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Re: Superfast broadband network class exemption and deemed functional separation undertaking consultation

ACCAN thanks the ACCC for the opportunity to comment on the superfast broadband network class exemption and deemed functional separation undertaking consultation paper.

ACCAN has previously supported the amendments to Part 7 and 8 of the Telecommunications Act 1997.¹ The amendments allow superfast fixed line broadband networks serving residential customers to operate on a functionally separated basis, where networks are able to voluntarily submit functional separation undertakings or the ACCC can determine a standard functional separation undertaking, known as a 'deemed' undertaking.

Infrastructure owners have the market power and incentives to maximise their profits by charging prices in excess of competitive market rates. Vertical integration reduces retail competition and leads to poor consumer outcomes. However, the cost of structural separation may be prohibitive for smaller providers to enter the market, therefore the option of adopting a functional separation could potentially reduce their costs and encourage investment in the market.

This submission considers issues relating to the draft instrument for the exemption for small networks to operate on a wholesale-only basis, the nature and extent of functional separations for deemed undertakings, as well as the classes of corporations to which deemed undertakings should apply.

Draft class exemption instrument

Exemptions can be justified on the basis that it is necessary to protect the sunk costs made by private investors. By reducing the cost of participating in the superfast broadband market, a class exemption which relieves smaller network operators from undergoing structural or functional separation requirements should encourage investment and entry into the market. However, the objective of encouraging investment needs to be balanced with the objective of precluding the exercise of market power by owners of infrastructure in the wholesale market.

¹ ACCAN (2017) *Telecommunications Reform Package Submission*.

<https://accan.org.au/files/Submissions/ACCAN%20submission%20to%20Telco%20Reform%20Package.pdf>

Australian Communications Consumer Action Network (ACCAN)

Australia's peak body representing communications consumers

Consumers on networks subject to exemptions often receive a service which is inferior to those available on the open retail market via the NBN. For example, we frequently receive calls from consumers on Telstra's Velocity network regarding a lack of retail choice and poor service, a selection of these case studies can be found in the appendix. Furthermore, the Department of Infrastructure, Transport, Regional Development and Communications received over 40 submissions from residential and small business consumers on Telstra's exemption extension requests.² The submissions show that many of the consumers are not satisfied with the price and performance of the service. Considering the poor customer outcomes which have materialised when network operators have been allowed to operate on a wholesale and retail level, ACCAN recommends caution when granting exemptions.

Class of persons

The draft instrument defines the class of persons by the number of residential customers to whom a person or group of associated persons is supplying fixed line carriage services to. Currently the maximum threshold is 2,000 services and may be increased to 12,000 residential fixed line customers by ministerial determination.

A maximum threshold of 2,000 appears to be appropriate, although we are unable to say whether this will provide enough incentive for new operators to enter the market. Nevertheless, ACCAN believes the ACCC should not allow for an automatic extension of the 2,000 services to any maximum threshold of fixed line carriage services. We consider it more appropriate that the ACCC make an assessment on a case by case basis for network operators seeking to extend beyond 2,000 services, due to the fact that consumer outcomes will largely depend on where the exemption will be granted. An assessment should consider whether an area is already being served by another network operator and the characteristics of the location.

If a new operator decided to overbuild a pre-existing network, the new operator would have to provide a cheaper and/or higher quality service to attract consumers from the incumbent. Thus, as long as consumers have the option of an alternative wholesaler, we would expect consumers to benefit from the increased levels of competition. In this instance, we welcome the exemption as it will encourage network operators to invest and compete.

ACCAN has concerns regarding a network operator being encouraged to enter the market by being granted an exemption in an area where it will become the monopoly, for example a new development. Where a network operator has been named the Statutory Infrastructure Provider (SIP) for that area and is exempt from operating on a wholesale-only basis, the network operator will be able to exercise its monopoly power and charge uncompetitive prices.

ACCAN understands that the services mentioned in the exemption instrument are covered by the Local Bitstream Access Service (LBAS) and Superfast Bitstream Access Service (SBAS) declarations. However, there is an exemption to the standard access obligations (SAOs) for SBAS providers supplying

² Department of Infrastructure, Transport, Regional Development and Communications (2020) *Have Your Say – List of public submissions*. <https://www.communications.gov.au/have-your-say/consultation-telstra-request-extensions-ministerial-exemptions-its-south-brisbane-and-velocity>

up to 12,000 end users under the current SBAS final access determination (FAD).³ Thus we have concerns over the lack of price regulation on smaller networks that may permit network operators to supply services at monopolistic prices.

It is for this reason that the characteristics of a location also need to be considered when granting exemptions beyond 2,000 services. Given that superfast broadband providers supplying up to 12,000 end users are not subject to the regulated SBAS prices, the ACCC should be acutely aware of the characteristics of the location where an exemption is to be granted. For example, if the exemption is granted in an area characterised by households on lower incomes, consumers in the area may be less able to absorb high costs of telecommunications. For consumers on limited incomes, the burden of monopoly or non-competitive prices is inequitable and unnecessary.

