

17 July 2020

Australian Competition & Consumer Commission

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To ACCC

## **Re: Superfast broadband network class exemption and deemed functional separation undertaking – Consultation paper**

VostroNet welcomes the opportunity to provide this submission in relation to the ACCC's development of the superfast broadband network class exemption and deemed functional separation undertaking.

Responses to the questions raised by the ACCC are provided in the table below.

	<b>Question</b>	<b>VostroNet Response</b>
1	Should the ACCC specify a class of persons other than for the maximum number of residential customers being supplied with fixed line services?	No.
2	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 determined by the Minister under regulation?	<p>Yes. We strongly believe that a threshold of 2,000 services is too low and will have unintended consequences.</p> <p>We refer to Section 4.2.2 of the Consultation Paper, which sets out various functions that must be performed exclusively by the retail unit, including:</p> <ul style="list-style-type: none"><li>• Marketing, sales and supply of retail local access line services</li><li>• Supply of other value-added services to retail customers</li><li>• Taking service orders from retail customers</li><li>• Responding to network and service complaints from retail customers</li><li>• Retail billing</li><li>• Setting retail price and non-price terms and conditions</li></ul>

		<p>We estimate that a minimum of six full-time equivalent employees (“FTEs”) would be required to operate a functionally-separate retail unit.</p> <p>Assuming an average gross margin of \$10 per service per month (a realistic estimate for a small retailer), it is not viable for a retailer on a network with only 2,000 services to achieve functional separation. In this example, if the retailer were to capture 50% of the market it would generate \$10,000 gross margin per month, which would be insufficient to cover the salary costs of six FTEs. We also note that there would be substantial non-payroll costs involved, such as additional office space and extra costs involved with oversight, compliance, legal advice and marketing.</p> <p>A threshold of just 2,000 users will operate as a significant barrier to entry in the retail market and will reduce competition at the expense of LTIE, in what is already a highly concentrated market.</p> <p>Having regard to the practicalities involved for functional separation, we believe that the maximum threshold of 12,000 should be adopted.</p>
3	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. We refer to our response to question 2.
4	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).	Commercial-in-confidence.
5	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?	No.
6	Should the ACCC specify any other conditions and limitations of the exemption?	No.
7	Would competition in the markets for the supply of wholesale and retail superfast broadband services to residential customers	Yes. The class exemption strongly promotes competition in both wholesale and retail markets.

	be promoted by the draft class exemption instrument?	<p>Wholesale market - the ability to operate retail services greatly improves a small wholesale operator's ability to compete for and invest in the provision of infrastructure, as they can ensure quality RSPs and delivery of services to end-users.</p> <p>Retail market - an additional retailer adds competition to the market. Any retailer that is connected with a wholesale operator is more invested in providing high quality outcomes for consumers on that network.</p>
8	Could this be aided by any further conditions or limitations on the exemption?	No.
9	What substitute services should the ACCC consider as part of its assessment?	Not applicable.
10	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?	Yes. We refer to our response to question 2.
11	Do you agree that implementing a class exemption will have no impact on achieving any-to-any connectivity?	Yes.
12	Will the draft class exemption instrument promote the economically efficient use of, and economically efficient investment in, infrastructure?	Yes. The exemption is necessary to reduce the significant financial burden of structural or functional separation for smaller wholesale operators. This promotes increased investment in these networks and enables them to better compete with larger operators.
13	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?	<p>Yes. At levels up to 12,000 services, the financial burden of structural and functional separation is significant and disproportionate. It follows that the economically efficient use of, and economically efficient investment in, infrastructure is promoted by increasing the exemption threshold.</p> <p>For larger operators (50,000+ services) there is already likely to be a high degree of separability with the different staff / multiple offices / complex structures, so the relative cost is far lower.</p>
14	Are there any other matters not captured under the LTIE test that the ACCC should take into account in deciding to make an exemption?	No.
15	Would the above proposed separation requirements present any major practical difficulties or costs for your business?	<p>Yes. We refer to our response to question 2.</p> <p>The following costs would need to be incurred in order to achieve functional separation:</p>

		<ul style="list-style-type: none"> <li>• Estimated six additional full-time employees (minimum to operate a separate business unit)</li> <li>• Additional office space</li> <li>• Management time/energy focused on compliance instead of value-adding activities</li> <li>• Costly separation of systems</li> <li>• Legal advice</li> </ul> <p>These costs and difficulties would be prohibitive in being able to operate in the retail market.</p>
16	Would the allocation of the above activities to the wholesale and retail business units be suitable for your business?	No. We refer to our responses to questions 2 and 15.
17	If not, what would be a more suitable allocation of activities between wholesale and retail business units for your business?	Not applicable. We refer to our responses to questions 2 and 15.
18	Would the allocation of personnel between wholesale and retail business units proposed above be suitable for your business? Please provide details.	No. We refer to our responses to questions 2 and 15. Functional separation would require us to engage additional employees who would be duplicating work of existing employees and/or would have an insufficient workload.
19	If not, what would be a more suitable allocation of personnel between wholesale and retail business units?	Not applicable. We refer to our responses to questions 2 and 15.
20	Are the proposed information sharing restrictions and training obligations reasonable?	No. We do not think it would be practical to restrict information sharing within a smaller office due to the close physical and social proximity of staff. We believe this could only be achieved in a larger environment.
21	Would your business have any difficulties introducing the proposed incentive structures?	<p>Yes. The proposed governance requirements are unlikely to be practical. For example, our Chief Executive Officer would be the manager of the wholesale unit. It would not be possible (or desirable) to find someone with comparable seniority to manage the retail unit.</p> <p>We would also need to incur significant legal costs to obtain advice in relation to the proposed governance regulations.</p>
22	What degree of separation of IT systems and applications would be feasible for your business?	Nil. The expense and disruption involved with the proposed separation of IT systems and applications would be disproportionate to the scale of our retail operation.

23	Would you object to all provisions being treated as fundamental provisions? If so, which ones wouldn't you wish to see included and why?	Yes. We believe that whether or not provisions are fundamental should be proportionate to the size of the organisation.
24	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 refer to our response to question 20.
25	Do you have views on the timing and content of compliance plans and compliance reports to be provided pursuant to the undertaking?	No. However, we respectfully note that the requirement to provide ongoing compliance reports is another impost that will disproportionately affect smaller businesses. We strongly believe that the maximum threshold of 12,000 services for the exemption should be adopted.
26	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 believe that class exemptions should be made with reference to size. We suggest that the class exemption should apply to wholesalers with up to 12,000 residential customers. We have no submissions in relation to any classes for larger wholesalers.
27	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?	We believe that the fairer approach would be to make a number of undertakings that apply to a number of specified classes.
28	To the extent the ACCC has discretion under the legislation, what provisions should apply or not apply for particular classes of corporations?	To the extent possible, we believe that the provisions applying to smaller wholesalers should be minimised.
29	Do you think the ACCC's proposed treatment of the non-discrimination provisions is reasonable?	We agree with the ACCC's view that the obligations under Sections 151ZF and 151ZG exist independently of the functional separation undertaking provisions, and that it is not necessary to repeat such obligations in the deemed undertakings.