3 February 2017

Telecommunications Reform
Broadband Implementation Branch and Infrastructure and Access Branch
Department of Communications and the Arts

Submission by NBN Comparable Carriers on Telecommunications Legislation Amendment (Competition and Consumer) Bill 2017 and the Telecommunications (Regional Broadband Scheme) Charge Bill 2017

This submission is made on behalf of the following carriers:

- OPENetworks Pty Ltd ACN 118 525 821
- LBN Co Pty Ltd ACN 073 226 114
- CNT Corp Pity Ltd ACN 106 668 071

We construct, own and operate wholesale only, high speed fixed line networks, mostly in new developments (**Greenfields)**. We are the "**NBN Comparable Carriers**", operating Local Bitstream Access Services (**LBAS**) networks on an open access wholesale only basis, and whose networks are not merely providing Superfast Broadband Access Services (**SBAS**).

We have been operating our networks for well over a decade, long before the nbn was contemplated. Together, with Opticomm (another NBN Comparable Carrier) we operate networks that can now connect over 200,000 premises and provide high speed broadband to those business and residential customers via a diverse range of retail service providers in broad geographic areas across Australia.

Impact on LBAS Operator Carriers

Our businesses will be severely impacted by the new tax proposed in the *Telecommunications Legislation Amendment (Competition and Consumer) Bill 2017* and the *Telecommunications (Regional Broadband Scheme) Charge Bill 2017* (together, **the RBS Bills**) and draft *Superfast Broadband Access Service and Local Bit stream Access Final Determination 2017* (**FAD**) from the ACCC.

The effect of the RBS Bills is to levy a flat Superfast Broadband Charge (**SBC**) on each active fixed lines connected to **LBAS** networks or each **SBAS** connected service provided by operators with more than 2,000 active connections and who do not wish to sell their networks to NBN Co (such as Telstra Velocity) or who are not otherwise exempt from the SBC (such as Mobile, Satellite, Wireless and Business Fixed Line Broadband Service Providers).

The SBC:

- will cost each affected operator initially $7.10/month/service or $85/year/service for 2017- 2018 or **up to 30% of operational revenues**;
- is expected to only raise $21m in 2018 from 240,000 active "NBN Comparable" connections (with SBAS operators like TPG/Pipe Networks paying about $13m and NBN Comparable Carriers and others paying $8m);
- shall be increased in future years without reference to our costs or ability to pay;
- may be secured by performance guarantees if the Minister so determines, even before operators earn any revenue to pay the levy;

- is financially unfair for LBAS operators, who have complied with all government regulations to operate competitively on an open access basis similar to NBN Co and without cherry-picking (but because of the FAD) may not be able to pass on the SBC to end users or offset it against Retail Service Charges to End Users like SBAS Operators; and
- may impact adversely on young families, students, pensioners and those end users who need broadband but who can least afford it, by forcing LBAS operators to discontinue affordable broadband products that are no longer profitable. The SBC levy is a "flat rate" of $7.10 for 2017 – 2018 across all service connections and therefore the SBC proportionately erodes more of the wholesale price for lower speed affordable products (such as those with transmission speeds of less than 50/20 Mbps) than higher speed products.

The RBS Bills' objectives can be better achieved without imposing a large new tax on complying LBAS carriers and undermining investment in LBAS businesses. The Draft Report of the Productivity Commission on "***Telecommunications Universal Service Obligation***"[1] ("**TUSO**") has recently recommended:

1. that government should fund targeted measures to telecommunications universal serv objectives principally through general government revenue rather than an industry levy[2];
2. that minimum eligibility thresholds to qualify for levy payments can reduce the administrative burden of compliance and collection on smaller carriers. The current Telecommunications Industry Levy (**TIL**) only applies to 'participating persons' with eligible revenue greater than $25 million (Chapter 3)[3]. The threshold was first implemented for the 2010-11 eligible revenue assessment, after being announced in 2009 as a red tape reduction measure. At that time it was assess that telecommunications providers that fell below the threshold accounted for less than 1 percent of total eligible revenue in the industry[4].
3. Any industry levy in the telecommunications sector can be expected to be (at least partially) passed on to the broader telecommunications consumer base through higher prices[5].
4. A levy should also be broad-based in a competitive sector with substitutable products …. A narrow-based levy (such as one imposed mainly on premium services) risks affecting overall market competitiveness[6]

