Response to Consultation Paper and Draft Instrument regarding pit and pipe exemption criteria (Pt 20A of the Telecommunications Act)

NBN Co Ltd submission to the Department of Infrastructure, Transport, Regional Development, Communications and the Arts

September 2023

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Introduction

NBN Co welcomes the opportunity to provide a submission in relation to:

- the Consultation Paper titled 'Possible amendments to the pit and pipe exemption criteria under Part 20A of the Telecommunications Act 1997' (the **Consultation Paper**); and
- the draft *Telecommunications (Fibre-ready Facilities – Exempt Real Estate Development Projects) Instrument 2023* (the **Draft Instrument**),

published by the Department of Infrastructure, Transport, Regional Development, Communications and the Arts (the **Department**). This submission responds to both the Consultation Paper and the Draft Instrument. Generally, NBN Co welcomes the proposed reform as a means to modernise and simplify the exemptions process under Part 20A of the *Telecommunications Act 1997* (the Act).

NBN Co notes that it previously made a submission during the Department's 2021 consultation on the current version of the exemption instrument *Telecommunications (Fibre-ready Facilities – Exempt Real Estate Development Projects) Instrument 2021.*[1] We acknowledge that the Draft Instrument is expected to address our earlier submission on related matters.

New developments are an important part of Australia's economy: generating jobs and creating housing stock. It is critical that the regimes which underpin developments facilitate the best outcomes for the Australians who ultimately live and work in them, by being fit-for-purpose not just for today, but into the future. In this context, NBN Co is keen to ensure that any measures which could limit the opportunity of Australians to receive the connectivity solutions that they need, especially in new developments, are minimised.

It is important that the criteria for exempting developers from the Part 20A requirements are appropriately targeted, so they capture only those non-urban developments unlikely to receive fixed-line telecommunications in the foreseeable future. While we recognise that there are some circumstances in which installation of pit and pipe by developers may be inefficient and unnecessary, there are significant, and often unworkable, costs associated with retrofitting fibre into buildings without pit and pipe. As such we firmly believe that any exemptions should be carefully considered to ensure the Commonwealth's objectives are maximised.[2]

In summary, NBN Co's general position is that, while we are supportive of the Draft Instrument, we believe that ensuring it is properly and appropriately understood by the real estate development community is paramount. Most significantly, we think more clarity could be provided as to the party (or parties) from whom a developer is be expected to seek assurance/ written notice. In particular, due to its unique position, we consider the SIP for the General Service Area should be explicitly included as a party from whom assurances need to be sought.

[1] Submission of NBN Co, 18 February 2022.

[2] NBN Co understands the Commonwealth's objective to be the installation of fibre, where possible, in new developments: consistent with the Explanatory Memorandum to the *Telecommunications Legislation Amendment (Fibre Deployment) Act 2011* (Cth), which introduced Part 20A into the *Telecommunications Act 1997*.

For the purposes of this submission, references to numbered criteria have the same meaning as they do in the Consultation Paper.

Role of the Default SIP

Under the SIP regime, NBN Co is the SIP for the General Service Area (the '**Default SIP'**) and is currently the only SIP who offers fixed-line, fixed-wireless and satellite technologies. In addition, NBN Co is the only SIP who may be required to serve an area even where another party has previously nominated as the SIP (for instance where a non-NBN Co SIP is no longer able to meet its obligations due to insolvency). The Default SIP therefore occupies a unique position in respect of exemptions to Part 20A.

For these reasons, the technology by which the Default SIP would (or may want to in the future) use to serve a development should always be a relevant consideration for exemption from the obligations in Part 20A of the Act. An express obligation to consult the Default SIP under criteria 2 and 6 should be included to ensure appropriate flexibility is maintained in those developments to meet ongoing connectivity needs and to maximise the Commonwealth's objectives regarding the installation of fibre. That is to say, a developer should be required to ask the Default SIP if they would have served the development with fibre (and would have taken ownership of the pit and pipe), and if the Default SIP advises that they would, then the developer would be ineligible for an exemption.

Consistent with the Consultation Paper (p 4), such a requirement would not oblige the developer to select the Default SIP (nor any other fixed-line SIP) to provide communications infrastructure to their development, but rather acknowledge that the Default SIP's views on how it might have chosen to serve the development will always be a relevant consideration for an exemption claim.

