



1 November 2021

Senate Standing Committees on Environment and Communications  
PO Box 6100  
Parliament House  
Canberra ACT 2600

Dear Committee Members

## **Telstra Corporation and Other Legislation Amendment Bill 2021**

BAI Communications Pty Limited (**BAI**) welcomes the opportunity to provide a submission to the Senate Standing Committees on Environment and Communications Inquiry into the *Telstra Corporation and Other Legislation Amendment Bill 2021* (the **Bill**).

As outlined in this submission, BAI has significant concerns about Schedule 4 of the Bill, which inserts a new Part 34B to the *Telecommunications Act 1997*.

### **Summary**

While the BAI Australia group of companies does not currently own any assets or provide any services that would require it to hold a carrier licence, the group is looking to expand its service offering to include innovative telecommunications services. In order to ensure that BAI can win opportunities as they arise and commence services without delay, a subsidiary company, BAI Communications Networks Pty Limited (**BAICN**), acquired a carrier licence in November 2020.

The new Part 34B to the *Telecommunications Act 1997* introduced in the Bill would require Australian BAI group companies, other than BAICN, to provide carriers with regulated access to BAI assets, including a national network of broadcast transmission towers. We believe that this is an unintended consequence of the Bill and is not supported by a policy justification, given existing regulatory arrangements and market experience, nor any stated policy intention. The fact that BAICN was not engaged in any consultation prior to the release of the Bill also indicates that the application of the access regime to these assets may be wider than intended from a policy perspective. Given these ramifications, we urge the Committee to consider recommending deletion of Schedule 4 of the Bill which introduces this change.

### **Background**

The BAI Communications group designs, builds and operates cellular, Wi-Fi, broadcast, radio and IP networks around the world, with operations in the Australia, Canada, the United Kingdom, Hong Kong and the US.

The Australian business of BAI owns and operates one of the most extensive terrestrial transmission networks in the world, delivering terrestrial television to approximately 99% of the Australian population. We have provided managed broadcast transmission services to the ABC and SBS nationally for over 20 years, and in 2019 became the managed broadcast transmission provider to Southern Cross Austereo (SCA). We also maintain the networks of WIN and Prime TV and are contracted to provide managed transmission services to Network Ten.

The infrastructure that enables us to provide these services includes approximately 700 broadcast transmission towers across the nation.

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As well as using this infrastructure to provide managed services to the ABC, SBS and SCA, we provide access to this tower network to most of the other major broadcasters in the Australian market, and to a number of telecommunications operators including NBN Co, Telstra, Optus and TPG Telecom. As a 'neutral host' service provider, BAI is highly incentivised to make its infrastructure available to all parties and BAI has never had a dispute with a broadcast or telecommunications operator about access to BAI's tower infrastructure.

The Australian BAI Group does not currently own or operate any assets that require it to hold a carrier licence under the *Telecommunications Act 1997*, and our towers and other assets (being held in a company that is not a licensed carrier) are not currently subject to the facilities access regime in the Act. However, the BAI Australia group is looking to expand its service offering to include providing services to the telecommunications industry, potentially including owning and operating assets that require a carrier licence. Using models successfully deployed by our group companies overseas, we believe that we can offer innovative and competitive 'neutral host' and other services to mobile network operators and others, to improve connectivity and cost outcomes for those operators and their customers.

To ensure we are best placed to respond to tenders or government programs relating to such opportunities, and to ensure that we are ready to provide innovative new services without delay, on 27 November 2020 our wholly owned subsidiary, BAICN, acquired a carrier licence. BAICN does not yet own any assets or provide any services.

As the Committee will be aware, the Bill proposes to insert a new Part 34B into the *Telecommunications Act 1997* to apply a facilities access regime to all companies in a company group that includes a licensed carrier. This will mean that the BAI Australia group will be subject to the facilities access regime in relation to all of the group's relevant facilities and towers in Australia, including the national tower network used for broadcasting transmission. For the reasons set out in this submission we believe that this is an unintended consequence of the legislation, is not supported by a compelling policy justification given existing regulatory arrangements and actual market experience, and may operate to undermine BAI's incentive to provide competitive and innovative services (i.e. by discouraging the group from continuing to hold a carrier licence and offering innovative new 'neutral host' business models in the market).

### **Impact and consequences of the Bill for BAI**

Our view on the impact of Schedule 4 of the Bill and the new Part 34B of the Telecommunications Act, and its consequences, are summarised below.

- **The Bill extends regulation to broadcasting assets which are already subject to regulated access regimes**

BAI's tower assets are subject to regulated access regimes in the *Broadcasting Services Act 1992* and the *National Transmission Network Sale Act 1998*. Without going into the detail on these regimes, they extend access to specified access seekers, mainly broadcasters, for specified purposes.

