



AUSTRALIAN COMPETITION
& CONSUMER COMMISSION

Industry guidance on the carrier separation rules

**ACCC explanatory material relating to the
carrier separation rules in Part 8 of the
Telecommunications Act 1997**

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Australian Competition and Consumer Commission
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1. Introduction

- 1.1 This explanatory material provides guidance for industry in relation to the carrier separation rules prescribed in Part 8 of the *Telecommunications Act 1997* (Telecommunications Act).
- 1.2 This guidance, prepared following consultation with industry, is intended to be an industry-focused plain language guide to assist industry in understanding the superfast fixed-line broadband network (superfast network) carrier separation obligations and how we will consider whether network operators have complied with them.
- 1.3 The information in this publication is intended for general guidance only and the ACCC will periodically review and consult on whether any changes are required. We encourage network operators to seek their own advice about how these obligations apply.

2. Overview of the regulatory framework

Simplified overview

The carrier separation rules in Part 8 of the Telecommunications Act require controllers of local access lines serving residential customers to supply eligible services on a wholesale-only basis. This means that a company that controls a superfast broadband network cannot itself supply retail services over it unless an exemption applies.

Network operators may seek to be exempt from the wholesale-only requirement via either a class exemption (for network operators with no more than 12,000 residential customers) or a functional separation undertaking.

- 2.1 In August 2020, the carrier separation rules in the Telecommunications Act were amended to better enable network operators to compete with NBN Co at the infrastructure level.
- 2.2 While the default position remains for superfast network operators to provide services to residential customers on a structurally separated basis (a wholesale-only basis), operators can now seek approval from the ACCC to operate on a functionally separated basis. This means they can operate both wholesale and retail businesses, but at arms-length from each other and subject to certain requirements. This is intended to provide greater commercial flexibility for superfast network operators and promote infrastructure-based competition.
- 2.3 A network operator with no more than 12,000 customers can elect to be bound by the ACCC class exemption¹, if they wish to offer both retail and wholesale services. Further detail on this class exemption is set out in Section 4 below, including the requirement to provide written notice to the ACCC electing to be bound by the terms of the class exemption to benefit from it.
- 2.4 Larger network operators need to submit and have the ACCC approve a functional separation undertaking or elect to be bound by the ACCC's deemed functional separation undertaking. Further detail on functional separation undertakings is set out in Section 5.
- 2.5 Importantly, all superfast network operators must also offer access to a wholesale service, and carry on related activities, on non-discriminatory terms. Network operators who have elected to be bound by the class exemption are subject to the non-discrimination obligations in the conditions contained within the class exemption.² Network operators who have elected to be bound by the deemed functional separation undertaking or submitted a customised undertaking are subject to the non-discrimination obligations in Part 8.³ The

1 [Telecommunications \(Superfast Broadband Network Class Exemption\) Determination 2020.](#)

2 Sections 8(a)–(e) of the [Telecommunications \(Superfast Broadband Network Class Exemption\) Determination 2020.](#)

3 Sections 151ZF and 151ZG of the Telecommunications Act.

ACCC's telecommunications non-discrimination guidelines provide guidance in relation to the non-discrimination requirements and those requirements are not covered in any detail in this document.⁴

3. Key provisions and terms in Part 8 of the Telecommunications Act

- 3.1 Part 8 of the Telecommunications Act requires a 'controller' of a telecommunications network or local access line that is used, or proposed to be used, for the supply of superfast carriage services to residential customers to supply eligible services on non-discriminatory terms and operate either on a wholesale-only basis or subject to a functional separation undertaking.
- 3.2 A summary of the main provisions is set out in Table 1, with key terms discussed in this section.
- 3.3 A decision tree summarising how these provisions apply to the services they offer is provided at Appendix A.

Table 1: Summary of Part 8 superfast network rules

When network or line came into existence or was upgraded	Summary of provisions	Reference
From 25 August 2020	<p>A controller of a local access line (other than a line that is part of the infrastructure of the National Broadband Network) must not use the line to supply an eligible service to a person other than a carrier or a service provider, if:</p> <ul style="list-style-type: none"> (a) the line came into existence, or was upgraded, on or after 25 August 2020 (b) the line is used, or is proposed to be used, to supply a superfast carriage service wholly or principally to residential customers, or prospective residential customers, in Australia (c) no functional separation undertaking is in force. 	Section 142C
1 January 2011 to 25 August 2020	<p>A controller of a telecommunications network (other than the National Broadband Network) must not use a local access line to supply an eligible service to a person other than a carrier or a service provider, if:</p> <ul style="list-style-type: none"> (a) the line is part of the infrastructure of the network (b) the network came into existence, or was upgraded, on or after 1 January 2011, but before the designated commencement date (c) the network is used, or is proposed to be used, to supply a superfast carriage service wholly or principally to residential customers, or prospective residential customers, in Australia (d) no functional separation undertaking is in force. 	Section 143

⁴ ACCC, '[Non-discrimination guidelines: ACCC explanatory material relating to the telecommunications non-discrimination provisions](#)', September 2021.