The problems with the RBS Bills and FAD

Having regard to the findings and recommendations of the Productivity Commission, the combined effects of the RBS Bills and FAD are:

A. Funding for regional and remote telecommunications will be through an industry levy not the recommended general government revenue. This is clearly contrary to the opinions of independent industry and economic experts in the Productivity Commission;
B. The minimum threshold for exemptions from the SBC or levy is 2,000 service connections, which is so low that it will only exempt the very smallest of carriers and therefore the exemption is superficial and trivial. The RBS Bills impose costly red tape for a new tax on a few LBAS/NBN Comparable Carriers) and the SBAS carriers. The RBS Bills perversely exempt the largest wholesale carriers (Telstra and Optus, because they might now one day sell their superfast fibre networks to NBN Co) instead of focusing the levy on the larger wholesalers by revenue or otherwise exempting the LBAS Carriers and charging the SBAS operators;
C. The FAD will prevent the levy being passed on to end users, because the ACCC has somehow decided (albeit wrongly) that the SBC or levy is already included in NBNCo prices for broadband services. NBN Co's prices were determined years before the creation of the current SBC or levy, In the absence of a transparent business case for NBN Co and its methodology for price calculation, it is not possible to evidence that the prices now charged by NBN Co for broadband

[1] November 2016
[2] Recommendation 8.2 on page 26
[3] Page 255 of the Draft Report of Productivity Commission
[4] ACMA, pers. Comm., 2 November 2016
[5] Page 249 of the Draft Report of Productivity Commission
[6] Laffont and Tirole 2001) at page 249 of the Draft Report of Productivity Commission

services include any "levy" or component of the "levy". It is convenient, but a nonsense for the ACCC to conclude otherwise, but doing that without any substantive evidence of how the prices are or were calculated by NBN CO is at least unsustainable speculation by the ACCC. Certainly, that speculation should not prevent the SBC or levy being passed on to Retail Service Providers of broadband and ultimately End Users. The Productivity Commission's false assumption that any levy would be passed on to End Users, further condemns the imposition of that levy if, as the FAD and ACCC suggest, it must be entirely borne by the wholesale access provider, carriers.

D. The scope of the levy is extremely narrow and is targeting the few less influential fixed fibre line networks operating LBAS and SBAS services (other than Telstra and Optus) and it ignores networks with substitutable products, such as mobile and wireless networks, that already offer "superfast" broadband, at downloading transmission speeds faster than 25 Mbps, and tested recently to be much faster than NBN Co top speed for residential broadband.[7] Indeed Optus has launched its native Voice over WiFi or WiFi Calling product that allows its mobile customers to have voice, SMS and MMS services on Wifi when mobile coverage is limited, such as in apartments, homes or public spaces with WiFi where Voice over LTE (4G) is enabled. These game changing speeds and features of mobile broadband demonstrate how out of touch the Bureau of Communications Research, in the Department of Communications and the Arts (**BCR**) really is when it eliminated mobiles and WiFi from the basket of comparable broadband products to those offered by the fixed line operators.

   BCR's recommendations regarding funding for the NBN's non-economic services greatly underestimated the relevance and growing importance of mobile broadband and fixed wireless, despite this fact being recognised in other studies recently published by the BCR. With many other industry experts, we disagree with the Department of Communication's view that mobile and fixed wireless broadband networks are not capable of providing NBN-comparable services and that they are unlikely to be a competitive threat to NBNCo's market share in profitable areas.

