

The Hon. Michelle Rowland MP
Minister for Communications &
The Department of Communications

Submission to the Consultation on exempting a class of persons from the Telecommunications Industry Levy (TIL) and Annual Carrier Licensing Charge for three years (the **Consultation**)

Australia Tower Network (ATN) is pleased to provide the following submission to the public consultation recently announced by the Federal Department of Communications (the Department) in relation to the above. ATN is particularly interested in the broader policy issues that arise in the context of the Consultation on account of its recent acquisition of the Axicom telecommunications towers business and related assets. Following the purchase of Axicom, ATN is now the largest independent telecommunications tower infrastructure company in Australia.

In addition to acquiring the Axicom business, ATN also continues to pursue the concerns that Axicom raised over the past couple of years in relation to anti-competitive and unintended policy outcomes arising under the application of the TIL framework to emerging business plans. It is in this broader context that ATN makes the following statements that are directly relevant to both the Consultation and Axicom's unresolved public policy concerns:

1. By letter dated 22 December 2021, Axicom requested that the then Minister for Communications provide an exemption for Axicom along the same lines as the current NSWTA Consultation but in relation to assessments for the financial year ending June 30, 2021.
2. Following discussions with the Department and the then Minister, Axicom was advised that the Department would consider the matter further, including obtaining legal advice. There was a stated expectation the Minister would then further consider this new material in assessing the Axicom exemption request.
3. To date, Axicom is yet to receive a formal response from the Minister or the Department notwithstanding the additional legal advice and related material that has been provided including letters of support for Axicom from other telecoms market participants.
4. The widely acknowledged unintended policy outcomes arising from the current Axicom TIL assessments are, in substance, directly referable to those arising in the current Consultation context.
5. The impact of the TIL assessments as currently applying to Axicom have the effect of hindering competition for the rollout of 5G infrastructure with the further adverse

downstream impact of limiting access for consumers to the full benefits and opportunities of the leading wireless technologies.

6. Similarly, the requirement of the NSWTA to make TIL contributions has the potential to lead to poor public policy outcomes. In particular, it has the possibility of limiting the pool of available investment in public safety communications services in NSW. This again has the unintended impact of undermining effective and efficient public safety controls and undermining community protection arrangements available to first responders.
7. Accordingly, ATN is supportive of the exemption proposed in the Consultation. However, it also calls upon the Department and the Minister to take similar interventions in the TIL assessment process to promote the full range of public benefit outcomes in other like cases such as the Axicom circumstance.
8. ATN also fully supports payment of the TIL in relation to any business that can only be undertaken through obtaining a carrier licence. However, applying a licence fee on revenue that otherwise does not require a carrier licence creates a substantial disincentive for the development of future business opportunities that will require a carrier licence. This situation substantially reduces the opportunity for competition and innovation in the development of small cell infrastructure solutions.

ATN is of the view that levying the TIL on un-commercial activities of the NSWTA is a highly counterproductive and perverse outcome in the same way that Axicom contributing to the TIL in circumstances where it does not receive any carrier licence related revenue is also a poor public policy outcome.

ATN's tower business does not require ATN to hold a carrier licence. The tower business involves ATN leasing its tower or rooftop assets to telecommunications carriers and other businesses that require wireless telecommunications infrastructure. In this business it does not own or use any "network units," which is the trigger to require a carrier licence to be held.

The neutral host small cell business which Axicom and now under new ownership, ATN may explore, and for which Axicom obtained its (now surrendered) carrier licence, involves Axicom acquiring access to appropriate sites for small cell infrastructure (for example on power poles or smart poles) and acquiring some active elements to provide services to and from those small cells. This may include radio access network equipment and also optic fibre cable to connect the small cells back to a point of presence at which network operators can connect to the small cell infrastructure. In this small cell business, as with its tower business, Axicom is expecting it would be providing access to infrastructure to carriers and carriage service providers on an open access wholesale only basis as a neutral host.

The neutral host model for the deployment of mobile infrastructure is being increasingly recognised in Australia and in other jurisdictions as an important and desirable mechanism.

This is because it enhances the economically efficient use of infrastructure by enabling true sharing of both passive and active infrastructure by mobile network operators (and virtual mobile network operators). This reduces the cost of the very capital-intensive network development required to provide a high standard of 5G mobile and fixed wireless services. It also reduces the environmental impact of the duplication of network equipment by multiple network operators. This will increasingly become an issue for all levels of government as the densification required for the effective operation of mobile networks continues.