Controller of a telecommunications network or local access line

- 3.4 An entity exercises control of a telecommunications network or a line where it:
- legally or beneficially owns the network or line (whether alone or together with one or more other persons), or
 - is in a position, either alone or together with an associate⁵, to directly, or indirectly, exercise control of the operation of all or part of the network or line.⁶
- 3.5 More than one entity may exercise control of a network or line at the same time.⁷
- 3.6 The legislative criteria for determining when an entity exercises control of a network or a line (referred to as a controller or network operator in this document) is set out in sections 155 and 155A of the Telecommunications Act and summarised in Appendix B.

Superfast carriage service

- 3.7 The Telecommunications Act defines a 'superfast carriage service' to mean a carriage service where:
- the carriage service enables the end-users to download communications
 - the download transmission speed of the carriage service is normally 25 megabits per second or more
 - the carriage service is supplied using a line to premises occupied or used by an end-user.⁸

Residential customers

- 3.8 Part 8 applies where the network or line is used, or is proposed to be used, to supply a superfast carriage service wholly or principally to residential customers, or prospective residential customers, in Australia.
- 3.9 The Telecommunications Act does not define 'residential customer', but it does specify that it includes home-based businesses.⁹
- 3.10 The ACCC considers that supply to a residential customer, in the context of Part 8 of the Telecommunications Act, includes where:
- the customer resides permanently or for extended periods in the premises to which the superfast carriage services are supplied¹⁰
 - the customer has entered into contractual arrangements with the supplier of the services
 - the services are acquired for:
 - personal, household, or domestic use, or
 - business purposes (including partnerships, corporations and trusts) where most or all of the work is carried out at the customer's residence or where the customer's residence is the only location of the business.
- 3.11 For instance, a hotel guest who uses a fixed-line carriage service in their room is not likely to be a residential customer for the purposes of Part 8. They are staying on a short-term basis in the premises and would not typically enter into a contract with the supplier of the services.

5 Section 152 of the Telecommunications Act.

6 Sections 155 and 155A of the Telecommunications Act.

7 Sections 155(3) and 155A(3) of the Telecommunications Act.

8 Section 142A of the Telecommunications Act.

9 Section 161 of the Telecommunications Act.

10 See [Telecommunications Consumer Protections Code \(C628:2019\)](#) for support for this treatment of residential customers.

- 3.12 Networks or lines only supplying business customers, including small business customers¹¹ (with the exception of home-based business¹²) with incidental supply of residential customers¹³, are not subject to the wholesale-only requirement.

Eligible services

- 3.13 The wholesale-only requirement only applies to the supply of an 'eligible service', which is defined in the Telecommunications Act as:
- a carriage service between a point in Australia and one or more other points in or outside Australia (a 'listed carriage service'), or
 - a service that facilitates the supply of a listed carriage service
- where the service is supplied, or is capable of being supplied, by a carrier or a carriage service provider (whether to itself or to other persons).¹⁴
- 3.14 The ACCC considers that where these services are supplied via intermediaries, such as property managers or utility service providers, they are likely to fall within the definition of eligible services. The ACCC considers that property managers include developers of apartments, new housing estates and retirement villages where they supply retail broadband services to their residents.
- 3.15 Eligible services therefore include white-label services supplied by a network operator over an embedded network. An embedded network is a site (e.g., an apartment block or a retirement village) where the local access lines are configured in such a way as to enable the owner of the site to sell telecommunications services to the residential customers at that site. A white-label service means a wholesale service with full end-to-end capabilities that is supplied by a superfast network operator and branded and retailed to residential customers by another entity.
- 3.16 A network operator who supplies embedded network services is required to also offer these services to all other wholesale customers on the same terms so that the property manager and all other wholesale customers are in the same competitive position in order to comply with the non-discrimination obligations.¹⁵
- 3.17 A network operator or property manager is not mandated to provide wholesale access to ancillary capabilities, such as intercom, security cameras and gate opening, because those services are not currently subject to an ACCC declaration. However, the ACCC would be concerned should suppliers seek to restrict access to ancillary services, for example by only offering a bundled offer with their own retail services.
- 3.18 See further Section 7 below which considers several scenarios relating to embedded networks.

When network or line came into existence or was altered or upgraded

- 3.19 The Part 8 obligations only apply to networks or lines forming part of superfast networks that came into existence or were upgraded after 1 January 2011 (i.e., around the time the NBN rollout commenced).
- 3.20 For networks in existence between 1 January 2011 and 25 August 2020, the obligations:
- do not apply to the internal lines of multi-unit buildings¹⁶

11 Telecommunications Legislation Amendment (Competition and Consumer) Bill 2019 [Explanatory Memorandum](#), p 6.

12 Section 161 of the Telecommunications Act.

13 Section 143H of the Telecommunications Act.

14 Sections 7, 16 and 142A of the Telecommunications Act and section 152AL of the CCA.

15 Section 151ZF of the Telecommunications Act.

16 Section 158(2B) of the Telecommunications Act and Telecommunications Legislation Amendment (Competition and Consumer) Bill 2019 [Explanatory Memorandum](#), pp 130-131.