As acknowledged, a developer is free to contract with a carrier who is not the existing SIP for the service area in which the development is located. In such cases, the party from whom the developer is required to seek written notice / assurance (criteria 2 and 6) should be made clearer on the face of the instrument, or in its accompanying explanatory statement. For the reasons discussed above, we consider this should always include the Default SIP, noting that in most cases the Default SIP will be the incumbent (or relevant) SIP (especially in non fixed-line footprints).

In cases where the development is located within an area already excluded from the General Service Area,[3] it is important that the regime clarify that written notice / advice from a wireless-only carrier would not be sufficient. This is because the obligation to provide pit and pipe in Part 20A of the Act operates to ensure that although fibre may not be installed at the time, that the ability for a fixed-line provider to do so in the future is preserved, especially as fixed-line coverage boundaries may naturally expand over time. As we understand it, criteria 2 and 6 presuppose that those parties from whom written notice is required, have the *capability* to serve the development by fixed-line infrastructure. It follows then that a wireless-only SIP, which could never have intended to serve the

[3] Such as in a redevelopment on the urban fringe, just outside of the boundary of the **nbn** fixed line footprint

development by fixed-line infrastructure (and likewise would never have intended to take ownership of pit and pipe), is not a party from whom a developer should be able to seek written notice / assurance to qualify for an exemption.

As a consequence, where the existing SIP and the party with whom a developer contracts are two different wireless-only carriers, it should also be made clear that the party from whom notice should be obtained is the Default SIP. Ensuring this clarity would best reflect the intention of Part 20A of the Act, and be in the best interests of end users.

Further considerations as to clarity

Criterion 1

We understand that this criterion is intended to limit the exemption to those developments that are not 'inside the fixed-line SIP network region of NBN Co or another SIP' (Consultation Paper, p 4). To best articulate and achieve this intention, NBN Co suggests a preferrable form of words would be 'any relevant SIP' or 'each relevant SIP' (rather than 'a relevant SIP'). This would help to clarify expectations on developers in situations where a development sits across a Service Area boundary line.

In addition, we note that the Consultation Paper makes clear that that the pit and pipe requirements should apply where a carrier, including one which is not the Default SIP, is contracted to install fixed-line infrastructure. While we understand that the Department may have intended to capture this with its inclusion of the phrase 'at the relevant time', that phrase is not defined in the Instrument. NBN Co suggests that criterion 1 be clarified to reflect the objective expressed in the Consultation Paper.

Criteria 3 through to 5

In the Consultation Paper, the Department specifically asks whether Criteria 1, 2, and 6 could be sufficient as threshold criteria. NBN Co believes that criteria 3 through 5 aid the Instrument's clarity, by setting out what may make a development ineligible for an exemption. While SIPs are likely to have their own views on the technology type they would want to use to serve a development, the intention of Part 20A indicates a preference for fixed-line infrastructure to be installed (presently or in the future) in new developments. We therefore consider that any scheme or regime (such as this Instrument) which abrogates the intent of the Commonwealth's legislative regime should also have its limits clearly dictated by the Commonwealth to the extent possible. This helps to make clear, both to developers and to SIPs, the intended breadth of the exemption.

In practice, NBN Co considers criteria 3 through 5 will continue to do the heavy lifting in qualifying (or otherwise) a developer's exemption claim. Where a development fails on one or more of these criteria, it is likely because the development has characteristics that would generally be considered to warrant the provision of pit and pipe (for either immediate or future use), and it is reasonable to expect the Default (or relevant) SIP would take ownership. An exemption relying on criterion 6 should therefore only be available to a developer in extraordinary circumstances.

Therefore, it follows that we believe criteria 3 through 5 should operate conjunctively. Each of these criteria concerns factual circumstances that disqualify developers from being able to claim an exemption. Therefore, when framed as elements of the eligibility for the exemption, they should all be met before it is possible to claim an exemption. This is particularly the case given that there is no discretion to refuse an exemption once the elements set out in subsection 6(1) of the Draft Instrument are met.

Criterion 6

Currently, this criterion does not make clear the circumstances in which the SIP declares its intention not to take ownership. We think that this could cause developers to become confused between cases where a SIP has freely indicated it does not intend to take ownership, from those where the SIP has conditionally refused to on the basis of substandard pit and pipe installation. A drafting note or explanation in the explanatory statement would be helpful in this regard

Conclusion

NBN Co is grateful for the work of the Department in relation to possible changes to the operation of exemptions under Part 20A of the *Telecommunications Act 1997*. We consider that Part 20A continues to serve an important role, and exemptions to it should be confined, and clarified so as to minimise the risk of regulatory misunderstanding or avoidance. If the Department would like to discuss further, please contac (General Manager, Regulatory Affairs) at