

Response to ACMA Consultation: Remaking the Eligible Revenue Determination

July 2025

BAI Communications welcomes the opportunity to respond to the ACMA in relation to the consultation on the Eligible Revenue Determination (**ERD**).

About BAI Communications

BAI Communications Pty Limited (**BAI**) has extensive experience in designing, building and operating complex communications networks in Australia, including digital infrastructure for TV, radio, critical communications and telecommunications services.

BAI's core business is owning and operating an extensive broadcast transmission network, delivering terrestrial television and radio (including ABC and SBS television and radio services) to approximately 99% of the Australian population from a network of over 700 sites across the country. We also provide passive site-sharing services across our tower network to telecommunications operators including NBNCo, Telstra, TPG/Vodafone, Airservices and Optus, and manage the New South Wales public safety network on behalf of the NSW Telco Authority.

Having acquired a carrier licence in 2020 through its subsidiary BAI Communications Networks Pty Ltd, and having acquired area-wide apparatus licences from ACMA in 2024, BAI is expanding its passive infrastructure offering to offer innovative and competitive active telecommunications services in both the public wireless and private network spheres. This involves bringing our decades of experience operating and managing highly resilient, always-on networks, to new sectors of the telecommunications market such as the provision of in-building coverage for mobile network operators and the provision of intelligent private networks to enterprises in many industries.

Executive Summary

As the holder of a carrier licence within our corporate group, BAI Communications has direct experience with the practical operation of the current ERD, which we consider to be an instrument underpinning a flawed regulatory framework. For reasons we explain below, the regime unfairly penalises businesses, such as BAI, that are seeking to leverage their scale and expertise in providing services that do not require a carrier licence into innovative services that do require such a licence.

In our view, the removal of ACMA's declaration powers under the proposed new ERD will further cement these flaws, with the potential of damaging innovation and competition. While ACMA suggests these provisions are no longer necessary due to the 'well established and understood' nature of eligible revenue terms, we contend that it is far preferable that ACMA maintain the ability to make corrective determinations. Removing these essential powers would eliminate ACMA's capacity to address deficiencies in the framework and respond to emerging issues in the telecommunications landscape.

For these reasons we oppose the removal of ACMA's declaration powers.

BAI does not hold strong views on, and has not commented on, the other proposals in the consultation.

Response to the removal of declaration provisions

We fundamentally disagree with ACMA's assessment that the declaration provisions in subsections 9(2) to 9(3), 10(3), 12(5), 13(4) to 13(7), 15(5) to 15(6), 17(3) to 17(6), and sections 20, 30, 32, 33, 36(3), 38, and 39 are no longer necessary.

As ACMA notes, the declaration provisions were intended to allow for the fine-tuning of the definition of 'eligible revenue' in light of practical experience, and to address the conduct of carriers trying to minimise their eligible revenue. While ACMA states that the declaration powers are no longer considered necessary as 'eligible revenue' and the other terms in the ERD are now 'well understood', we consider that ACMA should retain these powers in order to retain the ability to use them to prevent unintended or market-distorting consequences in the operation of the ERD, such as in the scenario of an innovative market entrants reaching the eligible revenue threshold through earning revenue from activities that do not require a carrier licence.

To explain the concerns affecting BAI Communications:

- Entities holding a carrier licence with \$25m per annum in 'eligible revenue' are liable to pay the telecommunications industry levy. Those not holding a carrier licence fall outside the regime and do not pay the levy.
- The ERD defines a regime for calculating this eligible revenue.
- A fundamental test in the ERD for determining whether revenue from a particular activity is excluded as eligible revenue is whether it is revenue earned from an activity that is 'outside the telecommunications industry'.
- The definition of 'telecommunications industry' captures many activities that do not require a carrier licence.
- As a result, if a carrier or its related entities earn revenue from services that do not require a carrier licence but are nevertheless within the definition of 'telecommunications industry', then unless another deduction applies the revenue may be 'eligible revenue' and subject to the telecommunications industry levy.
- To date BAI has filed declarations of eligible revenue across 4 financial years. In this time, all of our 'eligible revenue' has been earned from activities that are considered to be inside the telecommunications industry but which do not require us to hold a carrier licence.
- While BAI's eligible revenue has not yet reached the \$25m threshold, we face the prospect of it reaching this threshold soon, particularly as the threshold is not subject to indexation.
- When this occurs, BAI will pay the telecommunications levy on revenue even though its non-carrier competitors offering the same services do not pay the levy on revenue for competing services. This is clearly market-distorting with a detrimental effect on BAI's ability to compete effectively.
- As a result, BAI must continually assess whether it should retain its carrier licence given the potentially high levy it may have to pay. Relinquishing the carrier licence would detrimentally affect parts of our product offering, with a negative downstream impact on innovation and productivity.

Services that would appear to fall within the definition of the telecommunications industry, but which do not require a carrier licence, include passive co-location services provided to

telecommunications carriers and broadcasters. As a large provider of such services, BAI Communications therefore faces the prospect of paying the telecommunications industry levy on revenues from these services in future years, even though some of the largest tower operators in Australia do not face this issue as they provide these services without holding a carrier licence. Such treatment contradicts the fundamental purpose of the telecommunications industry levy, which is to fund telecommunications services based on actual telecommunications activity.

The issue highlighted above may be particular to BAI Communications. However, in an environment in which telecommunications services continue to rapidly evolve (for example with LEO satellite operators and Google recently acquiring carrier licences in Australia), we do not consider it to be the appropriate time for ACMA's powers to fine-tune the revenues captured under the ERD through the declaration provisions to be dissolved. Having also debated the eligibility of certain revenues with ACMA in the past, we also fundamentally disagree that the terms of the ERD are 'well understood'.

Without declaration powers, ACMA will have no mechanism to address these issues short of lengthy legislative amendment processes.

Conclusion

The declaration provisions in the ERD serve as a crucial safety valve, allowing ACMA to maintain the integrity of the levy system to address fundamental deficiencies in the underlying framework, as well as to address any creative avoidance strategies that may arise. Rather than eliminating these important tools, ACMA should focus on addressing the underlying deficiencies in the eligible revenue framework while preserving its ability to respond to emerging issues and ensure equitable cost-sharing among participating persons.

We therefore urge ACMA to reconsider its proposal to remove the declaration provisions from the ERD, or, before considering removal of declaration powers, undertake a comprehensive review of the eligible revenue framework (in conjunction with the Department and Minister as necessary) to identify and correct structural deficiencies in the underlying instruments.

We would welcome the opportunity to discuss this submission further.

Emma McCormack

General Counsel & Company Secretary