

9 October 2013

Hon. Amy Adams  
Communications and Information Technology Minister

**re: Telecommunications (Interception Capability and Security) Bill**

Dear Minister Adams,

Thank you for your letter of 24 September 2013. We appreciate your engagement with our concerns. However, your response unfortunately does not assuage our concerns as it does not address all of the substantive issues we raised. Our understanding of the matters we are discussing is still very different from your own. We would like to explain why we have the understanding that we do.

First, thank you for confirming that there is no change to the definition of network operator brought about by the Telecommunications (Interception Capability and Security) Bill.

The problem is however that the definition of **network operator** in the draft TICS Bill remains imprecise. The irony of describing this new Bill as an attempt to update our legislation whilst retaining the—now very dated—definition of network operator is not lost on the local digital sector, many of whom, like Catalyst could be, by that definition, network operators. The first part of the definition of network operator is relatively clear - a person who owns, controls or operates a telecommunications network. Our reading of that is that it covers only people who own, control or operate the actual infrastructure – traditional telcos mainly. However, it is the second limb of the definition that we are concerned is so imprecise that it creates huge uncertainty and therefore business and investment risk for anyone in the New Zealand ICT industry or considering entering it.

The second limb specifies that a network operator is *a person who supplies (whether by wholesale or retail) another person with the capability to provide a telecommunications service* [TICS Bill, section 3(1)]. If we add in all the other complex cross definitions encapsulated in that definition, we arrive at an expanded definition of network operator as a person who:

- supplies (whether by wholesale or retail) another person with the capability to provide
- goods, services, equipment, and facilities that enable or facilitate [*expanded definition of “telecommunications service” from the Telecommunications Act*];
- the conveyance by electromagnetic means from one device to another of any encrypted or non-encrypted sign, signal, impulse, writing, image, sound, instruction, information, or intelligence of any nature, whether for the information of any person using the device or not [*expanded definition of “telecommunication” from the Telecommunications Act*]

If one stops and thinks about the interconnectedness of the ICT industry today, almost a decade on from the passing of the Telecommunications (Interception Capability) Act 2004, I hope you can see where our concern arises. But let me make it clear.

The concern in particular arises because just about anyone who is involved in the ICT sector might be included in the second bullet of the above definition. Here are a few examples:



- Any software as a service that allows a user to share content via a social networking site (a post to Facebook or Twitter button, for example). On the face of it, this appears to be supplying a service which gives the site the capability to facilitate telecommunication by users and is therefore a network operator. It would appear that any web-enabled platform provider that includes these social functions that are then used to enable or facilitate telecommunication, may be caught.
- A physical data centre provider, which leases rack space to a virtual server provider, which in turn leases space and services on those virtual servers to businesses, which enable customers of those businesses to communicate electronically with each other, also appears to be a network operator. In fact, various of the businesses in that chain may all be network operators.
- To take an even more ridiculous example, a power company which supplies the above news company with electricity appears to be a TICS Bill network operator. Electricity is a critical capability that is needed for the news company to host its website, which in turn facilitates telecommunication by and between the news sites users. Surely the power company should not be considered to be a network operator under the TICS Bill (or the current Act for that matter) and yet it appears to be caught.

So why are we concerned? Catalyst's platforms service New Zealand businesses, Government and general public, by providing them with internet based services that allow them to communicate electronically. These facilitate communication, publishing and broadcasting in various fields. For example more than 3,000 students across New Zealand use the MyPortfolio social learning platform that we support. Under the terms of the current definition(s), anyone who contributes to enabling schools to use that platform (including Catalyst) can be argued to be a network operator under the above definition. In fact, by enabling schools to use MyPortfolio to facilitate communication with and amongst their teachers and learners, it appears to us that the Ministry of Education itself is also a network operator.

This clearly fails the purpose of the draft Bill, in that it *does* create a potential barrier to the introduction of new and innovative technologies, like the open source cloud platform Catalyst has been developing and will launch next month. It also has significant potential to impact upon our future design and implementation choices around cloud offerings. Given the increasing reliance of individuals and businesses on software and infrastructure as a service, this level of uncertainty will have a deleterious effect upon New Zealand's digital businesses who provide Internet enabled technologies and services.

The obligations of network operators in the TICS Bill are very onerous. Many non-traditional telco businesses will technically and financially be unable to comply with those obligations so will be faced either with being in breach or curtailing their activities. That is unacceptable to us as we are sure it is to you.

We appreciate that the people that draft legislation are unlikely to have much exposure to the realities of running a digital services company in 2013, but rather than perpetuate the sloppy language of older pre-digital legislation in a Bill intended to modernise the law in this space, perhaps some consideration might be given to the potential impact of this on companies in our sector?

We do note the power to exempt classes of network operators, but we would prefer that instead there was an appropriate definition of **network operator** in the Bill, and that rather than enact legislation that casts a cloud over our sector's future, you work with the sector to remove ambiguity and uncertainty and provide us all with a Bill that inspires confidence and investment, not doubts.

Yours sincerely,

Don Christie.