- a 'carriage service provider' includes a person that supplies, or proposes to supply, a carriage service to the public²⁸
 - the concept of an 'immediate circle' in the Telecommunications Act is relevant in determining whether a person is supplying, or proposing to supply, a carriage service to the public.²⁹ Generally, if a carriage service is being supplied outside of a person's immediate circle, this will be the supply of a carriage service to the public and the person will be a carriage service provider and service provider. An immediate circle includes, among other things, employees of an individual or a partnership, officers of a body corporate, authorities or institutions of the Commonwealth, a State or a Territory, employees/students of tertiary institutions and any person specified in a determination made by the Minister.³⁰ The ACCC does not consider that an immediate circle encompasses a relationship between a property manager and their tenants (see further Section 7 below)
 - the definition of carriage service provider also captures 'intermediaries' such as property managers. If a property manager (rather than a network operator) has a retail relationship with residential tenants, the property manager is likely to be an intermediary for the purposes of the definition of a carriage service provider and therefore be a service provider.³¹ In accordance with the wholesale-only requirement in Part 8, a network operator may be able to supply an eligible service to an intermediary (which is a service provider) without requiring an exemption or the need to functionally separate.
- 3.30 As a service provider, an intermediary has a legal obligation to join the Telecommunications Industry Ombudsman (TIO) scheme,³² and must also comply with the *Telecommunications Consumer Protections (TCP) Code*.³³
- 3.31 Where an intermediary owns the network and supplies the retail service, the Telecommunications Act prohibits that intermediary from using, or from allowing or permitting the network operator from using, the network to supply the carriage service to customers unless it holds a carrier licence or there is a nominated carrier declaration in force.³⁴ The ACMA is responsible for administering the carrier licensing regime.
- 3.32 Whether an intermediary service provider is itself subject to the carrier separation rules in Part 8 is determined by whether it is a 'controller'. See further scenario 1 in Section 7 below.

28 Section 87(1) of the Telecommunications Act.

29 Section 88 of the Telecommunications Act.

30 Section 23 of the Telecommunications Act.

31 Section 87(5) of the Telecommunications Act.

32 Sections 128 and 132 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999*.

33 [C628:2019 Telecommunications Consumer Protections \(TCP\) Code](#).

34 Section 42 of the Telecommunications Act.

4. Class exemption

- 4.1 In August 2020, the ACCC issued a class exemption instrument, the Telecommunications (Superfast Broadband Network Class Exemption) Determination 2020, that exempts smaller network operators from the wholesale-only requirement.³⁵ The exemption is designed to reduce the cost burden on smaller network operators in participating in superfast broadband markets and to encourage investment in new broadband infrastructure.
- 4.2 The class exemption is only available to network operators with no more than 12,000 residential customers. All retail services supplied by the network operator, its related entities, including those within the same corporate group, and associates of the network operator count towards the customer threshold in the class exemption. A corporate structure diagram illustrating related entities in the same corporate group is provided at Appendix C.
- 4.3 It is also a requirement of the class exemption for the network operator to offer the declared wholesale Layer 2 service, the Superfast Broadband Access Service (SBAS)³⁶, at all sites on a non-discriminatory basis.³⁷
- 4.4 Where an intermediary such as a property manager (rather than the network operator) has a retail relationship with the residential tenants, those residential customers are not counted towards the customer threshold in the class exemption. The network operator is still required to provide wholesale access to SBAS services on these networks/lines pursuant to the SBAS declaration. The network operator is also subject to the non-discrimination obligations in the conditions of the class exemption in respect of the supply of all eligible services, including Layer 3 or managed services, and the network operator must provide access to these services to all wholesale customers, or prospective wholesale customers, upon request.
- 4.5 Importantly, any network operator wishing to benefit from the class exemption must elect to be bound by its terms by providing a copy of the written notice available on the ACCC website to telcoseparationrules@accc.gov.au.³⁸
- 4.6 The ACCC will publish a list of operators who have elected to be bound by the class exemption. If a network operator who has elected to be bound by the class exemption is subsequently found to be non-compliant with a condition in the class exemption determination, the ACCC may remove the network operator's name from the ACCC's class exemption register website and the network operator will then be subject to the wholesale-only requirement. The ACCC may also issue infringement notices or take court action for any non-compliance (see Section 6 below).

³⁵ [Telecommunications \(Superfast Broadband Network Class Exemption\) Determination 2020](#).

³⁶ Further detail on the SBAS is available on the [ACCC website](#).

³⁷ See sections 8(a)-(c) of the [Telecommunications \(Superfast Broadband Network Class Exemption\) Determination 2020](#).

³⁸ The written notice is available here on the [ACCC website](#).

5. Functional separation undertakings

- 5.1 A functional separation undertaking is required where a network operator that is not eligible for or has not elected to be bound by a class exemption intends to offer retail services over a superfast network it controls.
- 5.2 A network operator who has more than 12,000 residential customers is not eligible for the class exemption and must:
- elect to be bound by a deemed functional separation undertaking that has been made by the ACCC, if eligible, or
 - submit a customised standard functional separation undertaking, given by a single corporation, or joint functional separation undertaking, given by two or more corporations, for approval by the ACCC.
- 5.3 Once a network operator becomes subject to a functional separation undertaking, its terms apply to all local access lines servicing residential customers, regardless of when they were built or further altered or upgraded (i.e., the undertaking applies to new lines and existing lines, including any pre-1 January 2011 lines).³⁹

