

14 November 2014

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

By email: malcolm.turnbull.mp@aph.gov.au;
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Dear Sir

Thank you for the opportunity to respond to the Government's proposed *Carrier Licence Conditions (Networks supplying Superfast Carriage Services to Residential Customers) Declaration 2014* (**the proposed declaration**).

Vocus Communications (**Vocus**) is a leading supplier of telecommunications, data centre and high bandwidth connectivity solutions in Australia and New Zealand. Vocus owns and operates a global telecommunications network connecting Australia and New Zealand to the global Internet backbone in the USA and utilises its domestic network to provide telecommunications services to ISP and business customers. Vocus's additional telecommunications services also include data centre storage and dark fibre solutions.

As a provider of telecommunications services to wholesale and business customers, Vocus 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. However, Vocus is very concerned that the proposed declaration has been drafted in a manner that unintentionally captures networks that provide wholesale services to other carriers or carriage service providers that have a residential customer base. In this regard, the proposed declaration exceeds the scope of Parts 7 & 8 of the Telecommunications Act 1997 (**the Act**). In this submission, we describe the reasons for our concern and suggest how it can be remedied.

Part 7 & 8 of the Telecommunications Act

Parts 7 & 8 of the Act are a considerable obstacle to Vocus's ability to compete in telecommunications markets, in particular because of the negative effect that the provisions' prohibitions have on Vocus's ability to provide high speed broadband services to small businesses and to companies that at some point subsequent to acquiring a service from Vocus may become small businesses as a consequence of a downsize or personnel changes. Further, the 1km exemption allowing carriers with networks predating 1 January 2011, such as the network owned by TPG's PIPE Networks, has an anti-competitive effect by favouring some carriers over others simply because of the date that their respective networks were installed. If the result that the Government wants to achieve is to stop carriers from



building networks that will compete with or negatively impact the purpose or viability of a wholesale only NBN providing superfast residential services, then the Government should simply amend Parts 7 & 8 to remove the 1km exemption rather than impose complicated carrier licence conditions that do not ensure NBN Co retains the monopoly market position that the Government wants and further, potentially result in extremely costly but unintended consequences for carriers caught within the proposed declaration's ambit.

The purpose of the proposed declaration

The Government's Regulation Impact Statement¹ explains that the purpose of the proposed declaration is to counter a perceived threat to competition as a result of TPG's proposed vectored VDSL2 rollout to multi-dwelling units and multi-premises business centres. Vocus is concerned that the proposed declaration inadvertently oversteps the requirements that could be put in place to address TPG's rollout and has the unintended consequence of capturing networks that are clearly outside the stated purpose of the proposed declaration. We ask that the Government amend the proposed declaration to correctly target its operation in order to avoid the considerable costs of functional separation that will potentially result through implementation of a declaration that captures networks that are currently operating in a manner that is uncontroversially acceptable as per the parameters and purpose of Parts 7 & 8 of the Act.

Application of class licence condition

The Government has proposed to use the ministerial power in s.63(2) of the Act to apply a class licence condition on all carriers operating *designated telecommunications networks*, despite the immediate concern and cause for the declaration flowing only from the actions of TPG and its related carrier entity PIPE Networks. Though the Government has said that there is a possibility that other carriers may propose networks such as that proposed by TPG and PIPE², to date the only other carrier that has made similar proposals to build FTTB networks using vectored VDSL2 is NBN Co, which having a specific exemption is clearly outside the scope of the proposed declaration. Given this and that only a few carriers have superfast networks predating 1 January 2011 that would be capable of utilising the 1km extension exemption in Parts 7 & 8 that TPG and PIPE have relied on, the Government's decision to impose a class licence condition that could apply to all carriers seems to be an unnecessarily broad regulatory brush. A cleaner regulatory approach to achieve the Government's objectives would be to place the licence condition solely on PIPE, and possibly on any other carrier entity operated by TPG. This would avoid the unintended consequence described in this submission as well as other unintended consequences that are not immediately apparent but may come to light when the proposed declaration is put into effect.

