



Consultation Paper: Exemptions for controllers of superfast fixed-line networks from separation requirements

January 2021

Purpose

This consultation paper seeks views on whether the Australian Competition and Consumer Commission (ACCC) should have the power to allow certain high speed fixed line networks (referred to as 'networks' in this paper) to offer both wholesale and retail services.¹ Networks with 2,000 or less customers can already provide both retail and wholesale services. However, regulations can be made to increase this limit to up to 12,000 customers. The Minister for Communications, Urban Infrastructure, Cities and the Arts is considering whether regulations of that nature should be made. This consultation process will inform that decision.

Submission process

The Department of Infrastructure, Transport, Regional Development and Communications (the Department) welcomes submissions from individuals, businesses, peak bodies and other interested parties on the matters set out in this consultation paper.

Submissions will be accepted until close of business Friday 5 February 2021 via:

Email:

InfrastructureAndAccess@infrastructure.gov.au or

Post:

Director, Telecommunications Competition

Department of Infrastructure, Transport, Regional Development and Communications

GPO Box 2154

CANBERRA ACT 2601

Personal information such as your name and contact details will be collected by the Department through this consultation process when it is contained in submissions (including submissions in the form of an email or letter). Submissions will be used to consider the Government's position.

All submissions will be published on the Department's website unless a need for confidentiality is indicated to the Department in writing at the time of submission. The names of individuals who submit will be published with their submission unless a request for anonymity is made in writing with the submission. It is not our practice to publish contact details or other personal information contained in submissions and, if included by submitters, these details will be redacted prior to publication.

¹ References to 'networks' in this paper should be read to mean controllers of superfast fixed line networks. 'Superfast' networks are those networks that can provide peak download speeds of 25 Megabits per second (Mbps). This includes fibre networks, but excludes copper (ADSL) networks.

Your name, contact details and other personal information will not be provided to any other person or organisation unless it is required to consider the Government's position, required by law or we seek, and you give us, your permission to do so.

The Department's Privacy Policy contains information about privacy obligations, as well as complaint handling processes and how to access and/or seek correction of personal information held by the Department. If you wish to correct personal information in relation to your submission to this consultation process, please email InfrastructureAndAccess@infrastructure.gov.au.

Background

Since 1 January 2011, controllers of newly built networks must operate those networks on a wholesale-only basis. This means that a company that controls a network cannot itself supply retail services over it – instead that company must ask other companies to supply retail services to residents connected to the network.

These requirements are important because it is possible for a network operator that is both a wholesaler and a retailer to advantage itself. For example, an integrated business may have incentives to preference its own retail arm on price and non-price terms (for example, prioritising its own repairs). Further, the retail arm may have greater access to information, for example, about network capabilities, scheduled maintenance and proposed upgrades. This, in turn, could result in competitors exiting the market and deterring new entrants, thereby narrowing the number of retailers that consumers can choose from. Prices may increase and choices may be more limited as a result.

However, in some cases, integration between the wholesaler and the retailer on a network can result in better outcomes for consumers. For example, if more companies can provide both retail and wholesale services, they may be able to generate the revenue needed to gain a foothold in the market. In the longer term, this may help those providers challenge incumbent providers, in turn increasing competition at the retail and wholesale level.

Recent changes to the law

The law was recently changed in a way that was designed to promote infrastructure competition in broadband services.

The default rule remains that networks must operate on a wholesale-only basis. However, the *Telecommunications Legislation Amendment (Competition and Consumer) Act 2020* (TLA Act) amended Part 8 of the *Telecommunications Act 1997* such that a network can provide both retail and wholesale services for lines built or upgraded from 1 January 2011) that are used to provide superfast broadband services to residences if the ACCC accepts an undertaking setting out how the network will functionally separate its retail and wholesale services.

The new laws also allow the ACCC to exempt networks with up to 2,000 customers from the wholesale-only requirements altogether. Regulations can be made to increase the customer limit to which the exemption power applies to 12,000.

