



**Submission to the Senate Environment and Communications Legislation Committee
(the Committee) from Amcom Pty Ltd (Amcom)**

**Inquiry into the National Broadband Network Companies Bill 2010 and the
Telecommunications Legislation Amendment (National Broadband Network Measures
– Access Arrangements) Bill 2010**

Introduction

Amcom is a licensed telecommunications carrier. Amcom owns a fibre optic cable network that it uses to provide a range of telecommunications services to Corporate, Government and Wholesale customers in Perth, Adelaide, Darwin and Alice Springs.

Amcom welcomes the opportunity to make a submission to the above inquiry. Amcom acknowledges the significant change that is being made to the landscape of telecommunications in Australia. This significant change is being effected by:

- the reform of Telstra (either through structural or functional separation)¹; and
- the creation of the National Broadband Network (**NBN**).

The framework in which the NBN will operate will be governed by the following legislation, once enacted:

- the National Broadband Network Companies Bill 2010 (**the NBN Companies Bill**); and
- the Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Bill 2010 (**the NBN Access Bill**)

(referred to together as **the NBN Bills**).

Amcom's submission to the Committee about the NBN Bills is limited to addressing a concern that the solution to "opportunistic cherry picking" set out in the NBN Access Bill may have unintended consequences which will have a significant impact on Amcom's ability to continue to carry out its existing business operations. By "opportunistic cherry picking" Amcom is referring to the upgrading or building of a network for the purpose of diverting the economic segments of the wholesale market away from the NBN.

Amcom is concerned that the provisions of the NBN Access Bill that are intended to ensure that "opportunistic cherry picking" does not occur, can be interpreted in ways that would lead to unintended consequences. These unintended consequences would lead to Amcom's network and current business operations becoming subject to onerous regulatory requirements that are intended to apply only to the networks of "opportunistic cherry pickers".

¹ This is being effected through *the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act 2010*.

The relevance of opportunistic cherry picking to Amcom's existing network and business activities

The NBN implementation study made the following recommendations that are relevant to the issue of “opportunistic cherry picking” (emphasis added)²:

Recommendation 73. *That any future fixed-line superfast access network built in Australia must offer wholesale services on an open-access and equivalent basis and, if it is an FTTP network, must comply with the technical specifications mandated in relation to the construction of FTTP access networks in greenfields; that this recommendation be subject to the following qualifications:*

1. **This requirement should not apply to existing superfast access networks** or to existing or future small proprietary networks that are not covered by the Telecommunications Act 1997;
2. For the purposes of this recommendation, a fixed-line superfast access network should be defined as a fixed-line access network delivering download data rates consistently exceeding 25 Mbps;
3. ACMA should be empowered to agree to variations to the technical specifications in specific cases where those variations do not interfere with the Government's NBN objectives and result in significant cost savings through the use of existing infrastructure.

Recommendation 74. *That, if plans are announced for significant third-party deployments in high-value, low-cost areas of fixed-line superfast access networks (defined as a fixed-line access network delivering download speeds consistently exceeding 25 Mbps but excluding small proprietary networks) during the NBN roll-out, Government consider the introduction of a universal service levy on the owners of all such networks; this levy to be inversely related to a network's contribution to the Government's objective of providing affordable broadband coverage to all Australians. It would be hypothecated to fund telecommunications subsidy schemes; any such levy to be subject to a sunset clause causing its expiry after no more than ten years.*

It is clear from these recommendations that it is only “future fixed-line superfast access networks” or “significant third party deployments” that are of concern. Accordingly, the business as usual operation of Amcom's existing network (including any non significant extensions to that network) cannot sensibly be seen as an instance of “opportunistic cherry picking” that requires regulatory intervention of the kind contemplated in the above recommendations. It is only if Amcom were to make a “significant additional deployment” of the type contemplated in recommendation 74 that Amcom's network would come within the mischief intended to be addressed by the above recommendations.

² National Broadband Network Implementation Study - McKinsey and KPMG at page 467.

How the NBN Access Bill addresses the issue of opportunistic cherry picking

Item 86 of the NBN Access Bill introduces a new Part 7 into the *Telecommunications Act 1997 (Telco Act)*. The effect of this proposed new Part 7 is that a network unit to which proposed new section 141 of the Telco Act applies, and which is not the subject of a Ministerial exemption, cannot be used to supply carriage services to the public unless a Layer 2 bitstream service is offered³. This Layer 2 bitstream service will be subject to technical regulation and will be required to be offered to access seekers on a non discriminatory basis⁴. It is clear from the explanatory memorandum to the NBN Access Bill⁵ that proposed Part 7 is intended to apply only to networks that:

- come into existence after 25 November 2010; or
- if the network existed prior to 25 November 2010, the network is altered or upgraded after 25 November 2010, with the result being that the network unit so altered or upgraded becomes capable of being used to supply a superfast carriage service.

