



NBN Co Limited's submission to consultation draft of Telecommunications (Statutory Infrastructure Providers – Circumstances for Exceptions to Connection and Supply Obligations) Determination 2020

15 December 2020

NBN Co Limited (**nbn**) welcomes the opportunity to comment on the consultation draft of the *Telecommunications (Statutory Infrastructure Providers – Circumstances for Exceptions to Connection and Supply Obligations) Determination 2020* (the draft determination) relevant to those carriers that are determined to be a Statutory Infrastructure Provider (SIP) in Australia under the new SIP regime set out under Part 19 of the *Telecommunications Act 1997* (the Act).¹ Once the Minister for Communications and the Arts (the Minister) declares the **nbn**TM network to be treated as built and fully operational, **nbn** will become the default SIP across Australia.

Recognising the important role **nbn** has under the legislation, and consistent with **nbn**'s approach of being a customer-led organisation, **nbn** published a Connections Approval Policy² in July 2020 as envisaged in the Explanatory Memorandum to the SIP legislation. This Policy ensures that customers and Retail Service Providers (RSPs) have a clear understanding about the circumstances in which **nbn** considers a request for connection will not be reasonable. It also details **nbn**'s existing approaches to connection of **nbn** infrastructure and draws out **nbn**'s particular requirements as default SIP.

The Connections Approval Policy applies to premises across **nbn**'s entire footprint and gives clarity and confidence to the overwhelming majority of Australian customers that may be seeking to request an **nbn** connection to their premises. Where SIPs have a robust policy in place such as the Connections Approvals Policy, **nbn** is of the strong view that the draft determination is not necessary to regulate a SIPs approach to determining whether a SIP may reject a request to connect.

Additionally, as the SIP regime was only introduced several months ago it is premature to make the draft determination. The use of the Minister's power to make a determination about the circumstances in which the SIP obligation does not apply, is expressed to be a 'reserve power' in the Explanatory Memorandum. A reserve power is understood to mean a power to be used when there has been a manifest failure in the existing preferred mechanism, namely the SIP's own Connection Approvals Policy.

It is **nbn**'s view that there has been insufficient time for **nbn**'s Connection Approvals Policy to be fully integrated and utilised by RSPs. Accordingly, it would be premature for the Minister to make the draft determination on the basis that insufficient time has elapsed since the Connection Approvals Policy was put in place, and any feedback from RSPs or industry on the policy can first be addressed through amendment to this Policy. Therefore, there are no known grounds on which this intervention is required.

We set out our views on the draft determination and an alternative approach in more detail below. We have also provided our high-level comments on the detailed contents of the draft determination at **Appendix A**.

Premature for the Minister to exercise his reserve powers

Industry should be afforded the opportunity to give effect to the policy intent of the legislation before the Minister exercises the 'reserve powers' under the SIP legislation. **nbn** submits that the Minister's 'reserve powers' may be required only once sufficient time has elapsed, and where all other avenues of resolution with industry have been exhausted. By reserving the exercise of these powers in the early stages of the SIP regime, the SIP legislative framework is kept suitably agile to allow the industry to first be led by consumer-driven forces.

¹ As **nbn** has an existing obligation to supply eligible services under Part XIC of the *Competition and Consumer Act 2010*, **nbn** is not captured by the supply obligation under the Statutory Infrastructure Provider regime by virtue of section 360Q(2) of the *Telecommunications Act 1997*. As a result, the scope of **nbn**'s comments in this consultation paper is limited to Part 2, Division 1 of the draft instrument (relating to circumstances in which the obligation to connect premises to a qualifying telecommunications network does not arise).