The TLA Act also amended the definition of 'local access lines'. From 25 August 2020, if a line in a multi-dwelling building is used to supply a superfast carriage service to a residential customer in the building then it is taken to be a local access line that forms a part of the infrastructure of that telecommunications network. As a result, networks that use lines within a building and wireless technologies to distribute superfast broadband to customers in multi-dwelling buildings will be

captured by the separation requirements. As a result, the separation requirements are relevant to more businesses than they would have been under the previous laws.

ACCC decision on a class exemption

On 25 August 2020, the ACCC announced that it had decided to exempt network controllers with up to 2,000 residential services from the structural and functional separation requirements. The ACCC indicated that it was satisfied an exemption from the separation requirements would reduce the disproportionate regulatory cost burden on smaller networks, and would enable them to invest in competitive infrastructure through increasing the reach of their networks and improving the quality of services provided to end-users.

A summary of submissions made to the ACCC in advance of this decision is in [Appendix A](#).

The ACCC put forward the view that competition will continue to be safeguarded by the Superfast Broadband Access Service (SBAS) and Layer 2 Bitstream Access Service (LBAS) declarations and determinations. Those declarations and determinations require wholesalers of superfast broadband to provide a wholesale broadband service to other retailers on request. The ACCC also noted that high speed mobile and wireless services will provide a competitive constraint to possible services offered for some customer types and geographic areas.²

The ACCC drafted the exemption instrument such that any decision by the Government to create regulations to increase the class exemption limit up to 12,000 residential services would automatically increase the class exemption limit if and when such a regulation is made.³

The key question for this consultation process is whether regulations should be made to allow the ACCC to increase the class exemption limit to 12,000 residential services (which would be given effect automatically were regulations made).

Question 1:

Should regulations be made to increase the class exemption limit to 12,000 services? Please provide reasons to substantiate your views.

Specific considerations

How would businesses be affected?

The Department would like to better understand whether providers are likely to be captured by the new structural separation requirements, and how those providers might be affected by an increase in the class exemption limit.

² See ACCC Explanatory Statement for the *Telecommunications (Superfast Broadband Network Class Exemption) Determination 2020*, p.2, which is available at www.accc.gov.au/system/files/Superfast%20Broadband%20Network%20Class%20Exemption%20Determination%20-%20Explanatory%20Statement_0.pdf

³ See subparagraphs 7(a)(ii) and 7(b)(ii) of the *Telecommunications (Superfast Broadband Network Class Exemption) Determination 2020*, which is available at www.accc.gov.au/system/files/Superfast%20Broadband%20Network%20Class%20Exemption%20Determination.pdf.

For instance, some providers could potentially benefit in the immediate or short term by a decision to increase the class exemption limit to up to 12,000 customers. The Department is aware that some networks serve multiple developments, generally in the larger cities, but have less than 12,000 customers in total.

Generally, networks of this size provide services to premises within multi-dwelling units, using local access lines. Sometimes the use of local access lines within a multi-dwelling unit is combined with a technology like Wi-Fi to deliver services to multiple premises, and from 25 August 2020, new services provided under this scenario are now captured by the carrier separation requirements. While in this case the carrier separation requirements only apply to lines built since 25 August 2020, the count of the number of premises for the purposes of determining whether the class exemption applies includes services supplied to customers over all lines regardless of when they were built. Therefore, the Department is particularly interested in the impact on businesses serving multi-dwelling units, which previously may not have been subject to the wholesale-only requirements in Part 8 of the Act. Some operators may not be aware of this change because they have not previously had to consider structural or functional separation.

The Department is also interested in understanding in detail whether the proposed new functional separation requirements will create a significant compliance burden for smaller infrastructure providers, including in terms of whether separating staff, office spaces and information systems could increase operating costs for small providers.

The Department notes that the ACCC has some flexibility in the type and scope of the separation requirements that it can accept and establish through both functional separation undertakings and deemed functional separation undertakings. For example, it is open to the ACCC to accept undertakings that do not separate employees and business systems.

