



bai communications

6 May 2022

Grahame O'Leary
Director
Transmission and Facilities Access Section
Mobiles, Transmssion and Consumer Branch
Australian Competition and Consumer Commission

By email to grahame.oleary@acc.gov.au

Dear Mr. O'Leary,

Access to Telecommunications Facilities: ACCC review of the corporate control percentage

BAI Communications Pty Limited (**BAI**) welcomes the opportunity to provide a submission to the Australian Competition and Consumer Commission's (**ACCC**) consultation pursuant to section 581ZH(1) of the *Telecommunications Act 1997* (**Telco Act**).

About BAI

BAI owns and operates one of the most extensive terrestrial broadcast transmission networks in the world, delivering television to approximately 99 per cent of the Australian population. We provide managed broadcast transmission services to the ABC, SBS and Southern Cross Austereo (SCA), and maintain the networks of WIN and Seven Prime. BAI provides these services from 745 broadcast transmission sites across the nation. BAI owns or controls, and can provide co-location services, at approximately 410 of these sites.

We provide access to this tower network to most of the other major broadcasters in the Australian market, alongside 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. While certain customers (mainly broadcasters) are entitled to access BAI towers or services on regulated terms pursuant to access regimes in the *Broadcasting Services Act 1992* and the *National Transmission Network Sale Act 1998* and the *Radiocommunications Act 1992*, to date no customer has formally sought access pursuant to these regimes, as our access arrangements have always been put in place on the basis of mutual commercial agreement.

BAI is looking to expand its service offering to include providing services to the telecommunications industry, including owning and operating assets that require a carrier

Head office
Level 10, Tower A
799 Pacific Highway
Chatswood NSW
Australia 2067
P +61 2 8113 4666
F +61 2 8113 4646
W baicomunications.com

BAI Communications Pty Ltd
ABN 99 086 048 562

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 them and their customers. To ensure we were best placed to respond to these opportunities, and to ensure that we were ready to provide innovative new services without delay, in November 2020 our wholly owned subsidiary, BAI Communications Networks Pty Ltd (**BAICN**), acquired a carrier licence. However, BAICN does not yet own any assets or provide any services.

Response to the consultation paper

As BAICN (the licensed carrier entity) is a subsidiary of BAI, the access regime in Part 34B of the Telco Act now applies to BAI's broadcast tower network. As BAI owns all the shares of BAICN, this will continue to be the case regardless of what corporate control percentage is determined to be appropriate. As such, BAI does not have further relevant insight on the appropriate corporate control percentage questions on which the ACCC seeks stakeholder views in the consultation paper.

However, we note that several of the ACCC's questions seek to determine respondents' views about the incentive and ability of "carrier shareholders" to influence whether a subsidiary tower owner provides access to its infrastructure. This is a relevant and important question, but proceeds on the assumption that the carrier entity in a Group will always be the shareholder, and the tower owner will always be the subsidiary. In the case of BAI the reverse is true – that is, the owner of the towers is the shareholder of the entity with the carrier licence. As such, BAI's carrier entity has no corporate influence over the actions taken by the tower owner-operator in the Group, which is its parent.

In our view, the underlying premise of the ACCC's questions highlights that subjecting BAI to the facilities access regime in Part 34B is an unintended consequence of the legislation and does not serve the Government's policy objective, which was to prevent carriers from avoiding access obligations once their passive assets have been shifted into subsidiary companies. Applying a carrier access regime to BAI's broadcasting towers due to it having a (currently dormant) carrier licence is a perverse, and unintended, outcome.

As the ACCC will be aware, BAI proposed possible changes to Part 34B to the relevant Senate Inquiry, including an option that the Part 34B regime only be applied to telecommunications towers and facilities that are being used to provide carriage services by the entity in the Group that holds the carrier licence. We note the ACCC's acknowledgement (in its response to the Senate Inquiry's Questions on Notice) that "[t]his would appear to avoid the unintended consequences raised by BAI, but also allow the access framework to operate should the carrier commence using the towers or facilities of the group to provide carriage services".

Conclusion

While BAI does not have strong views on the appropriate corporate control percentage, our view is that the application of the regime in Part 34B to companies such as BAI is unfounded. As set out above BAI does not have any incentive to deter any access seeker from accessing its towers, and is already subject to three other access regimes.



bai communications

BAI believes that through its carrier licensed subsidiary it can offer innovative and value-adding solutions to mobile operators and other telecommunications operators. However, if the regulatory burden of the proposed regime is significant, BAI will need to weigh up the benefits of continuing to hold a carrier licence in its group. This would have the effect of stifling competition and impeding innovation which would otherwise achieve connectivity outcomes for the benefit of communities and the digital economy.

BAI will continue to discuss its concerns with the Department and relevant Minister.

Should the ACCC wish to discuss this response please contact our General Counsel Emma McCormack at [REDACTED]

Yours sincerely,



Elyssa Rollinson

Chief Commercial Officer, BAI Communications Australia

CC: peter.palmato@acc.gov.au