² Available at <https://www.nbnco.com.au/corporate-information/about-nbn-co/policies/telecommunications-policies>

As stated in the Explanatory Memorandum for the SIP legislation, the Government envisaged that each SIP would publish circumstances in which it considers a request would not be reasonable. This statement clearly demonstrates that the Government's policy intention is to allow SIPs to exercise a level of self-regulation in the first instance when determining the meaning of a 'reasonable request' for their organisation in accordance with the provisions of the Act. This policy intent was fully supported by **nbn** as demonstrated by **nbn**'s immediate publication of its Connection Approvals Policy.

nbn has seen no evidence to indicate that **nbn**'s Connections Approval Policy is not providing clear guidance about the meaning of a 'reasonable request'. For other SIPs that have only recently been declared to their roles, **nbn** is of the view that the regime is not yet well established and that continued collaboration between Government and industry on implementation is the logical 'first step' to addressing any perceived shortcomings in industry implementation. **nbn** submits that the Minister should not intervene at this stage given the 'reserve' nature of the power and for consistency with the policy position set out in the Explanatory Memorandum.

nbn's unique position as the provider of non-commercial services in regional Australia means that a 'one-size-fits-all' approach is not appropriate

nbn is of the view that the draft determination does not reflect the actual business realities of **nbn** as the default SIP, including at this critical stage as it completes the final migration of customers to the **nbn**[™] network. The draft determination may be suitable for non-default SIPs, but does not adequately reflect the unique considerations faced by the default SIP and **nbn**'s obligations to provide non-commercial services to regional Australia.

As the draft determination is intended to apply to all SIPs, **nbn** submits that the 'one size fits all' approach is not appropriate where **nbn** is the default SIP across the whole of Australia (including all the non-commercial areas), compared with the non-default SIPs who are only designated where they have chosen to deliver qualifying high-speed carriage services to an area on a commercially-viable basis.

This is specifically relevant in relation to connection of services on nbn's loss-making fixed wireless and satellite networks. Accommodation of the unique realities faced by **nbn** as the default SIP is required in any connections policy. In particular, where it is not reasonable for the SIP to connect premises to a fixed-line network, **nbn** as the default SIP must provide a fixed wireless or satellite technology solution.

Nevertheless, connection to the **nbn** fixed wireless or satellite networks is not always possible - in particular, where geographic or physical barriers prevent connection to **nbn**'s satellite network. While the unique nature of **nbn**'s requirements have been recognised in other policy measures (such as the Regional Broadband Scheme), this draft determination does not accommodate those nuances and as a result it does not reflect the careful balance of considerations in delivering non-commercial, loss-making services over technologies that are inherently capacity-constrained.

Recommended approach

As previously stated, **nbn** is of the view that the Government should allow the current process to continue and the draft determination should not be made at this time. In particular, **nbn** as the default SIP should be permitted to continue to follow the **nbn** Connection Approvals Policy. If issues are identified with the Policy, **nbn** welcomes the opportunity to discuss those issues and collaborate with industry and Government on possible resolutions. Only if those attempts produce inadequate outcomes, should the Minister exercise his 'reserve power' and issue the draft determination.

Finally, if the Government does proceed with the draft determination (whether now or in the future), **nbn** strongly recommends an alternative more tailored approach to regulating the approach to the reasonableness of connecting to a SIP network as follows:

1. **SIPs with a published connection policy:** If a SIP (whether **nbn** or another carrier) has published a policy which is comprehensive and consistent with the Ministerial determination, then that SIP might be exempt from application of a new Ministerial determination on this matter. This option could come with some oversight of the policy by the Department or the ACMA as required.
2. **SIPs without a published connection policy:** If a SIP has chosen not to publish a connection policy that might inform connections within their SIP area, then that SIP might be captured by a new Ministerial determination on this matter.



Appendix A: Detailed comments and feedback on draft determination

A range of the included circumstances are inconsistent with **nbn**'s current approach, and in some cases, difficult to demonstrate.

