

1 Introduction

The Australian Competition and Consumer Commission (**ACCC**) is seeking feedback on a proposed superfast broadband network class exemption and deemed functional separation undertaking and in particular:

- a draft instrument for the exemption for small networks including the class of persons to whom it should apply and any other conditions and limitations
- the nature and extent of potential functional separation provisions for deemed undertakings
- the classes of corporations to which deemed undertakings should apply

which the ACCC proposes to implement to give effect to the *Telecommunications Legislation Amendment (Competition and Consumer) Act 2020*, which is due to come into effect on 26 August 2020.

Uniti is currently a provider of superfast fixed line carriage services (**broadband services**) of the type contemplated by these regulations. Uniti operates a separate retail business unit which provides broadband services to residential customers on Uniti owned and operated fixed wireless infrastructure networks, NBN and selected private fibre to the premise (**FTTP**) networks (other than those operated by Uniti). Through another of its subsidiaries, Uniti also operates and maintains a FTTP network and is a wholesale provider of broadband services on these FTTP networks.

Due to its organisational structure, Uniti will not qualify for a class exemption, nor will it be able to take advantage of the deemed functional separation provisions. It does however intend to submit a joint bespoke functional separation undertaking given by two of the Uniti business units which are wholly owned subsidiaries and which will then be operated on a functionally separated basis, and as such Uniti is directly affected by, and has an interest in, the proposals from the ACCC.

Uniti welcomes the opportunity to provide its views on the above proposals.

2 Overview

Uniti's view is that the current proposed class exemption of 2,000 broadband services is reasonable and appropriate at implementation. At the present time, this threshold will encourage competition and promote the long-term interests of end-users (LTIE).

A market participant, including a potential new market entrant, who has constructed a superfast broadband network capable of providing broadband services and has acquired 2,000 broadband services as a retail service provider (**RSP**) without the requirement to be functionally separated should have achieved profitability enabling the participant to implement a functionally separated business structure.

In the future this threshold may need to increase in number to the proposed 12,000 services and potentially beyond due to changes in market conditions. This will be required to maintain

competition and encourage new competition by ensuring the viability of smaller market participants. Any contemplation of an increase should be measured against a number of factors including:

- The dominant market share held by NBNCo in the wholesale broadband services market. If the current proposed changes to the TIND policy are implemented the threshold of 12,000 will not be sufficient to ensure viability and maintain or encourage competition.
- The adoption and expansion of competing technologies to fixed line broadband services such as 4G and 5G cellular broadband services which are direct competitors (without the burden of the Regional Broadband Services Levy (**RBS Levy**)) to providers of fixed line broadband services. As competing wireless technology with comparable services but no RBS Levy increase penetration the 12,000 threshold will not be sufficient to maintain and encourage competition.
- The implementation and application of the RBS Levy which is an impost upon fixed line broadband service providers other than NBNCo will threaten the viability of small broadband network operators particularly when the 55,000 exemption to the tax is removed. Vertical integration will become increasingly important in the future to enable smaller operators to compete with NBNCo and fixed wireless providers, whose services are not subject to the Levy.

The regime proposed by the ACCC in the draft deemed standard functional separation undertaking is, on the whole, reasonable and appropriate, subject to a small number of qualifications:

- The ACCC should take into account the relative size of the applicant in determining whether or not the applicant's proposal in terms of the "extent specified in the undertaking" for separation of certain functions is reasonably acceptable.
- The incentive structures in place to remunerate and reward employees should take into account the organisation's goals and ability to attract and retain high quality employees, which may require a structure that extends beyond solely the performance of the business unit itself, particularly for a larger listed entity.
- The definition of "residential customers" contemplated in both the deemed undertaking and the class exemption should be clarified to exclude businesses which operate from residential premises as well as ancillary services supplied to residential consumers such as Wi-Fi services (e.g. to Hotels, Shared Accommodation, student accommodation, etc), access control, smart city/building services, integrated communications services, media services and similar products and services delivered via these fixed line broadband networks.
- The RBS Levy should not also apply to the ancillary services delivered over a broadband service as above.