Deemed functional separation undertaking

- 5.4 On 16 October 2020, the ACCC issued the Telecommunications (Deemed Functional Separation Undertaking) Determination 2020. This instrument is designed to reduce the cost burden of functional separation on smaller network operators participating in superfast broadband markets. Network operators that elect to be bound by the terms of the deemed undertaking do not have to go to the expense of preparing customised individual undertakings themselves.
- 5.5 The deemed functional separation undertaking is only available for networks supplying superfast services to no more than 50,000 residential customers via local access lines.⁴⁰ The deemed functional separation undertaking is also only available for single corporations (i.e., a corporate group will require a joint functional separation undertaking).
- 5.6 The instrument prescribes a set of model terms for a standard functional separation undertaking that an eligible network operator may elect to be bound by. In summary, a network operator who elects to be bound by a deemed functional separation undertaking is required to:
- maintain a single wholesale business unit and a single retail business unit
 - maintain arm's length functional separation between these business units, and
 - publish the terms and conditions on which the wholesale business unit will supply access to local access line services.
- 5.7 The instrument also specifies information provided by carriers and carriage service providers to a network operator's retail business unit that may be disclosed to its wholesale business unit.⁴¹

39 Section 142C(3) Note 1 of the Telecommunications Act (also for pre-25 August 2020 networks see section 143(3) Note 1 of the Telecommunications Act). See also Telecommunications Legislation Amendment (Competition and Consumer) Bill 2019 [Explanatory Memorandum](#), p 7.

40 Section 6 of the [Telecommunications \(Deemed Functional Separation Undertaking\) Determination 2020](#).

41 Section 151A(13) of the Telecommunications Act and section 9 of the [Telecommunications \(Deemed Functional Separation Undertaking\) Determination 2020](#).

- 5.8 On 3 March 2021, the ACCC issued the Telecommunications (Deemed Functional Separation Undertaking) Amendment Determination 2021 (No.1) which amended the permitted information sharing provisions in the ACCC's deemed functional separation undertaking to align them with the permitted information sharing provisions in the determinations issued by the ACCC for standard and joint functional separation undertakings.⁴² The determination specifies the kinds of information obtained from a carrier or carriage service provider that a network operator's retail business unit may disclose to that network operator's wholesale business unit.
- 5.9 Network operators considering whether to elect to be bound by the deemed functional separation undertaking are encouraged to review the written notice available on the ACCC website and to contact the ACCC to discuss the specifics of their networks before electing to be bound by the deemed undertaking.⁴³ Network operators may contact the ACCC at telcoseparationrules@acc.gov.au.

Customised standard or joint functional separation undertakings

- 5.10 A network operator can choose to submit its own customised standard functional separation undertaking to the ACCC for approval, while two or more parties can submit a joint functional separation undertaking to the ACCC for approval. This is intended to provide greater commercial flexibility for superfast network operators and promote infrastructure-based competition.
- 5.11 The ACCC must assess standard or joint functional separation undertakings for approval against the long-term interest of end-users criteria prescribed under Part XIC of the *Competition and Consumer Act 2010*.⁴⁴
- 5.12 Parties who submit a joint functional separation undertaking must comply with the Telecommunications (Permitted Information Sharing for Joint Functional Separation Undertakings) Determination 2020.⁴⁵
- 5.13 A network operator who submits a standard functional separation undertaking must comply with the Telecommunications (Permitted Information Sharing for Standard Functional Separation Undertakings) Determination 2021.⁴⁶ The information sharing exceptions are similar to those for joint functional separation undertakings.
- 5.14 Parties subject to either a standard or joint functional separation undertaking must submit periodic reports to the ACCC relating to their compliance with that undertaking.⁴⁷ Parties subject to a functional separation undertaking are also required to notify the ACCC of changes in control of the corporation who gave the functional separation undertaking to the ACCC and must do so in the approved form.⁴⁸
- 5.15 If a network operator enters into an access agreement with a wholesale customer that offers different terms to those published on its website, then it must publish statements about the differences in a form approved by the ACCC.⁴⁹

42 Further information about the permitted information sharing provisions is available on the [ACCC website](#).

43 The written notice is available on the [ACCC website](#).

44 Section 142BA of the Telecommunications Act.

45 [Telecommunications \(Permitted Information Sharing for Joint Functional Separation Undertakings\) Determination 2020](#).

46 [Telecommunications \(Permitted Information Sharing for Standard Functional Separation Undertakings\) Determination 2021](#).

47 Sections 151A(10), 151C(10) and 151C(11) of the Telecommunications Act.

48 Section 151ZB of the Telecommunications Act.

49 Section 151ZH of the Telecommunications Act.

- 5.16 Those seeking to lodge a standard or joint functional separation undertaking are required to submit their undertaking to the ACCC electronically and in the approved format. The ACCC has approved the following forms for functional separation undertakings:⁵⁰
- form of standard functional separation undertakings
 - form of joint functional separation undertakings
 - form of compliance reports
 - form of notices for changes in control
 - form of statements about the differences between an access agreement and an offer.
- 5.17 Parties who are considering submitting standard or joint functional separation undertakings are encouraged to review these forms, the requirements set out in Part 8 of the Telecommunications Act and to contact the ACCC to discuss the specifics of their networks.
- 5.18 The ACCC can be contacted at telcoseparationrules@accc.gov.au.

