



The Hon Malcolm Turnbull MP
Minister for Communications
Parliament House
Canberra ACT 2600

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By email: malcolm.turnbull.mp@aph.gov.au; infrastructureandaccess@communications.gov.au

Dear Sir

We appreciate being provided with an opportunity to respond to the Government's proposed *Carrier Licence Conditions (Networks supplying Superfast Carriage Services to Residential Customers) Declaration 2014 (the proposed declaration)*. Amcom is concerned about the potential impact of the proposed declaration and asks that the Government reconsider the regulatory steps that it puts in place to ensure that it implements only those measures that are necessary to meet its stated objectives and in a manner that minimises consequential costs to the telecommunications industry.

For the reasons outlined in this submission, it is Amcom's view that:

- (a) The proposed declaration should not be made or if made, it should only apply to TPG and its associates rather than carriers generally.
- (b) If the Government decides to proceed with the proposed declaration, we consider that the instrument should be amended so that open access must be provided on designated telecommunications networks but the captured carriers are not required to functionally separate.
- (c) In the alternative, if the Government decides that functional separation of captured carriers is required, the drafting of the proposed declaration needs to be amended to remove what appears to be an unintended consequence whereby it captures networks operated by carriers that are not themselves providing superfast carriage services to residential end-users.

Amcom's business

The product set of Amcom Telecommunications Ltd (*Amcom*) includes national data network access, unified communications, cloud solutions and managed services; all supported by Amcom's extensive fibre network and a range of IT services including advisory, integration and security solutions, making it the provider of choice for the converging Information, Communication and Technology needs of business and government across Australia. Amcom's subsidiary, Amnet Broadband Pty Ltd (*Amnet*) provides residential broadband services.

The scope of the proposed declaration

As a provider of telecommunications services to business and government customers, Amcom is outside what we consider to be the intended scope of the proposed declaration, i.e. high speed networks targeting residential customers in direct competition with the NBN. The residential services provided by Amnet are provided via ADSL and ADSL 2+ on Telstra's copper CAN rather than Amcom's fibre network and are not superfast carriage services.



However, Amcom is very concerned that the proposed declaration has been drafted in a manner that unintentionally captures networks providing wholesale services to other carriers or carriage service providers that have a residential customer base, rather than specifically targeting vertically integrated carriers that use their own networks to supply superfast services directly to residential customers. As a result, in its current drafting the proposed declaration casts a wider net than Parts 7 & 8 of the Telecommunications Act 1997 (*the Act*). This is extraordinary given that the proposed declaration will not be subject to anything like the level of scrutiny that Parliament and the Senate gave to the amendments that added Parts 7 & 8 to the Act.

The cost to industry resulting from the proposed declaration

Though we believe it to be a drafting error, the proposed declaration would capture a range of carriers operating fixed line networks and force them to legally or functionally separate. The Regulation Impact Statement that accompanied the proposed declaration (*the RIS*) almost goes so far as to dismiss the costs of functional separation out of hand, saying that in comparison to the multi-million dollar costs incurred when British Telecom and Telecom New Zealand functionally separated, the costs of imposing functional separation on (an Australian) carrier with a much more limited scale and network are "unlikely to be anywhere near these figures". The RIS goes on to say that the benefits of equitable competition through a level playing field for retail service providers are "likely" to be significant and "could" involve fewer barriers to innovation and lower prices overall for end-users, and over the long-term, the total benefits from functional separation "could" exceed the costs. What is notable about the RIS is that it provides no analysis to support any of this conjecture. The RIS makes no attempt to quantify the costs that a carrier will incur in being forced to functionally separate. Further, the RIS makes no attempt to cogently explain why functional separation of carriers will be of benefit to competition and result in lower costs for end-users but rather appears to assume it is accepted fact. This is very questionable given that the carriers likely be affected by the proposed declaration do not have substantial market power. Given this, it appears that the Government is imposing strict and costly regulation on the telecommunications industry as a defensive reaction to the potential for TPG's vectored VDSL2 network to cherry-pick valuable market share from NBN Co without undertaking adequate due diligence or properly assessing the impact of the proposed regulations.