The Explanatory Memorandum to the NBN Access Bill states⁶ that (emphasis added):

*Examples of the alteration or upgrading of a network unit could include extending an existing network, for example, by adding new line links, or upgrading the operation of a network unit so that it will support higher-speed broadband services. **If an existing network is operating to normally provide a download transmission speed in excess of 25 Mbps it would not be covered by these provisions. However, if a network is currently not capable of providing such services, but that network is upgraded, for example, through the deployment of new hardware or software or both, to be capable of supplying a download speed of more than 25 Mbps, the network would be captured.***

As Amcom's existing network was, prior to 25 November 2010, capable of operating in excess of 25 Mbps, Amcom's network should not be subject to proposed Part 7 of the Telco Act. However, Amcom submits that the way that proposed section 141 of the Telco Act is drafted, leaves open a possible interpretation that would allow a minor extension to Amcom's existing network to trigger proposed section 141 of the Telco Act and make proposed section 141 of the Telco Act applicable to Amcom's network.

Proposed section 141 of the Telco Act provides as relevant:

- (1) *This section applies to a network unit if:*
- (a) *the network unit is:*
 - (i) *part of the infrastructure of a telecommunications network in Australia; or*
 - (ii) *used, or for use, in or in connection with a telecommunications network in Australia; and*
 - (b) *the network is not the national broadband network; and*
 - (c) *the network is used, or is capable of being used, to supply a superfast carriage service to customers, or prospective customers, in Australia; and*

³ This layer 2 bitstream service will be a declared service under the *Competition and Consumer Act 2010* and would be subject to compliance with technical standards made by the Australian Communications and Media Authority (see item 93 and item 88 respectively of the NBN Access Bill).

⁴ See items 88 and 99 of the NBN Access Bill.

⁵ See page 165.

⁶ *ibid*

(d) no Layer 2 bitstream service is available for supply to those customers or prospective customers using the network; and

(e) either:

(i) the network came into existence after 25 November 2010; or

(ii) the network was altered or upgraded after 25 November 2010 and, as a result of the alteration or upgrade, the network became capable of being used to supply a superfast carriage service to customers, or prospective customers, in Australia; and

(f) the network unit is not used wholly to supply carriage services to a single end-user, where that end-user is:

(i) a public body; or

(ii) a company.

Amcom submits that although proposed section 141 of the Telco Act can be interpreted in a way that does not lead to it applying to Amcom's existing network (or to any non significant extensions of its network), it is possible to argue that section 141 can be interpreted to lead to either of the following two outcomes (both of which appear to be unintended):

- That "the network" for the purposes of 141(e)(i) includes all network units that make up the network. Therefore, if, for example, Amcom extended its network by adding a new customer lead in on 26 November 2010, Amcom's network would, for the purposes of 141(e)(1) have come into existence on 26 November 2010. If such an interpretation is followed, then any extension of Amcom's network would lead to Amcom's entire network becoming subject to proposed Part 7 of the Telco Act.
- Although Amcom's network as it existed prior to 25 November 2010 will not be caught by proposed section 141 of the Telco Act, any extension of Amcom's network made after 25 November 2010 will be caught. Therefore, if, for example, Amcom extended its network by adding a new customer lead in on 26 November 2010, proposed section 141 of the Telco Act would apply to that customer lead in.

Proposed solution

Amcom submits that the ambiguity referred to above, can be removed if the following amendments are made to the proposed section 141 of the Telco Act:

1. It is expressly stated that section 141 of the Telco Act does not apply to:
 - (a) superfast networks that were in existence prior to 25 November 2010; and
 - (b) any extensions to networks referred to in (a) above unless those extensions are significant.
2. The Minister is given power, after consultation with the ACCC, to decide whether a network extension is a significant network extension.

For convenience we have set out in the annexure to this submission, the proposed section 141 of the Telco Act with the Amcom's proposed changes set out in mark up.

The Government's statement of expectations

Amcom notes that in a joint ministerial media release, it was stated that new fibre networks built after 1 January 2011 for residential and small business purposes will be required to be wholesale-only as well as offering a Layer 2 service on an open-access basis⁷. Although it is difficult for Amcom to comment without seeing the detail of how this proposal will be implemented⁸, Amcom believes there is some value in Amcom bringing this issue to the Committee's attention, as it appears to be closely related to the "opportunistic cherry picking" issue. Amcom submits that a consistent approach should be taken so that any legislation which implements this requirement should make it clear that it does not apply to existing networks or non significant extensions to those networks.

