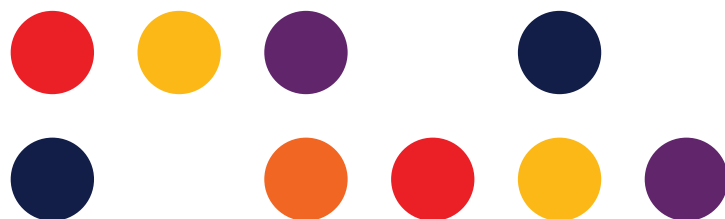


# **Superfast broadband network class exemption and deemed functional separation undertaking - consultation paper**

## ACCC

July 2020

Public version



Public

## Summary

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TPG Telecom Ltd (**TPG**) welcomes the opportunity to make this submission to the Superfast broadband network class exemption and deemed functional separation undertaking consultation paper (**Consultation Paper**).

Overall, the ACCC must bear in mind that the NBN is a government-owned entity which operates with a number of inherent benefits, including but not limited to an artificially low cost of capital. NBN also has a bespoke regulatory regime that appropriately recognises its extensive market power as a *de facto* monopolist. It remains a controversial policy question whether those same regulatory arrangements should be applied to market entrants that do not have such market power. Importantly, this means that the ACCC must be acutely aware of rules and requirements which impose complexities on competitors to the NBN as these may inadvertently favour the NBN by creating barriers to market entry and further tilt an already skewed playing field against NBN's competitors.

As the ACCC is no doubt aware, TPG has been attempting to compete as effectively as possible in broadband services for the benefit of Australian consumers for many years. TPG is a strong supporter of the long overdue relaxation of the superfast network rules to facilitate a greater ability to compete with the NBN. TPG's historic ability to effectively compete with the NBN has been severely hampered by the substantial complexities and barriers to genuine and effective competition created by the superfast network rules and associated instruments. TPG therefore welcomes the imminent commencement of the amendments to the regime and generally encourages the ACCC's current trajectory.

TPG has already achieved functional separation in accordance with the requirements of the *Carrier Licence Conditions (Networks Supplying Superfast Carriage Services to Residential Customers) Declaration 2014*. TPG makes this submission from the benefit of its own practical experience.

**[c-i-c]**. The NBN continues to unequivocally dominate the wholesale market. TPG therefore makes two key submissions:

- (a) Functional separation can act as a barrier to entry for potential competitors to the NBN by increasing the cost and complexity of market entry and operations. The ACCC should be wary of imposing onerous requirements that unnecessarily increase costs. The ACCC should adopt a flexible approach that facilitates market entry and promotes greater competition. The ACCC should be mindful that NBN's competitors do not raise the same competition concerns as the NBN itself, but NBN's competitors are rather a source of future competition to the NBN and should be fostered and encouraged. By promoting greater market entry, the ACCC will promote the long term interest of end users.

- (b) **[c-i-c]**. TPG would be concerned if the ACCC adopted an approach to the class exemption or the deemed functional separation undertaking that caused the ACCC to become unnecessarily prescriptive in its consideration of future bespoke functional separation undertakings.

## Response to the ACCC’s consultation questions

Consultation Question	TPG response
<p><b>Q1</b> (and related questions). Should the ACCC specify a class of persons other than for the maximum number of residential customers being supplied with fixed line services [for the class exemption]?</p> <p><b>Q26</b> (and related questions). How and at what levels should the ACCC specify classes for the purpose of the deemed undertaking(s)?</p>	<p>The ACCC’s approach to the class exemption seems appropriate. TPG notes that the exemption calculates customers on an ‘associated persons’ basis so is calculated holistically across the full corporate group. <b>[c-i-c]</b>.</p> <p><b>[c-i-c]</b>. TPG encourages the ACCC to adopt an approach to calculation of customer numbers based on individual companies, not corporate groups (with associated persons). Different companies may be subject to different existing arrangements, so greater flexibility is warranted and appropriate.</p> <p><b>[c-i-c]</b></p> <p>Importantly, TPG’s submission is made from the perspective of ensuring that the ACCC is mindful of the need for greater competition to the NBN and that excessive functional separation requirements can create an unintentional artificial barrier to market entry. It is critical that the ACCC seeks to facilitate market entry by promoting commercial flexibility, not imposing regulatory requirements that are inappropriate for the nature and scale of the businesses involved.</p>
<p><b>Q5</b> (and related questions). Should the ACCC specify a designated carriage service (other than a Layer 2 Bitstream Service) for the ongoing conditions and limitations of the exemption?</p>	<p>The ACCC should dovetail the draft exemption instrument and deemed functional separation undertaking with the existing declared services under Part XIC. The Part XIC regime creates a default set of terms and pricing, but also promotes commercial flexibility. The ACCC should avoid inadvertently increasing the compliance burden for the NBN’s competitors by requiring them to navigate multiple regimes with differing definitions and nuances.</p> <p>Increasing the costs of market entry for the NBN’s competitors would not be consistent with the long term interest of end users, particularly where the ACCC</p>