Compliance reporting should not impose an unreasonable burden on the company's resources. The requirement to adopt a functional separation model in order to provide both wholesale and retail services has the unintended consequence of imposing a higher barrier to entry to the superfast broadband services market and therefore shutting smaller operators out of this market. When contrasted with alternative technologies which are now delivering similar

outcomes to the superfast broadband network e.g. 4G and 5G technologies, or fixed wireless technology providers which are competing hard now with superfast broadband networks but which are not subject to being restricted to providing wholesale only services.

This increased compliance cost combined with the RBS Levy should be considered and balanced against the wireless broadband providers who operate without these costs or regulatory restrictions but offer comparable services, plans and prices.

It is critical that the ACCC take into consideration the broadband services market as a whole in setting the appropriate extent to which separation needs to be implemented and the threshold to be applied at any point in time.

3 Draft Class Exemption

3.1 Q1. Should the ACCC specify a class of persons other than for the maximum number of residential customers being supplied with fixed line services?

Uniti does not consider a further class within this number is necessary or required. However, exemption instrument should be clear though that residential customers exclude businesses operating from residential premises as well as ancillary services supplied to residential consumers such as Wi-Fi services (e.g. to Hotels, Shared accommodation, student accommodation, etc), access control, smart city/building services, integrated communications services, media services and similar products and services delivered via these fixed line broadband networks.

3.2 Q2. Would you favour an exemption instrument that allowed for an automatic extension of the 2,000 services to any maximum threshold of fixed line carriage services subsequently determined by the Minister under regulation?

Other than in respect of the inclusion of home-based businesses, Uniti agrees with the ACCC's preliminary view that the current maximum threshold of 2,000 residential customers does in fact promote the LTIE. The COVID19 event has resulted in an increase in home-based businesses. This needs to be recognised and excluded in the service threshold number.

The 2,000 threshold is also consistent with the thresholds applied by the Australian Communications & Media Authority (ACMA) in a number of its policies and supports the ability of smaller operators to be competitive without the additional compliance obligations.

Given the rise in mobile technologies which are not subject to the same restrictions as those applicable to fixed line services, we would support the automatic extension to a further maximum threshold determined by a third party.

Given that the Minister is also the representative of the NBNC Co shareholder, it would be more appropriate that this be undertaken by the ACCC.

The review by the ACCC should take into account current regulatory policies, competing technologies and the market share of NBNC Co (as outlined at point 2 above and 3.3 below) in determining the threshold determined in the future. Though we understand that the 12,000 service threshold will not increase without legislative amendment, which may be unlikely, Uniti does foresee that the threshold to operate a financially viable functionally separated business

could increase well above 12,000 services in the short term because of the impacts of various increased costs on smaller FTTP operators such as

- RBS Levy
- NBN market share
- Regulation of fixed broadband services including operational structures and RKR.
- Emergence of competing technologies with comparable broadband services, including 5G wireless technologies, which are subject to minimal regulation and no increased costs (for example, the RBS Levy or the requirement for a separated business operating model).

We believe an increase above 2,000 will be required by the start of 2021 and the threshold will then progressively increase in line with movements in market shares obtained by NBNCo and wireless operators who do not have the increased costs of separation and a RBS Levy.

3.3 **Q3. For the purposes of the above, do you consider that the LTIE would be promoted by a class exemption at the maximum threshold of 12,000 residential fixed line carriage services that can be specified by regulation?**

Yes, it would. Due to anticipated changes in market conditions, to maintain and encourage competition and ensure the viability of smaller market participants, the maximum threshold of 12,000 residential fixed line carriage services should be implemented to promote the LTIE. The ability of small fixed line operators to compete in wholesale and retail markets and provide end-users with diverse and innovative services at competitive prices is subject to significant competitive and financial burdens including:

- the dominant market share held by NBNCo in the wholesale broadband services market. NBNCo's estimated market share today is in excess of 80% and this does limit competition and new market entrants. If this persists or increases as a result of the proposed changes in the TIND policy to increase the competitiveness of NBNCo an increase in the threshold will be necessary;
- The emergence of competing technologies to fixed line broadband services such as 4G and 5G cellular broadband services which are direct competitors (without the burden of the **RBS Levy**) to providers of fixed line broadband services. Should the currently expected cellular broadband market share of residential customers reach circa 30%, a threshold increase will be required to ensure the viability of smaller FTTP operators; and
- The implementation and application of the RBS Levy which is an effective tax upon smaller fixed line broadband service providers (not applying to cellular or wireless operators or NBNCo) will put considerable strain on the financial viability of small fixed line providers, particularly if they are not eligible for the RBS Levy 55,000 recently connected greenfield premises transitional discount to the tax and when the transitional discount expires after five years.