   Very fast, high data capacity mobile and wireless broadband technology is already being made available and is increasingly likely to quickly be a substitute service rather than a complement service to fixed line broadband technologies. Mobile and wireless broadband should not be ignored in funding the NBN's non-commercial services as their potential to take a substantial share of NBNCo's market in commercially economic areas is very real and realistically very likely, particularly if competition between fixed line and mobile/wireless broadband is distorted by a tax that discriminates against fixed line networks, such as the new levy proposed in the Bills.

   Technologically advanced mobile and wireless services are already commercially available and entrenched in Australia. Some of the options include high speed mobile 4G, 4GX, 4G Plus services available nationally on Telstra, Optus and Vodafone networks, 4G LTE available in some capital cities on Telstra's network, fixed wireless Ethernet available via BigAir in major metro and regional areas, Vividwireless fixed wireless service available in metro areas on Optus's 4G network, Adam Internet's WiMax service in metro Adelaide, Aussie Broadband's Fixed Wireless network in regional Victoria and a raft of wireless broadband services on metro networks operated by new entrants such as Lightning Broadband, MyPort, Uniti Wireless and NuSkope. These high speed services offer a range of options to consumers, with increasing data caps and attractive pricing.

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[7] See itnews 31 Jan 2017 by Ry Crozier "***Telstra to boost CBD 4G speeds to 1Gbps***" at https://www.itnews.com.au/news/telstra-to-boost-cbd-4g-speeds-to-1gbps-449349?eid=1&edate=20170201&utm_source=20170201_am&utm_medium=newsletter&utm_campaign=daily_newsletter. See also Optus Media Release "***Optus launches native WIFI calling (Voice over WIFI)***" at https://media.optus.com.au/media-releases/2017/optus-launches-native-wifi-calling-voice-over-wifi/

To avoid funding arrangements that gives mobile carriers a competitive advantage over fixed line carriers, NBNCo said in its submission to the BCR's consultation:

> "nbn considers that the principle of competitive neutrality should also be adopted when considering the appropriateness of funding options. It is also critical to ensure that funding options facilitate a level playing field and that competition is not distorted so that no network operators are advantaged or disadvantaged. In this regard funding options should seek to minimise uneconomic effects on prices for fixed line services.[8]"

NBNCo also encouraged a broad funding base for the tax and recognised that mobile and wireless broadband services are close substitutes for services on the NBN, as follows:

> "nbn considers that equity outcomes would be best served by broadening the base of services on which the levy is added as much as possible. As discussed in section 5.1 this should include services which are close substitutes to those provided over the nbn network including mobile data and broadband services.[9]"

E. The narrow focus of the SBC or levy, already adversely impacts on the business of those NBN Comparable Carriers, because the risk enactment of the RBS Bills and FAD effectively discourages investment in those affected networks because of the uncertainly about whether the RBC levy will be introduced, the range of exemptions and the financial impact on those carriers. Whilst the uncertainty will abate if the RBC levy is enacted, the increase in carriers costs by virtue of that RBC levy is certainly going to reduce the financial return for those carriers and put NBN Co in a far stronger competitive position vis-à-vis the NBN Comparable Carriers as it erodes their financial viability and improves that of NBN Co who is a direct competitor.

The BCR and later the ACCC also failed to properly and professionally address the significance of certain aspects of the BCR research, which recognize that:

- *"Maximum network prices have been set according to nbn's SAU. For example, the price cap included in the 2015 Carrier Licence Condition and in the final access determination for the local bit stream access declaration for a 25/5 Mbps wholesale services, were both benchmarked against nbn's price for these services. This raises a potential risk that if and when competing networks become subject to the levy, these price caps may prevent networks from passing on the levy, and lead to private networks earning a low, non-commercial rate of return deterring private investment in the industry. The BCR considers these price caps should be reassessed if a levy is introduced."*

- *"Fibre based, superfast legacy networks which predate the NBN should not be included in the levy arrangement. As they were not in the original NBN rollout plan they do not compete with the NBN and are not a source of revenue leakage for NBN. It would be unreasonable and somewhat arbitrary, for the levy to be imposed on end-users in areas where NBN is neither operating nor intending to operate. These networks are clearly distinct from networks which directly compete with the NBN in the FTTB areas."*

The resulting problems of a selective, narrow levy on the LBAS NBN Comparable Carriers can be briefly described as follows:

Severe impact on businesses currently compliant with wholesale only rules

The RBS Bills will impose a new $7.10/month tax on every service provided over our networks and other wholesale only networks, as well as captured networks that are not wholesale only. This is an enormous tax, and the impost is approximately 30% of the wholesale price at which we sell some of our most popular services.