6. Compliance and possible enforcement action by the ACCC

- 6.1 Compliance with the carrier separation rules in Part 8 of the Telecommunications Act is a condition of holding a carrier licence⁵¹ and a requirement under the service provider rules.⁵²
- 6.2 A number of provisions in Part 8 are civil penalty provisions. This includes compliance with the wholesale-only requirements, the conditions and limitations of a class exemption determination, functional separation undertakings and the non-discrimination rules.
- 6.3 The ACCC may issue infringement notices or take enforcement action for any contraventions of these obligations.⁵³

⁵⁰ Forms approved by the ACCC are available on the [ACCC website](#).

⁵¹ Part 1 of Schedule 1 of the Telecommunications Act.

⁵² Part 1 of Schedule 2 of the Telecommunications Act.

⁵³ Parts 31 and 31B of the Telecommunications Act.

7. Worked examples

7.1 This section provides some worked examples intended to provide guidance on the ACCC's approach to enforcement of the carrier separation rules. We note the ACCC has separately published telecommunications non-discrimination guidelines, with worked examples dealing with non-discrimination obligations set out there.⁵⁴

Embedded networks – role of an intermediary

► Scenario 1

A network operator builds a superfast network available for residents in a residential apartment building. The network operator offers superfast carriage services for the property manager to supply directly to the residents.

Issues raised:

- Is the network operator supplying an 'eligible service'?
- Is the property manager a 'carriage service provider'?
- What requirements flow from this?

Assessment

- 7.2 This scenario, where the network operator is supplying 'white-label services' for the intermediary (here the property manager) to supply directly to the residents, is referred to as an 'embedded network'.
- 7.3 Supply by the network operator of wholesale services to the property manager, as an intermediary, is an 'eligible service' for the purposes of Part 8 of the Telecommunications Act.
- 7.4 The property manager, as an intermediary supplying these services to residents in the building, falls within the definition of 'carriage service provider' in section 87(5) of the Telecommunications Act.
- 7.5 This means that the network operator (as the 'controller') can supply these services ('eligible services') to the intermediary (a 'carriage service provider') in accordance with the wholesale-only requirement in Part 8. If the network operator elects to be bound by the ACCC class exemption, these customers do not count towards the customer threshold.
- 7.6 As the network operator is supplying eligible services, albeit to an intermediary, Part 8 and the conditions in the class exemption (if the network operator has elected to be bound by the exemption) require the network operator to offer these services on a non-discriminatory basis to all access seekers and to publish their standard offers. The network operator must therefore offer the services it provides to the property manager to all other wholesale customers on the same terms, so that the property manager and all other wholesale customers are in the same competitive position.⁵⁵
- 7.7 A network operator who offers to supply eligible services tailored to its wholesale customers using a local access line that is subject to either the wholesale-only requirement or a functional separation undertaking, must publish a statement of differences if the terms and conditions set out in the access agreement are not the same as the terms and conditions set out in their published offer.⁵⁶

54 [The ACCC's telecommunications non-discrimination guidelines](#).

55 Section 151ZF of the Telecommunications Act and Sections 8(a)-(e) of the Telecommunications (Superfast Broadband Network Class Exemption) Determination 2020.

56 Section 151ZH of the Telecommunications Act.

- 7.8 Importantly, the network operator must also offer the declared SBAS and offer it on the terms set out in the ACCC's Interim or Final Access Determination (as applicable) for that service. Only small-scale network operators (those with no more than 12,000 end-users) of superfast networks built before 1 January 2011 are currently exempt from complying with these standard access obligations.
- 7.9 As the property manager is a carriage service provider supplying retail services to end-users, this also means that it must comply with the obligations on carriage service providers set out in Division 5 of Part 4 of the Telecommunications Act and in the *Telecommunications (Consumer Protection and Service Standards) Act 1999*. This includes joining the TIO scheme.
- 7.10 The definition of a carriage service provider would not apply if the property manager is not supplying a carriage service to the public, or is not using a network unit to supply a carriage service to the public, for example because the property manager was only supplying to its 'immediate circle'. Furthermore, the definition of a carriage service provider would not apply where the business activity is the sole or principal use of the premises. This is not the case here, for the reasons set out below.
- 7.11 The ACCC does not consider that the customers are part of the property manager's 'immediate circle', even where all customers are located on the same premises as the property manager. The definition of 'immediate circle' does not capture the property manager and resident relationship.⁵⁷
- 7.12 The ACCC does not consider that the property manager's business, including selling communications services to these residents, is the 'sole or principal use of the premises'. The fact that the property manager primarily conducts its business on the premises, where its customers are located, does not necessarily mean this is the 'sole or principal use of the premises'.⁵⁸ For residential apartments and residential estates, the ACCC considers that residential living, rather than the property manager's business, is likely to be the principal use of these premises.
- 7.13 To the extent that the property manager is also a 'controller' of a local access line (that has been built or upgraded within the relevant timeframes prescribed in Part 8), they will be subject to the wholesale-only requirements. This means that to supply the customers in the embedded network, if they are residential customers, the property manager must comply with the carrier separation obligations and either elect to be subject to the ACCC's class exemption or be covered by an ACCC approved functional separation undertaking. The issue of controllers of networks and local access lines is discussed further in scenario 2.

