



29 September 2017

Phillip Mason
Assistant Secretary – Market Structure
Department of Communications and the Arts
BY EMAIL - Philip.Mason@communications.gov.au

Dear Phillip,

1. I confirm the Greenfield Fibre Operators of Australia's complaint against the licensed carrier, Myport Pty Ltd (ABN 32 121 129 280), of Level 1, 875 Ann Street, Fortitude Valley, Brisbane 4006 ("**Myport**") and certain residential building managers ("**Managers**") contracting with Myport to build, transfer and operate superfast broadband networks in new residential buildings ("**New Buildings**") where the Managers are providing broadband carriage services to the public without carrier licences via **Network Units** (as that term is defined in Division 2 of Part 2 of the Telecommunications Act 1997 (Cth) ("**the Act**").

Myport Background

2. Pursuant to contracts in writing ("**Myport Contracts**") with Managers of numerous New Buildings, (also connected by FTTP networks operated by open access, wholesale carriers like NBN Co Limited, OPENetworks, LBN Co, TPG Wholesale or Opticomm), Myport agrees to:
 - a. Build, transfer and operate superfast broadband telecommunications networks in the various residential buildings managed by the Managers ("**Buildings**"). The networks usually have fibre cables to the basement of the Buildings, with Cat5 or Cat6 cabling up the risers to Carrier grade Network Switches in Rack Cabinets and then Cat5 or Cat6 cabling to the apartments, where there are either Wireless Access Points ("**WAP**") (capable of Wifi or customer cable connection to broadband) or basic RJ45 access points for connecting cabling to devices in each units;
 - b. an online web portal for the Managers to:
 - i. create and edit customer broadband accounts for residents;
 - ii. fix and promote prices for various broadband/internet products; and
 - iii. access codes for residents and occupiers who purchase those broadband/internet products;
 - c. provide maintenance and support for the network and end users; and
 - d. provide a billing platform for the Managers to bill residents and occupiers for the broadband/internet products.
3. It is not entirely clear as to whether residents and occupants of the New Buildings are contracting with the Managers or Myport. It appears from the Myport Contracts there are a number of methods by which residents and occupiers can contract for "High Speed Internet Connections" in the buildings, namely:
 - a. by completing and signing the **attached** Form of "Application for High Speed Internet Connection" which appears to be addressed to both the Building Managers and Myport. The form which is provided by the Building Manager requires residents or occupiers to provide their credit card information and to sign a credit card authority to allow a charge for the required internet service to be

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made by someone not identified in the form. The form is then apparently collected by the Managers in the New Building.

- b. Alternatively residents or occupiers of New Buildings can access a similar form of application via a webportal in the New Building using a Myport Wifi enabled router in each apartment. The residents or occupiers provide their credit card information and to submit a credit card authority to allow a charge for the required internet service to be made by someone not identified in the form.
4. The Myport Contracts allow Myport to collect the credit card charges for those broadband/internet service and also provide for how net revenue will be split between Myport and the Managers, which varies according to whether the Managers have paid some or all of the capital cost of the supply and installation of the network by Myport. Myport manage and support the Managers' internet business for an ongoing variable monthly fee based on the number of active users. The Managers also pays Myport for the provision of backhaul services to the venue at the speeds requested by the Managers.

Regulatory Concerns

5. The activities of various Managers such as, the Song Group, Tessa Residential, JLL, Luwin and Pradella to name a few Managers involved, is a matter which we believe should be of concern for the Department of Communications and the Arts (the **Department**) to investigate, because:
- a. the Managers generally own the network cables and equipment in the Buildings, as demonstrated by the **attached** Myport Contract with Song Group (disclosed in *OPENetworks v Myport Pty Ltd & Ors QUD914/2016 (Federal Court Case)*);
 - b. the unlicensed Managers operate the network to provide broadband carriage services to the public (ie residents and occupiers in the apartments in New Buildings often via the letting pool or short stay accommodation); and
 - c. The fact that a licensed carrier, Myport, supports the network operation does not diminish liability for the absence of a Nominated Carrier Declaration (**NCD**) over the new copper lines and network units (assuming that deployment of copper cables before settlement of the sales of apartments in the New Buildings is lawful) or the failure of the network owner (Song Group) to hold a carrier licence (**Section 42 of the Telecommunications Act**). The maximum penalty for providing carriage services to the public without a carrier licence is \$4.2m per connection. As a result of the breach of Section 42:
 - i. residents and occupiers are left without recourse for complaints to the TIO;
 - ii. the operator does not need to meet standard carrier licence conditions;
 - iii. service connections, fault rectifications, billing services and obligations, broadband speeds and carrier obligations about service assurances are not available to end users;
 - iv. mandatory compliance with the data retention laws, interception capability regulations, life threatening call register requirements, reporting and other carrier obligations are ignored;
 - v. compliance with future regional broadband tax collection obligations appear unlikely to be met; and
 - vi. local planning and building laws concerning works albeit in New Buildings are circumvented because the carrier powers and immunities are seemingly invoked to disguise private works for a non carrier as those of a carrier, Myport.