The sound public policy basis of active sharing and neutral hosting of network assets has been expressly recognised by the NSW Government in its recent Mobile Coverage Project, instituted as part of its Regional Digital Connectivity Program. The RFP in relation to this project called for parties to partner with the Government to design active sharing solutions. Governments both overseas and in other Australian jurisdictions are similarly recognising the importance of this approach in facilitating network roll out and providing adequate coverage. Infrastructure owners and operators such as ATN are particularly well placed to provide neutral hosting solutions. However, the current TIL arrangements are effectively operating as a block to their participation in this important and emerging market.

The NSWTA, in the context of the Consultation, seeks relief from the TIL obligations by way of an exemption order. Under existing arrangements, the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth) (**TCSS Act**) a participating person must provide the ACMA with certain financial information so that ACMA can determine that carrier's eligible revenue. A participating person is a carrier with more than \$25 million in revenue at any time during the eligible revenue period. However, section 44 of the TCSS Act provides that:

*a person is not a **participating person** for an eligible revenue period if the person is of a kind, determined in writing by the Minister for the purposes of this subsection, to be exempt from this section.*

We consider that in addition to the NSWTA draft instrument, it would be appropriate for the Minister to make a direction pursuant to this section along the following lines:

Notwithstanding that the eligible revenue of an entity is greater than AUD \$25 million, if the eligible revenue of the entity which was earned from the sale of carriage services is less than AUD \$25 million then that entity is not a Participating Person for the relevant eligible revenue period

Importantly, a determination in this form means that once the revenue earned from carriage services exceeds \$25m, the full revenue of the relevant group is included as eligible revenue even if most of that revenue were derived from 'passive' infrastructure that did not require a carrier licence. As an illustration for ATN, if the determination were implemented it would mean that once revenue through small cells (or other carriage services) exceeded

\$25m then all of the ATN revenue (being an amount of over \$200m) would be regarded as eligible revenue.

Further, this is the model that has received strong support by other operators in the sector and for which letters of support have been sent to the Department.

While the power of the Minister to make a determination pursuant to this section is not constrained to a particular period, we understand that the Minister may be reluctant to make a determination which has application to a period for which the TIL contributions have already been determined by the ACMA. However, we consider that it would be appropriate for the Minister to make such a determination to be effective from 1 July 2020 (i.e., for the 20/21 financial year), noting that the final eligible revenue assessments for that period have not yet been made by the ACMA. In terms of timing, this is also a similar position to that of the NSWTA in the Consultation context.

The impact of this determination would be significant for entities such as ATN (and potentially other infrastructure companies). This is because ATN and others in a similar position would be able to enter the small cell market and develop other infrastructure solutions without effectively incurring a significant and ongoing cost before this new business has generated any revenue. However, the impact on other participants in the TIL would be negligible in the same way that the NSWTA exemption from the TIL is “non-material.”

Conventional carriers, including all the major carriers, would not fit within the bounds of the determination. For smaller entities, although we are not privy to the revenue lines of those businesses that have paid the TIL, our assessment is that the determination has limited (if any) impact on those entities, and therefore limited (if any) impact on the proportions of the TIL to be paid by all entities. To the extent there was any current eligible revenue which would be excluded through the determination it appears highly unlikely that any of those entities would have eligible revenue reducing below \$25m which in fact means that all of their current revenue would still be included for the purposes of the TIL, resulting in no impact for any participants from the position that existed before ATN obtained its carrier licence.

In addition, consistency would be maintained between infrastructure companies which have a carrier licence and those which do not. As you know, infrastructure companies have traditionally not contributed to the TIL and this determination would effectively reinstate the status quo which has prevailed with the exception of the 19/20 year, which is currently in dispute in our ADJR proceedings.

For completeness, we note that the ACMA also has the discretion under the *Telecommunications (Eligible Revenue) Determination 2015 (Eligible Revenue Determination)*, pursuant to either section 9 or section 33 to declare that revenue from the leasing of passive infrastructure does not constitute “telecommunications sales revenue” or



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alternatively is deductible from a person's "gross telecommunications sales revenue". However, the ACMA has apparently adopted the view that, notwithstanding these provisions in the Eligible Revenue Determination, the making of such a declaration is outside the scope of its role.

ATN urges the Minister and Department to ensure the unintended policy outcomes that apply to Axicom and ATN are resolved rapidly and in alignment with the relief sought by the NSWTA in the Consultation. ATN look forward to discussing these matters further with the Department and the Minister.

Yours sincerely

ATN