Amcom Pty Ltd
3 March 2011

⁷ Department of Broadband, Communications and the Digital Economy (Media Release 132077, 20 December 2010).

⁸ In this regard Amcom notes that the joint ministerial media release stated that consultation with the industry about this issue would occur.

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Annexure

141 Supply of Layer 2 bitstream services

Scope

(1) This section does not apply to:

- (a) a pre-existing superfast telecommunications network; or
- (b) any network units that are added to a pre-existing superfast telecommunications network unless the Minister has issued a determination under subsection (2) that those network units are a significant deployment.

(2) The Minister may, by written instrument, determine that specified network units are a significant deployment for the purposes of subsection (1)(b) if the Minister is satisfied that those network units will significantly compromise the ability of the NBN Corporation to compete in a wholesale telecommunications market.

(3) Before making an instrument under subsection (2), the Minister must consult:

- (a) the ACCC; and
- (b) the ACMA.

(4) The owner of a pre-existing superfast telecommunications network may seek a declaration from the Minister that specified network units that are to be added to that pre-existing superfast telecommunications network are not a significant deployment for the purposes of subsection 1(b), and the Minister must issue such a declaration unless the Minister is satisfied that those network units will significantly compromise the ability of the NBN Corporation to compete in a wholesale telecommunications market.

~~(4)~~ (5) This section applies to a network unit if:

- (a) the network unit is:
 - (i) part of the infrastructure of a telecommunications network in Australia; or
 - (ii) used, or for use, in or in connection with a telecommunications network in Australia; and
- (b) the network is not the national broadband network; and
- (c) the network is used, or is capable of being used, to supply a superfast carriage service to customers, or prospective customers, in Australia; and
- (d) no Layer 2 bitstream service is available for supply to those customers or prospective customers using the network; and
- (e) ~~either:~~
 - ~~(i) the network came into existence after 25 November 2010; or~~
 - ~~(ii) the network was altered or upgraded after 25 November 2010 and, as a result of the alteration or upgrade, the network became capable of being used to supply a superfast carriage service to customers, or prospective customers, in Australia;~~subsection (1)(b) does not apply to the network unit; and
- (f) the network unit is not used wholly to supply carriage services to a single end-user, where that end-user is:
 - (i) a public body; or

- (ii) a company.

Sole owner of network unit

- (26) If there is only one owner of the network unit, the owner of the network unit must not:
 - (a) use the unit, either alone or jointly with one or more other persons, to supply a fixed-line carriage service; or
 - (b) allow or permit another person to use the unit to supply a fixed-line carriage service.

Multiple owners of network unit

- (37) If there are 2 or more owners of the network unit, an owner of the network unit must not:
 - (a) use the unit, either alone or jointly with one or more other persons, to supply a fixed-line carriage service; or
 - (b) either alone or together with one or more other owners, allow or permit another person to use the unit to supply a fixed-line carriage service.

Offence

- (48) A person commits an offence if:
 - (a) the person is subject to a requirement under subsection (26) or (37); and
 - (b) the person engages in conduct; and
 - (c) the person's conduct breaches the requirement.
 Penalty: 20,000 penalty units.

Exemptions

- (59) The Minister may, by written instrument, exempt a specified owner from subsections (26) and (37).

Note: For specification by class, see subsection 46(3) of the *Acts Interpretation Act 1901*.

- (610) The Minister may, by written instrument, exempt a specified network unit from subsections (26) and (37).

Note: For specification by class, see subsection 46(3) of the *Acts Interpretation Act 1901*.

- (711) An instrument under subsection (59) or (610) may be:
 - (a) unconditional; or
 - (b) subject to such conditions (if any) as are specified in the instrument.

- (812) Before making an instrument under subsection (59) or (610), the Minister must consult:
 - (a) the ACCC; and
 - (b) the ACMA.

- (913) An instrument under subsection (2), (59) or (610) is not a legislative instrument.

Definitions

- (1014) In this section:

fixed-line carriage service means:

- (a) a carriage service that is supplied using a line to premises occupied or used by an end-user; or
- (b) a service that facilitates the supply of a carriage service covered by paragraph (a).

national broadband network has the same meaning as in the *National Broadband Network Companies Act 2010*.

pre-existing superfast telecommunications network means a telecommunications network built before 25 November 2010 that was prior to 25 November 2010 capable of supplying a superfast carriage service.

superfast carriage service means a carriage service, where:

- (a) the carriage service enables end-users to download communications; and
- (b) the download transmission speed of the carriage service is normally more than 25 megabits per second; and
- (c) the carriage service is supplied using a line to premises occupied or used by an end-user.