6. Section 42 of the *Telecommunications Act 1997* (Cth) (the **Act**) states:

Network unit not to be used without carrier licence or nominated carrier declaration

(1) If there is only one owner of a network unit, the owner of the network unit must not use the unit, either alone or jointly with one or more other persons, to supply a carriage service to the public, unless:

(a) the owner holds a carrier licence; or

(b) a nominated carrier declaration is in force in relation to the unit.

(2) If there is only one owner of a network unit, the owner of the network unit must not allow or permit another person to use the unit to supply a carriage service to the public unless:

(a) the owner holds a carrier licence; or

(b) a nominated carrier declaration is in force in relation to the unit.

(3) If there are 2 or more owners of a network unit, an owner of the network unit must not use the unit, either alone or jointly with one or more other persons, to supply a carriage service to the public, unless:

(a) the owner holds a carrier licence; or

(b) a nominated carrier declaration is in force in relation to the unit.

(4) If there are 2 or more owners of a network unit, an owner of the network unit must not, either alone or together with one or more other owners, allow or permit another person to use the unit to supply a carriage service to the public unless:

(a) the owner holds a carrier licence; or

(b) a nominated carrier declaration is in force in relation to the unit.

(5) A person who contravenes subsection (1), (2), (3) or (4) commits an offence punishable on conviction by a fine not exceeding 20,000 penalty units.*

[*Currently each Penalty Unit is worth \$210 making the maximum penalty of \$4.2m for each network unit or line connected.]

7. The regulatory breaches and legal liabilities for the Song Group and Myport becomes more obvious by also considering section 143 of the Act which states:

Supply of eligible services to be on wholesale basis

Scope

(1) This section applies to a local access line if:

(a) the local access line is part of the infrastructure of a telecommunications network in Australia; and

(b) the network is used, or proposed to be used, to supply a superfast carriage service wholly or principally to residential or small business customers, or prospective residential or small business customers, in Australia; and

(c) the network is not the national broadband network; and

(d) either:

(i) the network came into existence on or after 1 January 2011; or

(ii) the network was altered or upgraded on or after 1 January 2011 and, as a result of the alteration or upgrade, the network became capable of being used to supply a superfast carriage service to residential or small business customers, or prospective residential or small business customers, in Australia.

Note 1: See also section 156 (deemed networks).

Note 2: For exemptions, see sections 144 to 151.

Person in position to exercise control of network

(2) A person who is in a position to exercise control of the network, or a person who is an associate of such a person, must not use the local access line, either alone or jointly with one or more other persons, to supply an eligible service unless the service is supplied to:

(a) a carrier; or

(b) a service provider.

Note 1: For when a person is in a position to exercise control of a network, see section 155.

Note 2: For control of a company, see section 154.

Offence



- (3) A person commits an offence if:
- (a) the person is subject to a requirement under subsection (2); and
 - (b) the person engages in conduct; and
 - (c) the person's conduct breaches the requirement.

Penalty: 20,000 penalty units.

8. A **carriage service provider** is defined in section 87 of the Telecommunications Act 1997 to include: "a person who supplies, or proposes to supply, a listed **carriage service** to the public using a network unit owned by one or more carriers or a network unit in relation to which a nominated carrier declaration is in force".
9. Broadband services offered in Soda Apartments by the Song Group are "**listed carriage services**" under section 16 of the Act and when operated by the unlicensed Manager, Song Group, selling broadband to residents, occupiers and small business end users over their copper network that is network is "capable of being used to supply a superfast carriage service" and the broadband internet services cannot be sold directly to the residents and end users as a retail service without breaching the Act. The maximum penalty for the breach of this section of the Act is \$4.2m per breach.
10. This Myport business model is now common throughout the Brisbane and other cities, because it enables unlicensed Managers to provide carriage services to residents and occupiers of New Buildings where those Managers have physical presence and control over access and most of the enquiries about getting broadband connections. We have highlighted numerous high density residential New Buildings on the attached schedule where the Managers are currently in breach of the Act with the deliberate complicity of Myport.
11. As demonstrated by the evidence of documents produced in the Federal Court Case, Myport and other operators want to create similar business models, usually serve try to also the Developers and or the Bodies Corporate in the New Buildings with Land Access Activity Notices ("**LAAN**") under Section 17 of Schedule 3 of the Act demanding access for installation of allegedly low impact cables in the New Buildings after handover of possession of the New Building by the building contractor but before settlement of the sale of the apartments to the first residents or occupiers. This access is usually in breach of other carrier obligations under the Act to NBN Co or other wholesale carrier in situ, as the deployment usually relies on an unauthorised colocation with the other wholesale carrier.
12. OPENetworks has evidence of Building residents and occupiers who erroneously believe that they can only contract with the Managers or Myport for internet services, because they are misled by Managers about the availability of NBN or NBN comparable services in those New Buildings. At one such Building, "**La Vida Apartments**", in Fortitude Valley, Brisbane the NBN termination panel in the Customer Termination Cabinet of each apartments was deliberately hidden behind a false termination panel installed by Myport to hide the NBN equipment and enable the Managers to deceive residents and occupiers about the availability of a choice of internet retail service providers via the NBN. After we notified the Body Corporate of the Building and NBN Co of the true position we understand that the contract with the Managers was terminated and the Myport false panel was removed from the Customer Termination Cabinet in each apartment.