Amcom believes that functional separation will be extremely expensive for any carrier that is forced to do so because of the proposed declaration. Though it is easy to conclude that as highly integrated, large incumbent national network operators the costs that British Telecom and Telecom New Zealand incurred to functional separate would be significantly higher than the costs likely to be incurred by any Australian carrier except Telstra, those two incumbents were monopolies (like Telstra) with very large pools of wholesale and retail customers that could not easily or quickly shift to another provider but rather had to wear any short to medium term increase in access fees that were passed on to them because of functional separation of the incumbent. The costs of functional separation are of course relative to the size of a company. Though it will not cost a small or medium sized carrier as much to functionally separate as a very large highly integrated carrier, the smaller carrier does not have the same ability to weather or spread the costs of additional staff, additional premises and additional systems or the same ability to pass those costs on to customers without losing market share. Further, unlike the incumbent carriers that the RIS refers to, including Telstra, other Australian carriers are without significant market power such that it is questionable whether any significant competitive benefit can result from their forced functional separation. In our view, the proposed declaration is contrary to the Act's regulatory policy, which at section 4(b) states that *(t)he Parliament intends that telecommunications be regulated in a manner that.. does not impose undue financial and administrative burdens on participants in the Australian telecommunications industry.* It is only reasonable that when imposing such stern measures on the telecommunications industry, that the Government also provide a comprehensive and transparent analysis of the financial and administrative burdens the industry will incur and fully explain why this is outweighed by the promotion of the long-term interests of end-users of carriage services. To date, this has not been done with regard to the proposed declaration.

The proposed declarations timeframe

The proposed declaration commences on 1 January 2015 and expires on 31 December 2016. This provides carriers with less than 8 weeks to undertake functional separation and is simply unachievable in that time frame. At the least, it would take months to put in place new business processes, to assign contracts, and to secure the skilled personnel to meet the conditions required in section 6(2) of the proposed declaration. A rush to put in place these measures will result in errors and inefficient costs, and adversely affect the quality of service provided by carriers, which is contrary to competition and the expectations of end-users.

Given the proposed declaration has only a two year life span, it is extraordinary that such onerous requirements and costs are being imposed and for them to then subsequently be dismantled. We simply cannot see how such a process promotes competition in telecommunications markets or benefits the long-term interests of end-users. It appears that the only parties that will benefit from these measures are Telstra and NBN Co. Telstra has already undergone structural separation and will benefit from a proposed declaration that places significant financial and administrative burdens on its competitors, and restrains their ability to compete via infrastructure based innovation. NBN Co will benefit because the proposed declaration hinders the ability of competitors to build competing networks and to operate as, or benefit from, the scale economies available to vertically integrated service providers. Though residential end-users may eventually benefit from a competitive environment where retail service providers operate on a level playing field, we consider that the significant short-term costs that will be incurred by carriers captured by the proposed declaration may well damage competition and increase end-user costs in the short to medium term. Given the relatively small size of many carriers operating in the Australian market, their ability to recover from such a setback is uncertain and this could cause long term damage to competition in telecommunications markets, which is detrimental to the long-term interests of end-users. With the lack of analysis presented in the RIS it is not possible to be satisfied that the Government has given sufficient thought to the impact of this proposed regulation beyond its wish to prevent the NBN's wholesale market being diminished by TPG's FTTB network. For these reasons we consider that functional separation may be too onerous a regulatory tool and that the Government's objective may be better achieved by simply requiring carriers operating vertically integrated designated telecommunications networks to provide competitors with open access to services on the network.

Part 7 & 8 of the Telecommunications Act

Parts 7 & 8 of the Act represent a considerable obstacle to the ability of existing carriers and new entrants to actively engage in facilities based competition in telecommunications markets. We are sure that this is not lost on the Government and we understand that the Government decided that the restraining effect of Parts 7 & 8 was necessary to ensure a level playing field exists for RSPs to compete for residential and small business customers via the NBN. However, we consider that in making further regulations the Government should be sensitive to introducing any additional competitive cooling. We are concerned that the proposed declaration could hinder competition as it does not specifically target the activities that have led to the proposed regulation.