The Department notes that on 25 August 2020, the ACCC initiated consultation on a draft deemed functional separation undertaking that had significantly less strict requirements than those outlined in the ACCC's original 5 June 2020 consultation. On 16 October 2020, the ACCC issued a final deemed functional separation undertaking instrument that broadly implemented these more relaxed requirements, but limited its availability to providers with less than 50,000 residential customers.⁴

Question 2:

How would businesses be affected by increasing the class exemption limit from 2,000 to 12,000 customers? Please outline the nature of your business and how your customer base may be impacted.

Question 3:

If your business could agree a functional separation undertaking that did not require separate business systems and employees, would it reduce the costs of functionally separating? If so, to what extent?

⁴ More details on the ACCC's current consultation process on a draft deemed functional separation undertaking are available at www.accc.gov.au/regulated-infrastructure/communications/fixed-line-services/superfast-broadband-network-class-exemption-deemed-functional-separation-undertaking/final-deemed-functional-separation-undertaking-instrument.

Question 4:

If you provided a submission to the ACCC's consultation processes on the deemed functional separation undertaking, do the ACCC's revisions affect your views on the costs of functional separation? If so, how?

Would a change in the class exemption limit promote competition?

The Department is interested in whether an increase in the class exemption limit to 12,000 customers would be pro-competitive. In particular we are interested in whether it could help smaller competitors to build a customer base prior to functionally or structurally separating (when the customer limit is reached).

In addition, we would like to know whether reducing the regulatory burden on smaller networks may encourage them to overbuild existing networks, which would lead to some increased competitive pressure on incumbent providers, including NBN Co.

The Department is aware that often smaller networks are the only fixed-line provider in the areas they service. There is a possibility that the high initial outlays associated with network build create markets with the properties of a natural monopoly, and it may not be commercial for another efficient provider to compete at the infrastructure level. Consequently, the Department is interested in whether an increase in the class exemption limit would increase the likelihood of localised fixed-line infrastructure monopolies.

The Department is also interested in understanding whether increasing the class exemption limit will promote fixed-line infrastructure competition in practice. For instance, while exempted providers will be required to supply their services on a non-discriminatory basis, it is possible that they may still receive an advantage over their competitors by virtue of being integrated. Information advantages with respect to the retail market may allow integrated providers to better target customers and capture market share making it difficult for other infrastructure providers to compete.

Finally, the Department is interested in whether retailers will choose to compete on a network that is within the class exemption limit, which are inherently small. For instance, even when access to services is mandated by ACCC service declarations, there is a risk that very few retail competitors will choose to seek wholesale services on smaller networks due to the costs of interconnection and interfacing with the network controller's business systems.

Question 6:

Would a change in the class exemption limit allow smaller networks to obtain a stronger foothold in the market?

Question 7:

Would smaller networks taking benefit of a class exemption choose to overbuild existing networks? Or would those providers focus on building networks without an incumbent?

Question 8:

Is there a material risk that increasing the class exemption limit could promote infrastructure monopolies and discourage competition at the retail level?

Would a change in the class exemption limit affect service quality and promote unsustainable entrants?

The Department is interested in whether increasing the class exemption limit to 12,000 customers would create risks in relation to service quality for retailers and consumers.

For instance, it is possible that enabling smaller networks to operate on a vertically integrated basis would present service quality risks and promote entry into the market by unsustainable businesses. If a carrier ceases to become commercially viable, other network providers are likely to step in to provide services, but this could take time, and lead to significant service disruption for consumers.

The Department notes that smaller networks without statutory or Ministerial exemptions are subject to the LBAS declaration and the associated final access determination. As a result, all superfast broadband providers are required to supply a layer 2 bitstream service to a retailer on request. Unlike the SBAS, there is no minimum limit to the size of the networks to which the LBAS declaration apply.

The ACCC is currently reviewing the SBAS and LBAS declarations, and since the amendments made by the TLA Act, is now in a position to repeal the LBAS should it choose to do so.