- 3.4 **Q4. If you operate a superfast broadband network, please provide the number of residential customers being supplied with superfast broadband local access services and the total number you reasonably forecast to supply within the next 5 years (this information can be supplied on a commercial-in-confidence basis if desired).**

Broadband services are provided to retail service providers on a wholesale only basis with equivalence of price and non-price terms by the Uniti Wholesale and Infrastructure business unit. Current and future estimates (including the proposed acquisition of OptiComm Limited) of service numbers are provided on a commercial in confidence basis.

- 3.5 **Q5. Should the ACCC specify a designated carriage service (other than a Layer 2 Bitstream Service) for the ongoing conditions and limitations of the exemption? If, yes, would the services covered by the LBAS and/or SBAS declarations make a suitable designated carriage service?**

The ACCC does not, in our view, need to specify a designated carriage service other than a Layer 2 Bitstream Service. The ACCC should not specify another designated carriage service apart from a Layer 2 Bitstream Service. The regulations imposed upon the current providers of superfast fixed line carriage services as defined in the *Telecommunications Legislation Amendment (Competition and Consumer) Act 2020 (the Act)* which are largely imposed on small privately operated businesses providing much needed competition in a market dominated by NBNCo are discriminatory and lessen competition in the market and any further regulation is unwarranted as it would be contrary to the LTIE . Competition should be encouraged by reducing regulation of the challenger broadband services operators and retailers and the following factors should be considered:

- NBNCo current’s market dominance in the provision of wholesale broadband services both as a network builder and operator with a greater than 80% market share.
- The relaxation of the TIND policy to increase NBNCo’s market share and to allow it to overbuild challenger networks means further regulation is unwarranted.

The emerging direct competition to fixed line services by the cellular wireless operators who are not subject to functional separation, the RBS Levy or required to provide wholesale access to the cellular networks on a regulated basis has created an unfair playing field dictated by technology. Governments and regulators should not discriminate based on technology when regulating broadband services that are increasingly considered identical by end-user consumers and are quite clearly substitutes.

- 3.6 **Q6. Should the ACCC specify any other conditions and limitations of the exemption?**

Carriers operating under the exemption should provide verification to the ACCC on at least an annual basis of the number of residential customers receiving fixed line services they have and whether that they remain below the maximum threshold number. An appropriate mechanism for a deemed undertaking should also be included so that when an organisation ceases to become exempt, it is able to rely on the deemed undertaking for a fixed period, without taking further action.

3.7 **Q7. 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?**

Uniti agrees that the proposed class exemption will promote competition in these markets and further increases in the threshold will be required to maintain competition.

3.8 **Q8. Could this be aided by any further conditions or limitations on the exemption?**

Uniti does not believe further conditions or limitations on the exemption, given the low threshold, would be appropriate or necessary at this time.

3.9 **Q9. What substitute services should the ACCC consider as part of its assessment?**

The ACCC should consider broadband services provided on wireless networks particularly the cellular 4G and 5G broadband services. All three cellular operators in Australia today are providing mobile broadband services at speeds above 25Mbps at retail prices comparable or less than fixed line broadband services at the same speed and data inclusions. All three cellular operators have indicated they intend compete directly with NBNCo and private fibre operators with such services. All three operators are operating, testing and selling mmWave broadband services operating across licensed spectrum acquired for 4G and 5G wireless services. All three cellular operators are:

- Not required to be functionally separated or adopt an undertaking of any sort
- Not subject to the RBS Levy
- Not required to provide wholesale broadband services or provide any form of declared or regulated access to broadband services on networks which utilise spectrum exclusively acquired for fixed terms from all Australians
- Not subjected to increased competition from a mandated mobile access or “roaming” arrangements which would allow increased competition in wireless service provision by alternative challengers with fibre networks disbursed throughout Australia.