57 'Immediate circle' is defined in section 23 of the Telecommunications Act.

58 Section 89 of the Telecommunications Act.

Embedded networks – control of the network

► Scenario 2

A network operator installs network infrastructure for a property manager and operates the network on their behalf. The property manager owns the network infrastructure.

The network operator supplies superfast carriage services to the property manager who includes internet as part of their customers' rent or offers subsidised rates to residents.

The network operator charges the property manager a managed service fee for their services and the property manager controls the access offered to their customers.

Issues raised:

- Does the network operator or property manager control the underlying network?

Assessment

- 7.14 A network operator exercises control of a telecommunications network or a line if it (whether alone or together with one or more other entities):
- legally or beneficially owns the network line, or
 - can directly, or indirectly, control the operation of all or part of the network or line.⁵⁹
- 7.15 The network operator in this scenario can directly, or indirectly, control the operation of all or part of the network, despite not having a direct relationship with the end-user, and is therefore in control of the network.
- 7.16 Although other entities (i.e., the property manager) can also exercise control over some aspects of the networks or lines, including setting the prices or other terms of end-user access, the legislation is clear that more than one person may exercise control of a network or line.⁶⁰
- 7.17 In this scenario, as the property manager owns the network and the network operator controls its operation, the network operator and the property manager are both the 'controller' of the network for the purposes of complying with Part 8.

59 Sections 155 and 155A of the Telecommunications Act. See also summary provided in Appendix B.

60 Section 155(3) or section 155A(3) (for a line) of the Telecommunications Act.

Embedded networks – class exemption requirements

► Scenario 3

A network operator has elected to be bound by the ACCC class exemption. The network operator makes services available to embedded networks.

The network operator is deciding whether to offer property managers the choice of building either an open access model or to only offer bespoke embedded networks.

Issues raised:

- Does the network operator have to offer the open access model?

Assessment

- 7.18 The ACCC considers the services offered by the network operator in respect of embedded networks to be eligible services. Therefore Part 8 and the conditions in the class exemption require superfast network operators who provide these services to offer them on a non-discriminatory basis to all access seekers and to publish their standard offers.
- 7.19 It is a requirement of the class exemption for the network operator to offer the declared wholesale Layer 2 service (the SBAS) at all sites on a non-discriminatory basis.⁶¹
- 7.20 It is not therefore an option for the network operator to only offer bespoke embedded networks, they must also offer the open access model.

61 Sections 8(a)–(c) of the [Telecommunications \(Superfast Broadband Network Class Exemption\) Determination 2020](#).

Buildings with fixed wireless and fibre

► Scenario 4

A network operator supplies superfast carriage services to a building using fixed wireless to connect some customers and fixed-line links to connect other customers.

The network operator has elected to be bound by the class exemption.

Issues raised:

- Do the fixed wireless and fixed-line customers count towards the class exemption threshold?

Assessment

- 7.21 Where network operators use wireless and fixed-line links that were established after 25 August 2020 within the same building to connect residential customers, we consider that if the fixed-line links are being used in some manner to provide services to residential customers at a relevant point in time, those customers count towards the class exemption threshold.⁶²
- 7.22 This includes deployments where network operators use a fixed wireless link as part of the local access network to connect to the building and fixed-line links for connections to the residential customers.
- 7.23 It also includes deployments where network operators use a fixed-line link as part of a local access network to connect to the building and wireless technology to connect the residential customers. In this regard, the wireless technology component may be deployed on a dedicated basis (i.e., cabling to a wireless access point for each separate unit) or shared basis (i.e., cabling to one or more shared wireless access points that may each serve multiple units).
- 7.24 However, it does not include the network operator's residential customers that are served entirely by fixed wireless technologies without any fixed-line component within the building, for example using a 5G network.

⁶² Section 158(2B) of the Telecommunications Act and Telecommunications Legislation Amendment (Competition and Consumer) Bill 2019 [Explanatory Memorandum](#), pp 130-131.

Wholesale access to multi-unit buildings

► Scenario 5

A network operator installs cabling internally to each apartment in a build-to-rent apartment building and charges a fee to the property manager for this infrastructure. The property manager decides how to charge end-users for residential superfast carriage services. The contract between the network operator and property manager provides for the network operator to receive a share of the room rate and the property manager retains the rest of the revenue.

To provide access to other retailers over its network, the network operator would need to alter its network (e.g., install a switch).