The purpose of the proposed declaration

The RIS explains that the proposed declaration is required because TPG's vertically integrated vectored VDSL2 rollout to multi-dwelling units and multi-premises business centres will damage competition in those buildings. However, the proposed declaration may go beyond the measures that could be instituted to address TPG's rollout and may have the unintended consequence of capturing additional networks that are not operated in a manner similar to TPG's vectored VDSL2 network. We consider that the proposed declaration needs to be amended to correctly target its operation. This is necessary to ensure that carriers operating well within the boundaries set by Parts 7 & 8 and not

providing superfast retail services to residential and small business customers as a vertically integrated provider are not forced to functionally separate.

If vectored VDSL2 is the problem then it should be regulated

The RIS focuses specifically on vectored VDSL2, stating that it reopens the competition concerns that the NBN and the structural separation of Telstra were intended to address because vectored VDSL2 only functions at maximum capacity if operated by a single carrier. However, the proposed declaration does not address vectored VDSL2 and instead encompasses any fixed line network except for the NBN and specified HFC networks. The RIS explains that the Government believes that vertically integrated vectored VDSL2 networks will be detrimental to competition. If vectored VDSL2 networks are the reason for the proposed declaration, then the regulation should apply only to vectored VDSL2 networks and not to all superfast networks apart from HFC networks.

Application of class licence condition

The proposed declaration applies a class licence condition on all carriers operating *designated telecommunications networks*. This is despite the cause for the declaration flowing only from the decision of TPG to use PIPE Networks to target residential customers. Though the Government has said that there is a possibility that other carriers may propose networks such as that proposed by TPG and PIPE Networks¹, apart from NBN Co we are not aware of any other carriers proposing to build FTTB networks and service residential end-users via vectored VDSL2. Given this and that only a few carriers have superfast networks that were installed before 1 January 2011 that would be able to rely on the 1km extension exemption in Parts 7 & 8 that applies to TPG, the Government's decision to impose a class licence condition that could apply to any carrier seems to be unnecessary. Targeted regulation would place the licence condition only on TPG and its associates, which includes PIPE Networks. This would achieve the Government's objective without the risk that carrier's operating networks that do not compete in NBN Co's market could be forced to functionally separate.

The drafting of the proposed declaration

If the Government decides it is necessary to make a class licence condition rather than place licence conditions specifically on TPG and its associates, we ask that the current drafting of the proposed declaration be amended so that it only captures networks that the Government believes are operating in a manner contrary to the intention of Parts 7 & 8 of the Act. The proposed declaration should not apply to superfast networks that provide wholesale services to other carriers and carriage service providers, and retail services to business customers and not to residential customers. The drafting of the proposed declaration needs to be tightened to focus its application so that it does not capture carriers that do not compete with NBN Co. If the drafting is not corrected, carriers that operate predominantly wholesale or business focussed networks will potentially be forced to functionally separate even though their operations are unrelated to vectored VDSL networks operating in residential markets and their functional separation will not improve competition in residential markets.

The broad scope of the proposed declaration flows from its definition of *designated telecommunications network* in section 4 and in the declaration's application provision in section 5.

Section 4 provides that:

¹ Regulation Impact Statement, p.3

designated telecommunications network means a fixed-line telecommunications network (or part of a network) which:

- (a) incorporates local access lines or parts of local access lines necessary for the provision of carriage services; and
- (b) is used to supply superfast carriage services; and
- (c) is not :
 - (i) subject to either sections 141 or 143 of the Act; or
 - (ii) the subject of a ministerial exemption in force under section 141A or section 144 of the Act; or
 - (iii) any of the following types of networks:
 - (A) the national broadband network; or
 - (B) a Specified HFC network; or
 - (C) a fixed-line network that is used to supply carriage services wholly or principally to business customers and/or public bodies, provided that any incidental supply of carriage services to residential customers using the network does not represent more than [0.05%] of the total number of customers serviced by the network at any time; or
 - (D) a fixed-line network in existence immediately before 1 January 2011 that is used to supply carriage services principally to large business customers and/or public bodies and which is extended on or after 1 January 2011 by more than 1 kilometre from any point on the infrastructure of the network (as it stood immediately before 1 January 2011), provided that any incidental supply of carriage services to residential customers using the extended network does not represent more than [0.05%] of the total number of customers serviced by the network at any time; or
 - (E) any fixed-line network in existence immediately before 1 January 2011 which is situated in a real estate development project that is extended on or after 1 January 2011 to an area that was developed as another stage of the project; and
- (d) is situated anywhere in Australia.