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[8] nbn co limited, nbn non-commercial services funding options, nbn submission in response to Bureau of Communications Research Consultation Paper, June 2015, public version, p 8

[9] nbn co limited, nbn non-commercial services funding options, nbn submission in response to Bureau of Communications Research Consultation Paper, June 2015, public version, p 12

This will have a seriously detrimental effect on our businesses and will become our largest single expense in operating our networks. It will be larger than our staff costs, larger than our backhaul costs and larger than our rent costs

The ACCC recently stated it intends capping our regulated wholesale price structure to match NBN Co's prices. Given this, along with our small scale compared to NBN Co and other fixed line SBAS network operators, we have no scope to recover the enormous hike in our costs base.

The RBS Bills specifically provide for SBC Levy increases without any cap

This is particularly concerning for the future operation and investment in any LBAS NBN Comparable Carrier networks, like ours, as we simply do not know when and by how much the tax will rise. That undermines those network businesses and increases unquantifiable risk for investment in those networks, unless of course, we agree to sell out to NBN Co.

RBS Bills allows for security to be required before the SBC Levy is due for payment

To add emphasis to fiscal punishment already inflicted by the Bills new levy which cannot be passed on to RSPs and End Users, the risk of having to provide unquantified security bonds for the payment of future levy debts, further undermines the businesses of the NBN Comparable Carriers, unless they are willing to sell their networks to their competitor, NBN Co. The levy does not apply to those prepared to sell their networks to NBN Co. Whilst there is no certainty as to who would be required to provide that security and what amount of security would be required, this uncertainty is sufficient to further dissuade investment in the NBN Comparable Networks, another shameful government inspired win for NBN Co in the competitive area of the Greenfield marketplace and supposedly justified on the basis of levelling the playing field.

The tax is an unsustainable mechanism for future funding of the nbn

Though large to us, the amount recovered from NBN Comparable Carriers via the new levy is negligible when considered against the $9.8B that the Department of Communications and the Arts says is required to fund NBN Co's non-commercial satellite and fixed wireless operations.

The RBS Bills exempt Telstra and Optus's very large fixed line networks for spurious administrative reasons; exempt the three very large and highly profitable mobile networks based on a technologically blind view that they don't and won't compete with NBN Co and virtually ignore the growing competitive threat of rapidly expanding fixed wireless networks. Apart from giving the carriers operating those networks a massive competitive advantage, the narrowly targeted collection base for the new SBC levy severely limits how much it can raise and will result in NBN Co and its customers ultimately having to pay heavily to provide subsidised services to rural and regional Australia when a broader industry based tax in the form of the Telecommunications Universal Service Obligation eligible revenue charges currently raises $ more fairly and sustainably addresses these issues.

The tax will not stop cherry picking by vertically integrated SBAS providers

Local Bitstream Access Service (**LBAS**) providers, such as the NBN Comparable Carriers, are wholesale only and operate in compliance with the level playing field rules in Part 8 of the *Telecommunications Act 1997*. Most of our networks were deployed either before the nbn and all without government funding. We do not represent a threat to NBN Co's viability or revenue leakage and do not limit consumer choice through being vertically operated. SBAS providers that are able to avoid Part 8 and operate vertically integrated networks of significant size in reliance of Part 8's 1 km extension exemption have long been recognised as the real threat to NBN Co. The vertical operations of SBAS providers and their lower cost FTTB networks give them greater scope to spread and absorb the RBS levy and it is unlikely the new levy will prevent them from cherry picking NBN Co's market in lucrative areas. Though the repeal of the 1 km exemption will slow down SBAS network expansion, they will infill their current large footprint and are also likely to start rolling out fixed wireless networks from their existing fibre base.