3.10 **Q10. Would competition continue to be promoted if the exemption threshold were allowed to rise to 12,000 services in line with any subsequent regulation made by the Minister?**

Refer above in particular points 2 and 3.3 above. An increase in exemption threshold to 12,000 should be contemplated when market conditions create an environment making it more difficult for small operators or new markets entrants to build sufficient scale to be an effective competitor when functionally separated at less than 12,000 broadband services. The threshold will need to be continually increased as NBNCo and cellular operators increase market share based on their current competitive advantage achieved through regulation implemented today.

3.11 **Q11. Do you agree that implementing a class exemption will have no impact on achieving any-to-any connectivity?**

Yes.

3.12 **Q12. Will the draft class exemption instrument promote the economically efficient use of, and economically efficient investment in, infrastructure?**

Yes. Further increases in the threshold will also accentuate this benefit. The private FTTP network builders and operators construct networks at a much lower cost than NBNCo and on more efficient terms. The class exemption and continual increase in threshold will accentuate this efficiency by encouraging competition to NBNCo.

3.13 **Q13. Would this continue to be the case if the exemption threshold were allowed to rise to 12,000 services in line with any subsequent regulation made by the Minister?**

Yes. Refer 3.12.

3.14 **Q14. Are there any other matters not captured under the LTIE test that the ACCC should take into account in deciding to make an exemption?**

We do not believe so.

4 Deemed standard functional separation undertaking

4.1 **Q15. Would the above proposed separation requirements present any major practical difficulties or costs for your business?**

In principle, from an operational or transactional perspective, we do not view the proposed separation requirements as presenting any major practical difficulties or additional costs for Uniti. Uniti does not envisage any difficulties or increased costs in adopting a standard functional separation model. However, it should be noted that Uniti is in a unique position in this regard, having adopted an approach to integrating acquisitions made over the past 12 months in a manner designed to facilitate the functional separation model.

However, the separation requirements should not prohibit a company from seeking to build a companywide team and philosophy, so that employees of the separate business units should be permitted to attend Group events such as companywide employee briefings, social functions, and other such team events in order to enable team building activities, providing that these events are open to all employees. Similarly, with Group-wide values and goals. This relates in particular to the requirement that “staff assigned to each unit would not be able to access the other unit other than for purposes permitted under the undertaking, such as to attend meetings”.

4.2 **Q16. Would the allocation of the above activities to the wholesale and retail business units be suitable for your business?**

In general, we believe the proposed allocation is suitable. There is a question however on where the “supply of retail local access line service” is deemed to start and finish. Further specific definition is needed as to the network cut off point between the wholesale and retail service and what service this applies to. The private fibre network operators provide ancillary services, identified above, which are delivered over the same networks which deliver broadband services to residential customers but are not broadband services or are broadband services delivering internet or like connectivity but are different in nature such as Wi-Fi services in shared accommodation, hotels, resorts, shopping centres etc. Furthermore, there are fibre

operators who are also operating cellular wireless broadband services enabled over the same network servicing a group of the same premises also able to be served by the fixed network.

Uniti as well as a number of other carriers are providers of broadband services as defined which will need to be provided on a functionally separated basis and are also wireless infrastructure owners and operators providing super-fast broadband services on wireless within the same regions or precincts but such services are not subjected to the regulations implemented under the Act being both the need to be functionally separated and the application of the RBS Levy.

There is still uncertainty how the provision of identical broadband services albeit adopting different technology should be segregated when the only differentiator is the technology and not the services, speed, data inclusions etc.

Uniti has addressed this concern by conducting its wireless infrastructure business (operation and maintenance, and retail of that wireless service) in a separate business unit to its Wholesale and Infrastructure business which operates the FTTP networks. In effect, Uniti has separated its wireless and FTTP businesses from each other. Uniti is not certain this segregation has been applied by other carriers.

4.3 Q17. If not, what would be a more suitable allocation of activities between wholesale and retail business units for your business?

Not applicable.

4.4 Q18. Would the allocation of personnel between wholesale and retail business units proposed above be suitable for your business? Please provide details.

The principles for the separate allocation of staff between the wholesale and retail business units outlined in section 4.2.3 is appropriate. The scope of responsibilities for “corporate services” should be outlined for the purposes of the deemed undertaking, and if a company wishes to vary that scope, it should be the subject of a separate undertaking so that the ACCC can monitor compliance with this appropriately.