Issues raised:

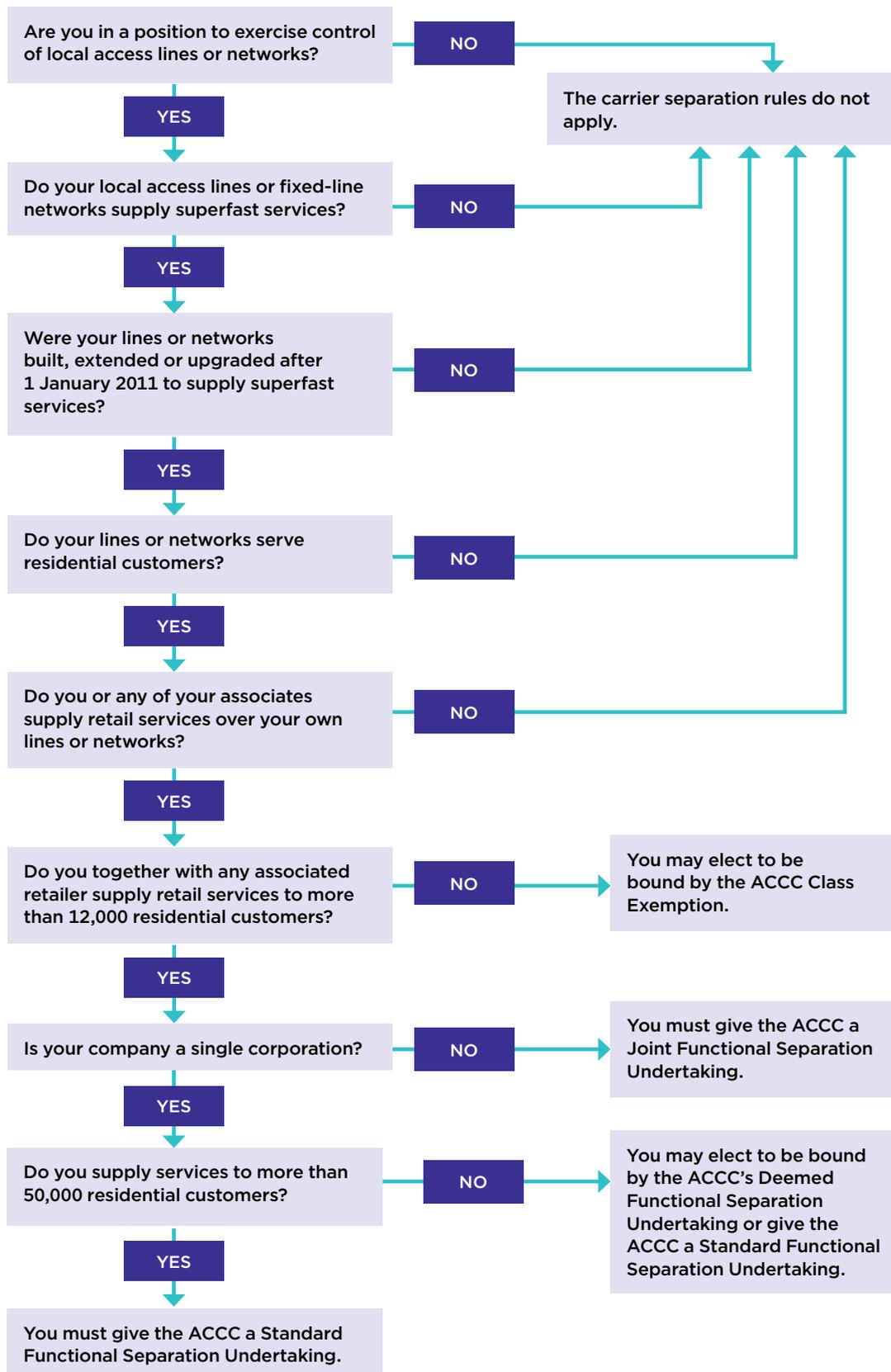
- Does the network operator need to provide wholesale access to build-to-rent apartments where it is not directly providing a service to end-users?

Assessment

- 7.25 The ACCC has declared the SBAS and made an access determination that requires all non-NBN superfast network operators to make the defined wholesale Layer 2 service available on request at regulated prices. The ACCC extended the Declaration for this service for another five years in July 2021. The Declaration makes it clear that lines in a multi-unit building used to supply a superfast carriage service to an end-user occupying or using a unit in the building are considered to form part of a superfast telecommunications network.
- 7.26 The Telecommunications Act defines a multi-unit building as a building that has 2 or more units for occupation as a place of residence or business, or a complex where each building meets that criterion.
- 7.27 Therefore, the network operator must make the declared wholesale Layer 2 access service available on request in all buildings where it is supplying superfast carriage services to units capable of residence. This includes build-to-rent apartments where there can be a mixture of different uses (i.e., short and long term accommodation) across the building. However, it does not include buildings that are solely used as hotels.

Appendix A

Carrier separation rules decision tree



Appendix B

Criteria for determining control of a network or a line in sections 155 and 155A of the Telecommunications Act

An entity is in a position to exercise control of a telecommunications network or a line if it (whether alone or together with one or more other persons):

- legally or beneficially owns the network or line; or
- can directly, or indirectly, control:
 - the operation of all or part of the network or line; or
 - the selection of the kinds of services that are supplied using the network or line; or
 - the supply of services using the network or line.

An entity (the *controller*) is in a position to exercise control of a telecommunications network or a line if a company other than the controller legally or beneficially owns the network or line (whether alone or together with one or more other persons), and the controller, either alone or together with an associate of the controller, is in a position to:

- exercise control of the company; or
- veto any action taken by the board of directors of the company; or
- appoint or secure the appointment of, or veto the appointment of, at least half of the board of directors of the company; or
- exercise, in any other manner, whether directly or indirectly, direction or restraint over any substantial issue affecting the management or affairs of the company.