Widespread and Serious Nature of the Regulatory Concerns

13. Please find **attached** a list of New Buildings where the deployment of Myport copper cable networks has happened in Brisbane. You will note that Myport has already overbuilt NBN FTTP networks on numerous occasions. We also **attach** copies of the advertising material and connection documentation for residents and occupiers of Buildings to connect to an "**NBN Internet**" provided by Myport.

14. The Myport business model is now widespread with several carriers and non-carrier operators offering Developers of New Buildings similar ways to enhance the value of their management rights for sale before practical completion of their New Buildings by ensuring that the Managers have a means to monopolise the broadband services in their New Buildings. The following companies offer similar agreements and arrangements for Developers and ultimately for the Managers of New Buildings:
- a. 5G Networks (Licence 462)
 - b. Lightning Broadband (Licence 403)
 - c. Freedom Internet (Licence 424); and
 - d. OC Ultranet or Capital Fibre Networks (may not hold any License).

Sky Tower, Brisbane

15. We understand TPG purchased the rights to operate the FTTP telecommunications network at Sky Tower in Brisbane from the developer, Billbergia. TPG avoided restriction of the potential '50 meter' deployment rule by purchasing the Network from the Developer once the Network had been deployed rather than . Billbergia then sold the management rights for Sky Tower to the Song Group on the basis that they could engage Myport to deploy a **copper cable network** in parallel to the proposed optical fibre TPG network at Sky Tower. We believe that the Developer is in breach of the Fibre Deployment Act by permitting Myport to overbuild TPG with a copper cable network because:

Fibre Deployment Act

On 27 September 2011 the Telecommunications Legislation Amendment (Fibre Deployment) Act 2011 amended the Telecommunications Act 1997 by inserting a new Part 20A. It was designed to:

- enable the Minister to specify new developments in which fixed lines which are installed need to be optical fibre;
 - require passive infrastructure such as pit and pipe that is installed to be fibre-ready;
 - impose penalties on constitutional corporations such as developers that sell or lease specified new developments without fibre-ready passive infrastructure;
 - enable carriers to seek access to passive infrastructure that is owned by non-carriers;
 - enable the Australian Communications and Media Authority to make standards for customer equipment and cabling for use with the NBN and other superfast networks.

Part 20A affected **all** new real estate developments, so that[1], unless the Minister grants an exemption for a development:

- **developer must not install a line in the project area unless it is an optical fibre line:**[2]
- developer must not install a fixed-line facility[3] in the project area for a real estate development project unless:
 - o the facility is a fibre-ready facility; or
 - o if NBN Co states that it has installed, is installing, or proposes to install, optical fibre lines in the project area;
- a developer must not sell or lease a building lot or building unit unless:
 - o a fibre-ready facility is installed in proximity to the lot or unit or
 - o if NBN Co states that it has installed, is installing, or proposes to install, optical fibre lines in the project area;
- A third party access regime applies to fixed-line facilities[4] owned or operated by a person other than a carrier.

For the purposes of this Act, a **fixed-line facility** is a facility used, or for use, in connection with a line, where the line:

- (a) is not on the customer side of the boundary of a telecommunications network; and
- (b) is used, or for use, to supply a carriage service to the public. [5]

16. The effect of the Fibre Deployment Act is to require developers that wish to sell or lease new building lots or building units, to undertake the pit, pipe and trenching works necessary to make each lot or unit "fibre ready", and if it is necessary to install telecommunications lines (as most Development Approvals and Permits will mandate before occupancy is possible), then developers can only use optical fibre telecommunications lines.

Handling of Life Threatening and Unwelcome Communications Code

17. As you are aware, all carriers and carriage service providers must provide Communications Alliance Ltd with:
- a. nominated contact point available 24 hours a day, 7 days a week contact to provide communications trace and customer information in relation to life threatening communications;
 - b. an escalation contact that is also available 24 hours a day, 7 days a week; and
 - c. a business contact name and public number for arranging routine tests of communications tracing.
18. This contact and business information is used by the Communications Alliance Ltd to assist Australian Emergency Service Organisations including Police, Fire and Ambulance. This information is critical to assist in responding to life threatening and emergency situations. There is extreme urgency associated with these regulatory requirement deficiencies as there is a question of public safety by the various Australian Emergency Service Organisations being unable to access the required data to assist the public in life threatening and emergency situations.
19. Should you require more information please do not hesitate to ask for further particulars. I have uploaded all the relevant material to a dropbox link found in the covering email.

Yours faithfully



Michael Sparksman
Managing Director