4.5 Q19. If not, what would be a more suitable allocation of personnel between wholesale and retail business units?

Not applicable.

4.6 Q20. Are the proposed information sharing restrictions and training obligations reasonable?

Yes.

4.7 Q21. Would your business have any difficulties introducing the proposed incentive structures?

No.

It should be noted however that governance arrangements for small private companies may need to be more specifically outlined in the required compliance plans as these would not be subject to the same level of scrutiny that public companies are, including shareholder engagement and voting, as well as regulatory oversight.

4.8 **Q22. What degree of separation of IT systems and applications would be feasible for your business?**

We agree that any systems and applications developed in-house should operate as separate systems, and that where the wholesale and retail units operate such systems, the systems should be logically separate.

In the case of third party generally available systems and applications, however, rather than having separate systems, separate instances with appropriate information barriers in place would be more appropriate. An example of this would be the finance systems used by both the individual business unit's finance teams and the corporate finance team to consolidate reporting at a group level to meet its regulatory obligations.

Similarly, with communications tools which are utilised for example Office365 or collaboration tools such as Slack, both business units should be able to utilise the same platform, albeit with separate accounts and email domains. Specific channels / groups should be permitted for Group wide communications which are not business function related, for example, communications to all staff regarding public holidays or office shut down periods, staff benefits and engagement, and other such communications.

4.9 **Q23. Would you object to all provisions being treated as fundamental provisions? If so, which ones wouldn't you wish to see included and why?**

We would not object to this.

4.10 **Q24. Is there any other information provided to a retail business unit by other carriers or CSPs that you consider would be appropriate to share or not share with a wholesale business unit?**

We envisage the following information which a carrier or CSP would provide to a retail business unit which might be shared with a wholesale business unit

- Certain information, opinions or recommendations with regards industry regulation.
- Certain information useful in managing business operations in times of emergency for example recent events under COVID19 and bushfire conditions.
- Requests for access to wholesale business unit infrastructure to provide network resiliency or protection solutions in particular times or generally.

Other than the above we cannot envisage any other instance.

4.11 **Q25. Do you have views on the timing and content of compliance plans and compliance reports to be provided pursuant to the undertaking?**

We agree that annual reporting would be appropriate in most cases. However, compliance reporting should not impose an unreasonable burden on the company's resources. Allowance should therefore be made for customising the requirements for those smaller organisations who submit a deemed functional undertaking, provided that the organisation is able to satisfy the ACCC that it is complying with the terms of the undertaking.

In relation to the content of the reporting, more clarity should be provided to participants in relation to the requirement to outline the details of its compliance. This should be able to be

satisfied with the submission of the Compliance Plan and with a requirement to provide the ACCC with advice of any substantive or material changes to that Plan.

The other three items are appropriate to be included.

In the case of small private corporations which are subject to the deemed undertaking regime, it would be appropriate for the required internal governance framework to be required to be documented in their compliance plan.

- 4.12 **Q26. How and at what levels should the ACCC specify classes for the purpose of the deemed undertaking(s)? In answering this question we request that superfast network operators provide us with the total number of residential superfast broadband local access lines you currently have in place and the total number you reasonably forecast to have in place within the next 5 years (this information can be supplied on a commercial in-confidence basis if desired).**

We agree that the number of residential superfast broadband local access lines provided by a corporation is an appropriate means of distinguishing a relevant class. However, we believe that the need for the wholesale and retail business units to both be incorporated under a single legal entity for a deemed undertaking to be able to be adopted is an artificial rule and that for a smaller “conglomerate” group with a number of different entities should also be able to be considered as part of a relevant class.

At 3.4 above an estimate of superfast broadband access lines is provided on a commercial in confidence basis.

- 4.13 **Q27. Should the ACCC make a single deemed undertaking that should apply for corporations from one class or a number of undertakings that apply to a number of specified classes?**

There should be a single deemed undertaking for corporations from one class.

- 4.14 **Q28. To the extent the ACCC has discretion under the legislation, what provisions should apply or not apply for particular classes of corporations?**

See response to Q27 above.

- 4.15 **Q29. Do you think the ACCC’s proposed treatment of the non-discrimination provisions is reasonable?**

Yes, the ACCC’s proposed treatment of these provisions is reasonable.

Please direct any questions regarding this submission to:

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