Additional considerations and limitations

ACCAN considers it appropriate that the network operators provide the ACCC with network expansion plans. This will assist the ACCC in assessing whether the exemption will promote the long-term interest of end users (LTIE).

ACCAN's main concern regarding the exemption is that there is genuine non-discrimination in the supply of the wholesale service. ACCAN considers it important that compliance reporting be carried out for network operators who are exempt from supplying wholesale-only. The compliance reporting should be timely and include proof that services have been supplied on a non-discriminatory basis, regarding price and non-price terms. Where this has not been achieved, a network operator should provide justification of why it hasn't occurred, and what they intend to do to remedy the discrimination.

It is important that the compliance report include details of the quality of service supplied. This would assist in overcoming the potential for a wholesaler to favour its own retail customers by providing a higher quality service, for example by achieving quicker repairs or lower percentage of missed appointments compared to what they would provide to the alternative retailer.

Despite non-discriminatory rules, network operators can create additional barriers to retailers from accessing their services. For example, creating operational systems which are prohibitively complex and expensive for other retailers to engage with. Due to continuing concerns over a lack of retailer choice on vertically integrated networks, ACCAN urges caution when granting exemptions above the 2,000-maximum threshold.

Nature and extent of functional separations provisions for deemed undertakings

ACCAN is supportive of the proposal for corporations to choose to be bound by the terms of the determination via a deemed undertaking. This will reduce compliance costs for smaller providers. Furthermore, ACCAN is supportive of the suggested nature of the functional separations and would

³ Australian Competition and Consumer Commission (20170) *Superfast Broadband Access Service and Local Bitstream Access Service Final Access Determination join inquiry. Final decision report.*

hope to see all the provisions mentioned in the consultation paper being treated as fundamental provisions. Additionally, we support the ACCC's preference that wholesale and retail business units operate physically separate IT systems and applications and recommend this be included in the legislation.

ACCAN notes that there may continue to be incentives for employees of a network operator to favour its own retailer over alternative retailers due to employee share schemes. For this reason, it is necessary that non-discriminatory compliance reporting be put in place.

Classes of corporations to which deemed undertakings should apply

We believe the ACCC should make a single deemed undertaking that should apply to corporations. This would also contribute to establishing a more level playing field and creating simplicity. We currently do not see any benefit from specifying different classes to which different deemed undertakings should apply. The focus should be on the LTIE, which we believe can be achieved with a single deemed undertaking rather than multiple.

If you have any questions regarding this submission, please do not hesitate to contact me.

Sincerely,

Megan Ward

Economic Adviser

Appendix

Case Study 1: Richard's story

Richard lives with his elderly mother in a house in South Brisbane. Richard was on an Exetel broadband plan on Telstra's velocity network, which cost \$39/month. A few years ago, he was disconnected in error when trying to change the name on his account and when he sought to re-connect his service, Exetel told him that they couldn't because his plan was no longer being offered and only Telstra serviced his address.

Richard receives a Centrelink Carer's Allowance. He talked to Telstra about getting a phone and internet plan, but he could not afford any of the available bundles. Richard was able to get a \$25/month concessional home phone service with Telstra due to his mother's eligibility as an age pensioner, but he relies on a portable 4G Vodafone WiFi dongle for internet access because it is all he can afford. His mobile broadband performance is poor, as he lives in a densely populated area where the network is frequently congested. Richard told ACCAN that it's unfair that he doesn't have a choice about which fixed broadband provider he can use.

Case study 2: Allen's story

Allen* lives in a residential estate in the Swan Valley area, WA. Before the COVID-19 outbreak, he was paying for a 25/1 Mbps home broadband service delivered via the Telstra Velocity network. Once he started working from home during the outbreak, he realised that his service was not suitable to his needs, as it was averaging download speeds between 4-8 Mbps. He contacted his provider, Internode, to upgrade his service to the 100/5 Mbps speed tier. Internode assured him that the upgrade would significantly improve his service's performance.

Allen did not experience any change in service performance after the upgrade. He continued to experience download speeds in between 4-8 Mbps. A few weeks after the upgrade, he contacted Internode to make a complaint. Internode organised a Telstra technician to attend his address and find out the nature of the problem. The Telstra technician tested his lines and told Allen that his connection would only be able to receive a maximum download speed of 44 Mbps.

When Allen contacted Internode to escalate his complaint, Internode told him that the fine print of his contract stipulated he was not guaranteed to receive the maximum 100/5 Mbps speed. Allen asked Internode to refund the difference between what he had been paying for the upgraded service and what his original 25/5 Mbps service costed. Internode refused. Allen has contacted Telecommunications Industry Ombudsman and continues to seek a partial refund.

Case study 3: Sami's story

Sami lives in South Brisbane and has a 100/1 Mbps broadband service with Telstra, delivered over the South Brisbane network. Sami works in IT and needed to start working from home due to the COVID-19 outbreak. Sami soon realised that her home internet connection could not sustain her working-from-home needs. She found that her plan's upload speed was far too slow to allow her to work effectively, and this negatively impacted her ability to work from home.