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Superfast Broadband Inquiry
Australian Competition and Consumer Commission

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Submission by NBN Comparable Carriers on Superfast Broadband Access Service and Local Bitstream Access Service Final Access Determination (FAD) - Joint Inquiry

About us - LBAS Operator Carriers/NBN Comparable Carriers

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

The above carriers and Opticomm Co Pty Ltd (ACN 117 414 776) all construct, own and operate wholesale only, high speed fixed line networks, mostly in new developments (**Greenfields)**. Collectively those carriers are herein called the "**NBN Comparable Carriers**", who operate Local Bitstream Access Service (**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.

No apparent need for the FAD to regulate LBAS Carriers

The government's own research by the ACCC and the Bureau of Communications Research in relation to the price and non-price terms of access demonstrates that the NBN Comparable Carriers offer LBAS to any and all access seekers at prices generally the same or less than NBN Co Limited (**NBN Co**) and on terms and conditions that have largely been acceptable to all access seekers. There is no evidence to show that the Price Caps or Standard Terms for Access proposed by the ACCC by the draft *Superfast Broadband Access Service and Local Bit stream Access Final Determination 2017* (**FAD**) are at all necessary.

It is our submission that the FAD is entirely misconceived in relation to LBAS NBN Comparable Carriers who should be exempt from the FAD as market forces determine the price and non-price terms without the need for anther complex layer of regulation.

Not sufficient information nor appropriate to make submission or the FAD

The Department of Communications and the Arts has proposed a consultation draft for the Regional Broadband Services (**RBS**) Levy, pursuant to the *Telecommunications Legislation Amendment (Competition and Consumer) Bill 2017* and the *Telecommunications (Regional Broadband Scheme) Charge Bill 2017* (together, **the RBS Bills**).

The RBS Bills have a fundamental and significant effect on the need, nature, fairness and proper drafting of any FAD. Whilst the RBS Bills are still being discussed and reformulated by the Minister for

Communications and the Arts, it is neither appropriate nor sufficient certainty of information to properly respond to the ACCC inquiry about the proposed FAD.

Furthermore, it is unfair and prejudicial to the legitimate business interests of the NBN Comparable Carriers who provide LBAS to access seekers, that they must respond to this ACCC inquiry with such haste, inadequate information and certainly about the fundamental issues flowing from the RBS Bills (including the quantum, exemptions and security requirements relating to the RBS Levy and other material access and operational conditions that the Minister may impose in addition to the RBS Levy.

It is our submission that if the FAD is to cover LBAS NBN Comparable Carriers, then it must not take effect unless and until such time as the RBS Bills are finalised by law.

Impact of RBS on LBAS Operator Carriers

Our LBAS businesses will be severely impacted by the new RBS Levy, a tax which, unlike GST or other business costs cannot be passed on to the access seekers and then to end users, because the ACCC considers that NBN Co prices are inclusive of the RBS Levy and because end users connected to the NBN Comparable Carriers' Networks must not pay more than end users on the NBN Co Networks.

The effect of the RBS Bills is to levy a flat Superfast Broadband Charge or Regional Broadband **Scheme (RBS)** Levy) 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 RBS Levy (such as Mobile, Satellite, Wireless and Business Fixed Line Broadband Service Providers).

The RBS:

- 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 RBS 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 due to the tax, are no longer profitable. The RBS levy is a "flat rate" of $7.10 for 2017 – 2018 across all service connections and therefore the RBS 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.

NBN Co Prices do not include the RBS Levy

The notion that NBN Co prices include the RBS Levy is misconceived and untrue. Certainly the NBN Co prices for wholesale access services were determined many years before the proposed RBS Levy, RBS Bills or, for that matter, the current remote and regional fixed wireless and satellite solution proposed by the present government. The prices therefore could not be said to include the RBS Levy.

NBN Co prices and its financial modelling is not transparent to us or the public and is not verifiable or reliable. As recommended by the Vertigan Report, until the separation of the NBN Co business units responsible for the remote and regional fixed wireless and satellite solutions from their FTTP and FTTB and other access solutions, proper assessment of the RBS Levy and justification for ACCC capping prices for LBAS (under the pretext of levelling the price playing field for NBN Co or otherwise) is fundamentally flawed.

ACCC should not therefore see the FAD as unrelated to the unfair and unreasonable imposition of the RBS Levy and the subsequent undermining of legitimate businesses of NBN Comparable Carriers by NBN Co and those in the Department of Communications and the Arts that would see it as a monopoly. If the ACCC allow the FAD to justify a price cap then the ACCC will be complicate in that unreasonable process to reduce fair competition and to undermine our businesses.

The vast majority of the network connections of the NBN Comparable Carriers are LBAS connections established without any government subsidy and the RBS Levy is determined without any regard for the higher cost structures of the LBAS NBN Comparable Carriers than those of NBN Co. Indeed, once imposed, the RBS Levy will be the largest single cost of the LBAS NBN Comparable Carriers and yet it would be borne entirely by LBAS NBN Comparable Carriers who do not have retail services to share the costs, like the SBAS carriers (TPG, Telstra or Optus). Instead, the LBAS NBN Comparable Carriers will be forced to disconnect unprofitable services and connections as a result of the RBS Levy and ACCC Price cap.

TUSO should be used to fund remote and regional Broadband and Voice from NBN Co

The RBS Bills' objectives can be better achieved without imposing a large new tax on complying LBAS carriers and undermining investment in LBAS businesses by the ACCC's FAD capping our prices for LBAS.

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 service 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]

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 RBS 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.
C. The RBS Bills impose costly red tape for a new tax on a few LBAS/NBN Comparable Carriers and the SBAS carriers.
D. The RBS Bills 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

[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

larger wholesalers by revenue or otherwise exempting the LBAS Carriers and charging the SBAS operators;

E. The FAD will prevent the levy being passed on to end users, because the ACCC has somehow decided (albeit wrongly) that the RBS Levy is somehow already included in NBN Co prices for broadband services. NBN Co's prices were determined years before the creation of the current RBS 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 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 unsustainable speculation by the ACCC. Certainly, that speculation should not prevent the RBS 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.

F. The catchment of taxpayers for the RBS Levy is extremely small or narrow and is targeting only, the few less influential fixed fibre line networks operators of 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

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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/

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.

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]"

G. The narrow focus of the RBS 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.

Research does not support the imposition of the FAD

The BCR and ACCC 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."*

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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

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

1. Severe impact on businesses currently compliant with wholesale only rules

The RBS Bills and FAD 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.

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

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.

2. The RBS Bills and FAD specifically provide for RBS Levy increases without any cap on quantum but the taxpayer cannot pass them on to customers

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. As a consequence the ACCC should not assist the process to undermine the legitimate business interest or the Non NBN Comparable Carriers by imposing a price cap under any FAD.

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

To add emphasis to fiscal punishment already inflicted by the RBS Bills and FAD, the RBS levy (which cannot be passed on to RSPs and End Users) coupled with the Ministerial imposition of LBAS Carriers also having to provide unquantified security bonds for the payment of future RBS 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 RBS 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. Again, it is the price cap by the ACCC and pursuant to the FAD that is the instrument that locks in the damage to the legitimate business interests of the NBN Comparable Carriers and the security for payment creates more uncertainty and increases the cost of business for those LBAS NBN Comparable Carriers.

4. RBS Levy 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 RBS 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.

5. 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 that 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.

6. RBS Levy and FAD will be particularly detrimental to small and medium sized LBAS operators

We consider the RBS Levy and capping prices under the FAD are 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 which cannot be passed on to RSPs and end Users is particularly damaging to our legitimate businesses. 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.

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