	<p>should be mindful that there may not be any material take-up of the wholesale services supplied by smaller competitors to the NBN.</p>
<p><b>Q6</b> (and related questions). Should the ACCC specify any other conditions and limitations of the exemption?</p> <p>(Similar questions are raised in the context of the deemed functional separation undertaking – see section 4 of the consultation paper)</p>	<p>The ACCC should promote commercial flexibility in its approach to functional separation requirements and should avoid being unduly prescriptive. The ACCC’s objective should be to promote market entry and competition with the NBN, and to avoid wherever possible inadvertently creating barriers to market entry by NBN competitors.</p> <p>Bearing this in mind, TPG highlights the following matters where the ACCC’s approach may be excessively granular or onerous in a manner that is likely to increase complexity and compliance costs for the NBN’s competitors:</p> <ul style="list-style-type: none"> <li>(a) TPG generally agrees with the proposed allocation of activities to the wholesale and retail business units, except in relation to network planning functions. Specifically, while a carrier and/or wholesale business unit would be ultimately responsible for planning and deploying new infrastructure and upgrades to existing infrastructure, it is not realistic to expect that a retail business unit would play no part in this process. Infrastructure is required to serve both wholesale and retail customers. Retail input would be required based on the identification of customer needs through the retail business unit’s marketing, sales and supply activities as well as in response to network and service complaints from retail customers.</li> <li>(b) TPG is unclear why the ACCC would attempt to impose a single rule requiring the manager of a retail business unit and the manager of the wholesale business unit to have the same level of seniority within an organisation. The relative size and importance of the retail and wholesale business units may be very different in different organisations and is hopefully also dynamic as each business unit waxes and wanes with effective competition. This requirement is likely to place an unnecessary burden on smaller organisations.</li> <li>(c) The ACCC may be unaware of the significant costs that are likely to be involved in building and maintaining entirely separate offices, and even</li> </ul>

	<p>more so with IT systems. The ACCC should focus on the policy intent rather than mandating very specific requirements. Practical work arounds are likely to reduce separation costs but still achieve the policy intent, especially software-based access restrictions and office partitioning. Any requirements by the ACCC that increase compliance costs will reduce the scope for potential competition to the NBN.</p> <p>(d) It is critical that the ACCC articulate core principles which would guide any consideration of revocation of a deemed undertaking. In our view, the ACCC should focus on any actions which have the effect or the intended effect of materially advantaging the associated retail company relative to third-party retail companies. We consider it would be fair and prudent for the ACCC to consider including a mechanism that allows a network operator the opportunity to take action or rectify any alleged breach before being provided written notice to revoke the network operator’s election to be bound by a deemed undertaking. Otherwise, we assume the ACCC would engage with the network operator (e.g. by way of requests for information) to allow the operator an opportunity to respond to any potential complaints from third parties, before the ACCC provides any written notice to revoke the deemed undertaking. The ACCC should be mindful that a requirement for structural separation may be fatal to the business of small competitors to the NBN. That would not promote the long term interest of end users.</p>
<p><b>Q7</b> (and related questions). Would competition in the markets for the supply of wholesale and retail superfast broadband services to residential customers be promoted by the draft class exemption instrument?</p> <p>(A similar question arises in relation to the deemed functional separation undertaking – see section 4 of the consultation paper)</p>	<p>Competition will be promoted by greater market entry and greater ability to compete on a more level playing field. Functional separation requirements have the potential to increase complexity and compliance costs, particularly where the take-up of wholesale services may be low.</p> <p>The ACCC should be mindful of the big picture, namely the need to promote greater competition to the NBN. Imposing functional separation obligations on market entrants that are the same as those imposed on the NBN inadvertently treats market entrants as if they had the same level of market power (or artificially low cost of capital and other benefits) as the NBN, which is manifestly not the case.</p>