While these regimes were deliberately applied to broadcasting assets, the *Telecommunications Act 1997* largely avoids regulating broadcasting, including by excluding base stations used for broadcasting from the definition of assets that can necessitate a carrier licence (section 34(2)).

To apply a carrier access regime to BAI's broadcasting towers due to it having a (currently dormant) carrier licence would be a perverse outcome.

- **The Bill extends an access regime to BAI's facilities and towers without any compelling policy reason**

The Government's stated policy objective is to prevent carriers from avoiding access obligations once their passive assets have been shifted into subsidiary companies. This objective does not apply to BAI at all – we are already subject to access regimes that are fit for purpose for the broadcasting sector and the application of this new regime arises only from the fact that we have a carrier licence for entirely unrelated reasons.

From a policy point of view, access regimes can be justified when an asset owner has an incentive to make it hard for competitors to access to its assets. An incentive to make access difficult arises if an asset owner has a vertically integrated business that competes with the access seeker- as is the case where a group of companies that owns mobile towers also operates a retail mobile business, and the access seekers (other retail mobile businesses) are competitors to that business. With each of the mobile operators being both asset owners and an access seeker to each other's towers, the justification for an access regime is apparent.

In the case of an infrastructure owner (like BAI) that does not provide telecommunications services in competition with the licensed carriers that are seeking access to its towers (such as the mobile operators), regulating access should not be necessary, as the infrastructure owner has an incentive to provide access to as many operators as possible.

The fact that a BAI subsidiary has recently acquired a carrier licence does not change BAI's incentives. As a result, in our view there is no sound policy reason for extending a regulated access regime to BAI's tower portfolio or other facilities.

- **The Bill results in a perverse outcome that may prevent reciprocal access deals**

BAI does have some reciprocal arrangements where it has installed broadcasting assets on telecommunications transmission towers and provided reciprocal access to the carrier to install telecommunications equipment on BAI broadcasting towers. If the regime in the new Part 34B of the *Telecommunications Act 1997* is implemented as drafted, the Bill would permit the carrier in this scenario to access BAI towers on regulated terms, but would not provide BAI with an equivalent reciprocal right, as the BAI company installing broadcasting equipment is not the licensed carrier company within the BAI Group. This would appear to be a perverse outcome.

- **The Bill creates an unlevel playing field by regulating access to BAI's towers, but not those of its main competitors**

BAI's main competitors are other passive infrastructure owners, most of which (as we understand it) do not have a carrier licence in their group. As a result, the legislation will apply to BAI and not to many of our main competitors.

- **If the imposition of the regime incentivises any infrastructure operator to relinquish its carrier licence, or deters new entrants from acquiring a carrier licence, this will be detrimental to competition**

BAICN believes it can offer innovative and value-adding solutions to mobile operators and other telecommunications operators, deploying models which may in time involve owning and operating assets that require a carrier licence. However, if the regulatory burden of the proposed regime is significant, BAI will need to weigh up the benefit of continuing to hold a carrier licence in its group.

## **Recommendation**

BAI was not consulted on the Bill and became aware of it only when it was tabled in Parliament on 21 October 2021.

Given the potentially significant impact of the Bill on businesses such as BAI and the broader ramification for innovation and competition, we propose that Schedule 4 of the Bill be deleted in its entirety (so that the proposal to insert Part 34B into the *Telecommunications Act 1997* is deleted).

If the Committee is not inclined to recommend deleting Schedule 4, we propose that it is severed from the current package of regulatory reform set out in the Bill, so that a more extensive consultation process with impacted parties can be carried out.

While we advocate strongly for deleting Schedule 4, or for a more extensive consultation, as an alternative we would propose that Part 34B of the *Telecommunications Act 1997* as introduced in the Bill is amended to avoid the negative and unnecessary consequences we have outlined.

While BAI has only a very short period to consider what amendments would achieve this, there are at least two options that would appear logical:

- (i) First, an option would be to only extend the access regime in the new proposed Part 34B to facilities and telecommunications transmission towers that are used to provide carriage services by the entity in the group that holds the carrier licence.

In the case of Telstra, this would mean continuity of regulation of the facilities and telecommunications transmission towers owned by Amplitel, as these facilities and towers are used by the carrier-licensed entity(ies) within the Telstra Group. In the case of BAI, however, if this change to Part 34B is implemented then the facilities access requirements would not extend to BAI group facilities or towers initially, but these assets would become subject to the regime if and when BAICN actually started to provide carriage services utilising those facilities and towers.

- (ii) Second, appropriate exclusions could be introduced to exclude from the definitions of affected facilities and transmission towers any assets used predominantly for broadcasting. There are existing exceptions and exemptions in the *Telecommunications Act 1997* that do this – including sections 34(2) and 48.

We would welcome the opportunity to discuss our submission with the Committee.

Your faithfully

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