigafy's business model

NBN Co and Superloop both expressed concerns that Gigafy had represented its business model as supplying services to building managers, who act as the preferred internet supplier for their residents. This included marketing towards building managers, property developers and bodies corporate on its website.

Physical separation of staff

NBN Co submitted that it is unclear whether there is any intention to implement measures to prevent a staff member from Gigafy Retail or Gigafy Wholesale from accessing the premises of each other and recommended stronger commitments to the physical separation of staff in Gigafy's offices.

Shared corporate services

NBN Co submitted that there is uncertainty around which levels of Gigafy's corporate entity will have visibility over potentially sensitive information from both the wholesale and retail business units via the shared corporate services team.

NBN Co also submitted that there are no explicit restrictions on the staff of each business unit performing work for the other business unit.

ACCC's views

Lead-in period

The ACCC agrees with submissions that a shorter lead-in period is appropriate. We consider that removing the staged approach to implementing functional separation and including a single commencement date of 15 February 2024 upon which all provisions in Gigafy's undertaking come into force mitigates the concern raised in submissions about the lengthy lead-in period whilst giving Gigafy the necessary time to complete functional separation.

Gigafy's business model

The ACCC has confirmed that Gigafy has removed the website content marketed towards building managers, property developers and bodies corporate becoming the preferred internet supplier for their residents.

Gigafy is subject to the non-discrimination obligations in relation to its local access lines. Consequently, it must offer the services it provides on these lines to building managers, property developers and bodies corporate to all other wholesale customers (and prospective wholesale customers) in a manner that is not discriminatory. Gigafy has advised that its business models are compliant with the carrier separation rules and non-discrimination obligations.

We therefore do not consider that Gigafy's undertaking requires additional obligations regarding its business model.

Physical separation of staff

The ACCC agrees with NBN Co's submission that a stronger commitment from Gigafy to physical separation of staff in its offices is appropriate. We consider that incorporating the commitment in clause 7(2)(a) of the ACCC's [Telecommunications \(Deemed Functional Separation Undertaking\) Determination](#) addresses the concern raised in NBN Co's submission.

Shared corporate services

The ACCC agrees with NBN Co's submission that there is uncertainty around what levels of Gigafy's management will have visibility over potentially sensitive information via the shared

corporate services team. The ACCC considers that amending the definition of Shared Corporate Services at subclause 1.1(13) of the undertaking to remove '(including by directors and senior executives)' and adding 'by the Chief Executive Officer and the executive Board of Gigafy' addresses NBN Co's concern.

We note that clause 10.1 of Gigafy's undertaking states that 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. The ACCC considers this is sufficient to ensure that staff of one business unit will not do any work for the other business unit.

Other matters

In addition to the matters raised in submissions, we reviewed Gigafy's undertaking and identified several areas where we considered additional commitments from Gigafy would promote the LTIE.

To better monitor Gigafy's compliance with its undertaking and to promote retail level competition, the ACCC considers it appropriate for Gigafy to commit to maintain stronger arm's length functional separation between its wholesale and retail business units and enhanced transparency measures.

The ACCC considers that commitments to:

- document pricing in a way that facilitates comparison between the price terms that Gigafy Wholesale provides services to Gigafy Retail and the price terms that Gigafy Retail provides services to retail customers
- update the pricing documentation each time Gigafy changes its wholesale or retail prices, including any short- or long-term discounts or offers
- enable the ACCC to direct Gigafy to make changes to its Compliance Plan, and
- provide six-monthly compliance reports, with a requirement to include copies of its pricing documentation and published terms and conditions

will enable more effective regulatory oversight of Gigafy's compliance with its obligations under the undertaking.

The ACCC considers that commitments to:

- update published wholesale price terms each time there is any change to the price related terms and conditions or other terms and conditions that Gigafy Wholesale offers either to Gigafy Retail or other wholesale customers
- promptly notify all wholesale customers of the updated wholesale terms, and
- use the same customer interface for all wholesale customers, including Gigafy Retail, and to provide the same functionality and access to the same set of local access lines

will promote retail level competition and give wholesale customers greater assurance that Gigafy is operating its wholesale and retail business units on an arm's length basis.

Notice to vary

On 20 September 2023, the ACCC gave Gigafy a Notice to vary its original undertaking in accordance with subsection 151K(2) of the Telecommunications Act.

On 20 September 2023, Gigafy submitted a varied undertaking in accordance with the Notice.

The Telecommunications Act requires the ACCC to publish a notice on its website setting out the varied undertaking and inviting submissions from interested persons about the undertaking within a specified period of no less than 15 business days, before deciding whether to accept or reject the varied undertaking.¹

Summary of Notice to vary

The Notice to vary invited Gigafy to make variations to its original undertaking to address the concerns raised in submissions as well as to incorporate stronger commitments to arm's length separation and enhanced transparency.

In summary, the Notice invited Gigafy to vary its undertaking to:

- set a single Effective Date of 15 February 2024
- incorporate the stronger physical separation arrangements for staff set out in clause 7(2)(a) of the ACCC's *Telecommunications (Deemed Functional Separation Undertaking) Determination*
- limit senior executive leadership visibility of both retail and wholesale operations to the CEO and executive board of Gigafy
- commit to documenting its pricing in a way that facilitates a direct comparison of the price terms on which Gigafy Wholesale supplies services to Gigafy Retail with the price terms on which Gigafy Retail supplies its retail customers, and to keeping its pricing documentation current
- commit to updating its published wholesale terms and conditions each time there is a change in its wholesale prices, including short- or long-term discounts and offers, or change in other terms and conditions, and promptly notifying its wholesale customers of the updated terms
- commit to ensuring that its wholesale customer interface provides the same functionality to its wholesale customers and Gigafy Retail and provides access to the same set of local access line services
- provide six-monthly compliance reports, which include copies of the pricing documentation and the published terms and conditions, and
- enable the ACCC to direct Gigafy to make changes to its Compliance Plan and Compliance Reports.

Consultation and next steps

The ACCC requests written submissions on Gigafy's varied undertaking by no later than **26 October 2023**. Stakeholders may email submissions to telcoseparationrules@acc.gov.au.

After considering submissions from interested parties, the ACCC will then publish its decision on whether to accept Gigafy's varied undertaking.

¹ Combined effect of subsections 151K(2)-(3), paragraph 151F(6)(b) and section 151G of the Telecommunications Act.

ACCC consultation policy

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](#)² 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.

² ACCC, *Confidentiality Guideline for submitting confidential material to ACCC communications inquiries*, April 2014.