An entity (the *controller*) is in a position to exercise control of a telecommunications network or a line if a company other than the controller legally or beneficially owns the network or line (whether alone or together with one or more other persons), and the company or more than 50% of its directors:

- act, or are accustomed to act, in accordance with the directions, instructions or wishes of, or in concert with, the controller, the controller and an associate of the controller acting together, or the directors of the controller; or
- under a contract or an arrangement or understanding (whether formal or informal), are intended or expected to act in accordance with the directions, instructions or wishes of, or in concert with, the controller, the controller and an associate of the controller acting together, or the directors of the controller.

Associate is defined in section 152 of the Telecommunications Act.

152 Associate

(1) For the purposes of this Part, an **associate** of a person (the **controller**) in relation to control of:

(a) a telecommunications network; or

(aa) a line; or

(b) a company;

is:

(c) a partner of the controller; or

d) if the controller or another person who is an associate of the controller under another paragraph receives benefits or is capable of benefiting under a trust—the trustee of the trust; or

(e) a person (whether a company or not) who:

(i) acts, or is accustomed to act; or

(ii) under a contract or an arrangement or understanding (whether formal or informal) is intended or expected to act;

in accordance with the directions, instructions or wishes of, or in concert with:

(iii) the controller; or

(iv) the controller and another person who is an associate of the controller under another paragraph; or

(f) another company if:

(i) the other company is a related body corporate of the controller for the purposes of the *Corporations Act 2001*; or

(ii) the controller, or the controller and another person who is an associate of the controller under another paragraph, is or are in a position to exercise control of the other company.

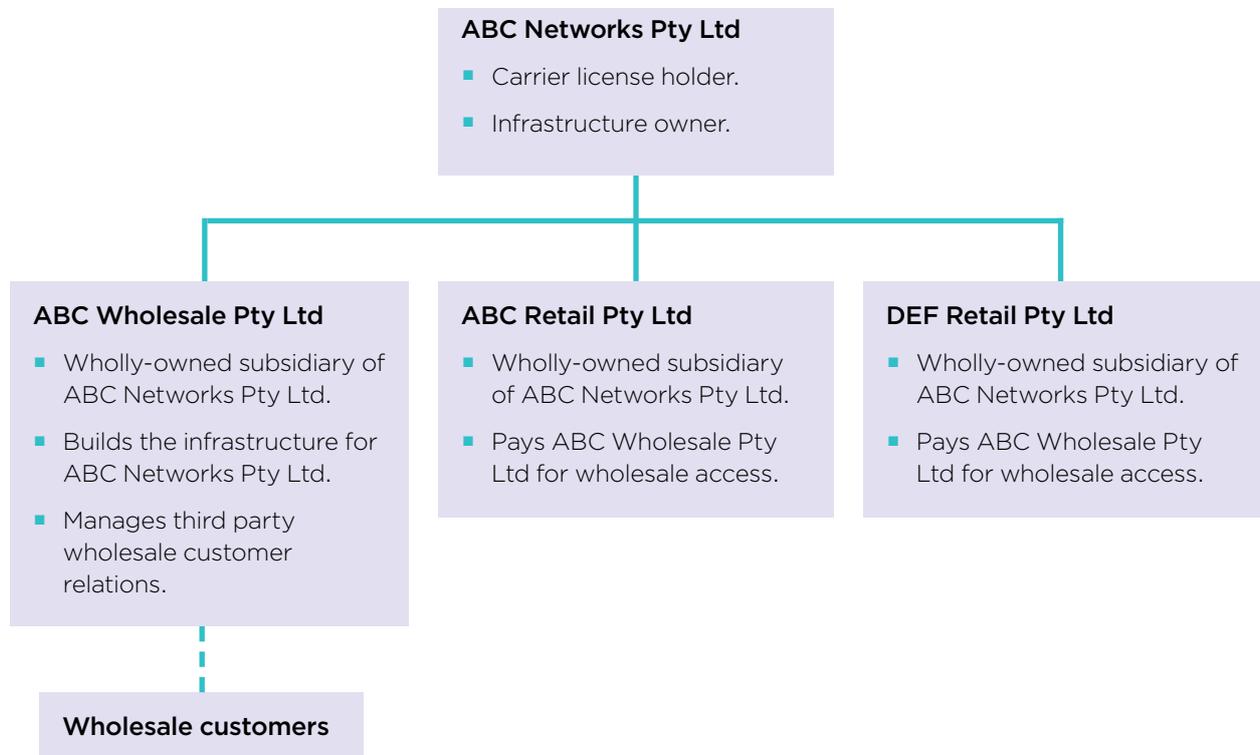
(2) However, persons are not **associates** of each other if the ACCC is satisfied that:

(a) they do not act together in any relevant dealings relating to the network, line or company; and

(b) neither of them is in a position to exert influence over the business dealings of the other in relation to the network, line or company.

Appendix C

Corporate structure diagram



While ABC Retail Pty Ltd and DEF Retail Pty Ltd are separate entities with their own ABNs, they are associated companies of ABC Wholesale Pty Ltd and therefore the retail services of both ABC Retail Pty Ltd and DEF Retail Pty Ltd are counted towards the class exemption threshold for the ABC Networks Pty Ltd corporate group.



AUSTRALIAN COMPETITION
& CONSUMER COMMISSION