The Department notes that concerns about service quality could potentially be mitigated by the new Statutory Infrastructure Provider (SIP) obligations, which commenced on 1 July 2020. The SIP obligations are designed to ensure that all Australian premises are able to access superfast broadband services (25 Mbps download or better and 5 Mbps upload or better). SIPs are required to connect premises and supply wholesale broadband services on reasonable request from a carriage service provider on behalf of a consumer. NBN Co is the SIP for areas where it has rolled out its network and it will be the default SIP for all of Australia after the NBN is declared built and fully operational. Other network providers can also be SIPs where appropriate, and on 20 August 2020 the Minister declared 17 new SIPs.⁵ The Minister could also make standards, rules and benchmarks that could set out more detailed requirements, such as timeframes for providing access and rectifying faults. SIPs would be required to comply with any such standards, rules and benchmarks.

Question 9:

Would increasing the maximum allowable class exemption increase the likelihood of poor end-user outcomes? If so, why?

Question 10:

Are potential concerns about service quality mitigated by the ACCC SBAS and LBAS declarations and the new Statutory Infrastructure Provider obligations?

⁵ See the *Telecommunications (Designated Service Area and Statutory Infrastructure Provider) Declaration (No. 1) 2020*, which is available at www.legislation.gov.au/Details/F2020L01053.

Appendix A: Summary of outcomes of ACCC consultation process

In preparation for the commencement of the TLA Act, on 5 June 2020, the ACCC consulted publicly on a draft instrument for the class exemption of small networks of up to 2,000 customers. The ACCC sought feedback on the class of persons, if any, to whom the exemption should apply and queried whether any other conditions and limitations should be included. The discussion paper also sought input on a draft Deemed Functional Separation Undertaking that outlined the requirements that providers would need to meet to avoid having to structurally separate.⁶

During its consultation process, the ACCC received submissions from: NBN Co; the Australian Communications Consumer Action Network (ACCAN); Aussie Broadband; several smaller infrastructure providers (Connected Australia, Countrytell, Frontier Networks, Lynham Networks, Real World Networks, Swoop, and VostroNet); Telstra; TPG Telecom; and Uniti.

NBN Co argued that a level playing field requires a uniform regulatory approach, that is, all telecommunications infrastructure providers should be fully structurally separated. NBN Co therefore opposed the introduction of any exemption that would potentially establish a three-tiered approach to the separation requirements (i.e. fully structurally separated carriers, functionally separated carriers and, for those subject to the class exemption, vertically integrated carriers). NBN Co argued that such a situation would neither support efficient investment nor promote infrastructure-based competition for consumers.

ACCAN argued that exemptions from structural separation requirements can lead to poor outcomes for consumers. ACCAN's preference was for providers with 2,000 or more customers to be subject to either functional or structural separation.

Smaller telecommunications providers argued that functional separation would impose substantial costs on their businesses (both in terms of initially separating business operations and then maintaining separate business arms). Smaller providers argued they were already competing in a low-margin market. Aussie Broadband, Lynham Networks, Countrytell, Connected Australia, Real World Networks, VostroNet and Swoop all submitted that it would not be viable for an operator with less than 2,000 connections to separate, and that strictly enforcing the requirements would not promote meaningful competition. There was some consensus from this stakeholder group that providers would need to have around 50,000 customers before functional separation would be financially viable.

Larger providers, including Telstra and TPG tended to concur with the positions outlined by smaller providers. Telstra argued that functional separation would impose overly onerous requirements on smaller providers, which would result in material costs to their businesses. TPG argued that the ACCC should keep the goal of infrastructure-based competition front-of-mind and argued that applying the same separation requirements that apply to NBN Co to smaller providers would make the mistake of treating market entrants as if they had equal market power and access to low cost capital as NBN Co.

⁶ See *ACCC Superfast Broadband Network Class Exemption and Deemed Functional Separation Undertaking* consultation paper, which is available at www.accc.gov.au/regulated-infrastructure/communications/fixed-line-services/superfast-broadband-network-class-exemption-deemed-functional-separation-undertaking.