The tax will be particularly detrimental to small and medium sized LBAS operators even though they operate on a wholesale only basis and have always acted in accordance with the law

We consider the tax is designed to prevent the proliferation of vertically integrated SBAS networks, however, it has been drafted in a manner that also captures the small number of small and medium LBAS providers. Given our wholesale only business structure, a tax of this size is particularly damaging to our businesses.

There is no need for Price Capping under the FAD

Whilst not strictly part of this legislative review of the RBS Bills the FAD is clearly designed to work in tandem with it and therefore needs to be assess in the context of this review. In short there is no justification for the price capping under the FAD to regulate our prices. The ACCC's own evidence shows that the retail broadband products offered by RSPs on NBN Comparable Carriers networks are offered to end users at prices that don't exceed the prices for the same products on the NBN Co networks. Therefore there is no case or justification for the ACCC to cap the price for broadband on those NBN Comparable Carrier networks. There certainly is no justification for the exclusion of the levy from our wholesale prices given that Vertigan recommended against the levy until the disaggregation of the non commercial businesses from the NBN Co fixed line business all independent experts recognise that to require our capped prices to include the levy that amounts to up to 30% of total operational revenue is an expense that is both unreasonable and a deliberate attack on the financial viability of the NBN Comparable Carriers in an effort to force us to sell to NBN Co or at least provide NBN Co with a competitive advantage in its pricing or by financially disabling its competitors in the Greenfields.

Solutions

We understand that the proposed SBC or levy is to meet two objectives:

a) to fund NBN Co's rollout of fixed wireless and satellite services in non-economic areas; and
b) to prevent cherry-picking of NBN Co's market share.

These objectives can be better achieved without undermining our businesses and competition in wholesale markets using:

- More sustainable mechanisms to assist funding of the nbn in non-economic areas, such as redirection of the now redundant TUSO which is an industry wide levy that does not distort the wholesale broadband market;
- LBAS carriers should be exempt from the Levy;
- Alternative options to deal with SBAS operators that are undermining NBN Co's business model, such as defining SBAS operators.

Recommendation

We ask that the RBS Bills be amended to replace the narrowly targeted new RBC levy with a levy similar to the existing TUSO and that this levy be collected from all participants of the telecommunications industry including carriers operating mobile and fixed-wireless broadband networks.

Totally inadequate Consultation by Government

The RBS Bills and FAD which so directly affects NBN Comparable Carriers was drafted without any direct reference to or specific discussions with them and they are the most seriously affected Carriers.

The Exposure Draft of the RBS Bills was released on 12 December 2016 for public consultation that closes on 3 February 2017. The consultation and the period for review is completely inadequate and superficial. Requests by Opticomm (another of NBN Comparable Carriers) for extension of time to provide proper feedback have already been rejected by the Department of Communications and the Arts.

The Department of Communications and the Arts has a long history of releasing lengthy consultation papers and exposure drafts to carriers just before Christmas, so that industry participants can spend the holiday season trying to understand documents that have taken that Department many months to draft. The Department then expects to receive considered, professionally researched, evidence based submissions within a few weeks of the end of what is for industries like telecommunications, the embargo period, when staff can take holidays and network changes are kept to a minimal. Without the input of experienced legal practitioners and other experts, who tend to take their holidays over the same period, it is unreasonable for the Department to expect completely well considered, professional submissions by industry participants about what will be extremely important changes to the rules and returns from the fixed line telecommunications market.

We object to the minimal consultation approach of the Department of Communications and the Art and to their failure to directly consult with us about this important legislation. We believe that this legislation requires much more consideration by the affected carriers than what has been allowed by that Department. If the Department is determined to continue with the process of this legislation them we request a further 2 months for consultation about the RBS Bills and FAD, as any longer will also prolong the uncertainty created by this legislation which undermine the businesses of the NBN Comparable Carriers.

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