

Gigafy functional separation undertaking consultation paper

NBN Co submission

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Public version





nbn welcomes the opportunity to comment on the ACCC’s Consultation Paper ‘Gigafy standard functional separation undertaking’ (**Gigafy Undertaking**).

nbn supports measures that will promote competition and incentivise investment in superfast broadband infrastructure, in particular where this is achieved by levelling the regulatory playing field. The legislative changes introduced by the *Telecommunications Legislation Amendment (Competition and Consumer) Act 2020* provide a framework in which superfast network operators can invest in infrastructure-based competition with confidence around the regulatory obligations that will apply. We consider this approach, where properly administered by the ACCC, will generally promote the long-term interest of end users (LTIE). Accordingly, we support Gigafy’s lodgement of a Functional Separation Undertaking and commitment to complying with the obligations set out in Part 8 of the *Telecommunications Act 1997* (Telco Act).

The effectiveness of this regulatory framework lies in the strength of, commitment to, and enforcement of undertakings accepted by the ACCC. To this end, nbn considers the undertaking submitted by Gigafy is broadly appropriate, however we note there are a few areas requiring further clarification as well as broader questions around the commercial models Gigafy operate. Our submission focuses on these areas.

To discuss further, please contact Matthew Scott, Principal Regulatory Advisor - Consumer & Network at [REDACTED].

Areas of concern with the Gigafy Undertaking

Staff location

In contrast to the ACCC’s deemed functional separation undertaking (**Deemed Undertaking**)¹ and to similar provisions in the TPG joint functional separation undertaking (**TPG Undertaking**),² it isn’t clear from the Gigafy Undertaking 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. We note that the detailed information sharing obligations in clause 20 of the Gigafy Undertaking would act to limit the ability of wholesale or retail staff members to disclose certain information to each other, however we consider access control commitments are required to prevent the opportunity for Gigafy’s wholesale and retail staff to independently gain inappropriate access to sensitive data of each other. Replication of the equivalent clause from the TPG Undertaking should sufficiently address this concern.

Shared Corporate Services

The Gigafy Undertaking specifies that Shared Corporate Services will include ‘corporate governance and senior executive leadership (including by directors and senior executives)’. In their supporting submission, Gigafy suggests this is appropriate given that retail and wholesale will be represented by separate business units within a

¹ Part 7 (2)(a) of the ACCC’s Deemed Undertaking

² Clause 14.2 of the TPG joint functional separation undertaking



single legal entity. nbn considers this introduces uncertainty around what levels of the legal entity will have visibility over potentially sensitive information from both retail and wholesale business units.

Further, clause 10.2 of the Gigafy Undertaking outlines that staff of Gigafy Wholesale and Gigafy Retail will not be subject to senior management direction of Gigafy Retail and Gigafy Wholesale respectively but is not explicit around these staff not doing work for the alternative business units. This contrasts with the TPG Undertaking which clearly outlines that:

- staff of wholesalers won't do any work for retailers (and vice versa);
- staff of wholesalers won't be subject to management direction of retailers (and vice versa); and
- no director of a wholesaler will be a director of a retailer (and vice versa).

As such, we suggest more specificity is included in the undertaking to explain the levels of leadership who will be shared across the business and to ensure that staff of one business unit won't do any work for the other business unit.

Commencement and Duration

The Gigafy Undertaking specifies a 12-month implementation period that would apply to a range of substantive commitments within the undertaking, including but not limited to:

- Implementation of arm's length functional separation;
- Separation of staff;
- Separation of systems; and
- Compliance training for staff.

The practical impact of this is that Gigafy won't realistically be operating a functionally separated business until July 2024 at the earliest.

Such an approach would seem appropriate in a scenario where a provider was operating as a wholesale only provider with the intention of launching a retail brand, or was a small provider expecting to grow out of the scale limitations of the Class Exemption. However, in this case Gigafy appears to currently be operating as an infrastructure owning, retail only provider (notwithstanding uncertainty around Gigafy's business models as expanded on below).

At the same time, clause 3.5 of the Gigafy Undertaking sets out that Gigafy will separately commit to providing wholesale access on non-discriminatory terms in areas where they are the Statutory Infrastructure Provider (SIP) from the date that the Gigafy Undertaking is accepted by the ACCC (i.e. without the need for a 12 month phase in period).

It's hard to understand how 12 months are needed to put in place functional separation, yet wholesale-only and non-discriminatory obligations can be implemented immediately in respect of SIP locations. Given this, we suggest a 12-month timeframe for Gigafy to align itself with the requirements of Part 8 of the Telco Act is excessively generous and suggest a shorter period would be appropriate. The ACCC should also seek clarification of how and at which locations Gigafy intends to continue to operate a retail business without functional separation in the period between the effective and implementation dates.



Gigafly's commercial models

Gigafly has indicated that it has been the only retailer on its networks to date³, however the Gigafly business model as we understand it sometimes differs from conventional retail supply of services and can include arrangements with building managers and body corporates. In these cases, the building manager acts as the preferred internet supplier for their residents.⁴ This arrangement looks more like a wholesale rather than retail arrangement, whereby the building manager / body corporate may be assuming the role of a carriage service provider and managing the retail relationships with end users. nbn notes this type of scenario is considered in the ACCC's recently published Carrier Separation Guidance.⁵

It isn't clear from the Gigafly Undertaking or supporting submission if or how these commercial implementations will be addressed either from the effective or implementation dates. nbn suggests the ACCC seek more detail on these scenarios.

³ As Gigafly outline in Part 3.1 (1) and (2) of their supporting submission

⁴ <https://gigafly.com.au/building-managers/>

⁵ ACCC Industry Guidance on the carrier separation rules, Section 7, scenario 1



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