Section 5 provides that

A carrier licence granted to any specified carrier is subject to all of the conditions set out in section 6 if, at any time, on or after the commencement of this Declaration the designated telecommunications network (or any part of the network) is used to supply a superfast carriage service to residential customers.

Together, the definition of *designated telecommunications network* and the application provided by section 5 result in the proposed declaration applying more broadly than Parts 7 & 8 of the Act. Clearly, the proposed declaration is intended to apply more broadly as its purpose is to capture networks that take advantage of the 1km exemption in Parts 7 & 8, but in doing so it currently also captures networks that do not pose a competitive threat to the NBN but acceptably operate outside the ambit of Parts 7 & 8 by providing retail superfast services to business customers and wholesale superfast services to CSPs that have a residential customer base. We consider that capturing such networks is an unintended consequence of the proposed declaration's drafting.

For example, the retail superfast services provided to business customers over fibre networks utilise lines that are installed directly into the business premises of the customer. These lines are commonly installed from the carrier's underground network in a street into the customer's building's main distribution frame room and up through the building's risers to the customer's tenancy. These lines can presumably be described as 'local access lines' as that term is used in paragraph (a) of the

definition of *designated telecommunications network* and also in sections 141D and 158 of the Act. As the fibre network supplies superfast carriage services as defined by section 141(10) of the Act, the network also fits within paragraph (b) of the definition of *designated telecommunications network*. Therefore, if the network is in Australia, in accordance with paragraph (d), it will be captured by the proposed declaration unless one of the exemptions in paragraph (c) applies. This can be considered as follows:

- Sub-paragraph (c)(i) will not necessarily apply as the business focussed network's local access lines are not being used to supply services to residential or small business customers.
- Sub-paragraph (c)(ii) will probably not apply as there are few ministerial exemptions.
- Sub-paragraphs (c)(iii)(A) and (B) will not apply as it is not the NBN or an HFC network.
- Sub-paragraph (c)(iii)(C) will not necessarily apply as the carrier's wholesale CSP customers utilising the network may be using the network as part of their supply of retail services to residential customers.
- Sub-paragraph (c)(iii)(D) will not necessarily apply as the network may not be extended and if it was the carrier's wholesale CSP customers utilising the network may be using the network as part of their supply of retail services to residential customers.
- Sub-paragraph (c)(iii)(E) will not necessarily apply as the network may not be part of an ongoing real estate development.

As such, the fibre network would be characterised as a *designated telecommunications network* and would be captured by the declaration if any part of the network is used to supply a superfast carriage service to residential end-users, even if the RSP providing the residential service is a wholesale customer of the carrier that operates the *designated telecommunications network*. This would result in the carrier having to functionally separate, even though its business of supplying wholesale services to other CSPs is acceptable under Parts 7 & 8, it is not supplying superfast services to residential end-users as a vertically integrated carriers, it is not using vectored VDSL so there is no issue regarding crosstalk interference in the local access lines, and its activities do not appear to pose the competitive threat that concerns the government of which TPG's rollout is an example.

A possible way to remove this problem from the proposed declaration is to make it clear that the licence conditions only apply to carriers supplying superfast services to residential customers on a vertically integrated network. This could be done by amending section 5 of the declaration as follows:

A carrier licence granted to any specified carrier is subject to all of the conditions set out in section 6 if, at any time, on or after the commencement of this Declaration the local access lines of a designated telecommunications network owned or operated by the specified carrier (or any part of the network) is are used by the specified carrier or an associate of the specified carrier to supply a superfast carriage service to residential customers.

Yours sincerely,



David Hinton

Chief Financial Officer and Company Secretary