Any carrier captured by the proposed declaration will be required to functionally separate into wholesale and retail companies. The Regulation Impact Statement states that the costs of functional separation of British Telecom and Telecom New Zealand were £153 million and NZ\$200 million respectively. The Regulation Impact Statement states that smaller Australian carriers would not incur costs anything like these amounts. These are very material amounts for any company to absorb, even very large incumbent operators, which sounds warning bells when assessing the value of the regulation against its impact. Though we agree that it is likely to cost significantly less for smaller carriers to functionally separate than the UK and NZ incumbents, the costs would be proportional to the size of a company and will

¹ Regulation Impact Statement for Early Assessment, Carrier Licence Conditions (Networks supplying Superfast Carriage Services to Residential Customers) Declaration 2014

² Regulation Impact Statement, p.3

undoubtedly be very material. Given this, we consider that any declaration implemented by the Government should carefully target the specific mischief that actually requires regulation. This is necessary in order to minimise damage to competition in other markets, such as the markets for wholesale telecommunications services and business telecommunications services. Failing to target the regulation and instead implementing a declaration with conditions applying broadly could result in carriers incurring very material costs to functionally separate without actually providing any benefit to competition or to the interests of end-users of carriage services, i.e. making it more expensive for carriers to compete in wholesale and business markets is very unlikely to promote a level playing field environment that allows RSPs operating in residential and small business markets to equitably compete.

The proposed declaration does not target vectored VDSL2

The Government's Regulation Impact Statement 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 actually mention vectored VDSL2 and instead encompasses any high speed fixed line network except for the NBN and specified HFC networks. The Regulation Impact Statement makes it clear that the Government's concern is the impact of vectored VDSL2 networks, as such the proposed declaration should be amended to target vectored VDSL2 rather than superfast networks in general.

The drafting of the proposed declaration is too broad

If the Government decides to make a class licence condition rather than place licence conditions specifically on PIPE and other TPG carrier entities, we ask that the current drafting of the proposed declaration be closely considered to ensure 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 current drafting of the proposed declaration is too broad and requires amendment to avoid the unintended consequence of capturing networks that do not compete with the NBN and are unquestionably outside the scope of Parts 7 & 8 of the Act, i.e. networks that provide wholesale services to other carriers and carriage service providers, and retail services to business customers and not to residential customers. Failing to correct the proposed declaration's drafting will result in carriers that operate predominantly wholesale networks being caught within the ambit of the proposed declaration and potentially being forced to exit some markets such as the provision of retail broadband to business customers or bear the considerable expense of functional separation, without any corresponding benefit to the competitive threat that has been identified by the Government.

The main problem is the proposed declaration's definition of *designated telecommunications network*, which is as follows:

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.

A simple way to demonstrate the problem is to consider whether Vocus's network fits within the definition of *designated telecommunications network*. Vocus owns a high speed fibre network that is used to provide wholesale services to other carriers and carriage service providers (**CSPs**) as well as retail services to business customers.

- Vocus's business customers are serviced via fibre lines that branch off the backbone of Vocus's fibre network and are installed directly into the customer's premises. These are 'local access lines' and therefore fit within paragraph (a) of the definition of *designated telecommunications network*.
- Vocus provides services such as inter-exchange transmission to other carriers and CSPs. These services fit within the definition of *superfast carriage service*³ because they are 25Mbps+ carriage services that are supplied using a line to premises occupied or used by an end-user, e.g. into an exchange building that is used by the carrier or CSP. Further, the services that Vocus provides to business customers are also clearly superfast carriage services as again the services are well in excess of 25Mbps+. As such, Vocus's network fits within paragraph (b) of the definition of *designated telecommunications network* as it is used to supply superfast carriage services.
- The carriers and CSPs that are wholesale customers of Vocus provide retail telecommunications services to residential customers, predominantly using Telstra's CAN for the last mile before the retail service is supplied to the residential customer. Vocus's fixed-line network is used as part of the supply of carriage services to those residential customers, even though Vocus's contribution to the supply of the services is a long way upstream in the various interconnected networks. Notwithstanding the fact that Vocus does not have any commercial relationship with the residential end-user it is clearly arguable that Vocus's network is used in the supply of carriage services to those end-users who may represent more than 0.05% of the total number of customers serviced by Vocus's network at any time which could result in Vocus

³ S.141 of the Telecommunications Act 1997

being unable to rely on the exemption in paragraph (c)(iii)(C) in the definition of *designated telecommunications network*. As Vocus's network does not fit within any of the other exemptions provided by paragraph (c), it appears that Vocus's network is unintentionally captured within the ambit of the proposed declaration, even though Vocus does not itself provide services to residential end-users or otherwise compete in the same market as NBN Co.

We believe that this is not the Government's intention in making the proposed declaration. We also believe that this problem can be easily rectified through an amendment to the paragraph (b) of the definition of *designated telecommunications network*, as follows:

(b) *is used to supply superfast carriage services to residential customers by the specified carrier or an associate of the specified carrier; and*

Yours faithfully



Mark Simpson
General Counsel & Company Secretary
Vocus Communications Limited