Clause	Proposed circumstance under which a SIP obligation would not arise	nbn comment
clause 5(1)(a)(i)	Premises which are under construction and will not be at lock up stage of the construction by the day nominated by the carriage service provider for the connection to be undertaken	nbn is unsure if this proposed circumstance reflects industry standard. nbn does complete some connection requests to premises which fit this category (notably, within the new developments area), because early engagement during the construction phase can often be more efficient than retro-fitting network build after a construction is complete.
clause 5(1)(a)(iii)	<p>If the premises is not included in the following list of premises:</p> <ul style="list-style-type: none"> (a) a Designated Private Residence; (b) a place of worship; (c) an Educational Premises; (d) a Government Premises; (e) a business premises; (f) a premises of a charity; (g) a not-for-profit entity's premises; 	<p>The inclusion of this list of excluded types of premises does not help to define requirements – only one of these, the <i>Designated Private Residence</i>, is defined as requiring an addressable location. nbn's current method of determining eligible premises is based on the ability to assign the premises a separate LOCID, which would require it to be addressable and identifiable from a mapping/boundary perspective. However, by specifying the list of premises as shown, it may mislead end users to believe that all requests that are captured in these categories will be approved – which may not be the case. For example, a 'place of worship' may still not be able to be connected if other requirements are not met, such as having a sufficiently secure and permanent structure for housing telecommunications equipment.</p> <p>Conversely, it may mislead end users to believe that a request that does not fall within these categories will not be approved.</p> <p>In contrast, nbn's Connection Approvals Policy takes an approach that no obligation will arise if 'the connection request does not relate to a premises' which provides an appropriate 'catch-all' for ensuring that unusual circumstances which should not be included, but are not yet envisaged, are still captured.</p>

Clause	Proposed circumstance under which a SIP obligation would not arise	nbn comment
<p>clause 5(1)(a)(iv)</p>	<p>Premises is a moveable structure that is not reasonably expected to be continuously located at the particular site where the connection has been requested</p>	<p>The effect of this clause would mean that nbn may be required to connect some moveable structures, such as caravans, motorhomes and tiny homes, if it can be reasonably expected that they will be continuously located at the site. Connecting a moveable structure is inconsistent with current nbn policy. Even with the assurance that a structure is ‘located on a relatively permanent basis’, owners may move those structures within the site (such as repositioning the structure, or accidental movements that would not otherwise occur if the structure was permanent) which could damage the connection equipment or render it unusable (for example, satellite equipment must point in a particular direction to align with the associated satellite beam. Even if undamaged, movement of satellite equipment from the installed position would interrupt supply of the service).</p> <p>nbn believe this paragraph should be replaced with “the premises is a moveable structure”. nbn’s Connection Approvals Policy states that a request to connect will not be approved if the “site is not suitably secure, <i>permanent</i>, or equipped to support the connection for the relevant technology” (emphasis added). This policy is wider in scope than this proposed clause and more certain as it relies on technical and environmental impediments as the factors for denying a connection request (rather than relying on subjective and unknowable factors such as “a moveable structure that is not reasonably expected to be continuously located at the particular site). As such nbn believes this clause should be expanded to align with nbn’s current Connection Approvals Policy.</p>
<p>clause 5(1)(e)</p>	<p>Where the SIP has already received a request for connection at the same premises, and the SIP is either processing the request or has already connected the premises.</p>	<p>nbn does not believe this clause is broad enough in scope. It needs to be broader to also capture requests where there is a pending request for connection of the premises with another CSP. The onus should be on the end user to cancel other pending requests and ensure that concurrent requests are not active to avoid complications with fulfilling the connection request.</p>

Clause	Proposed circumstance under which a SIP obligation would not arise	nbn comment
		<p>By way of example, nbn's current Connection Approvals Policy states that a request to connect will not be approved if at the time the request is made, "there is a pending request for connection to a qualifying carriage service at the same premises, <i>whether the pending request is with [nbn] or another CSP, and whether it was made by the parties making the first-mentioned request or a third party</i>" (emphasis added).</p> <p>To ensure a smoother and more efficient connection process (by avoiding potential delays caused by misinformation or lack of information), nbn believes this clause should be expanded to align with nbn's current Connection Approvals Policy.</p>
Division 2, Notes	Circumstances in which the obligation to supply eligible services does not arise – as set out in Division 2, Clause 6	Division 2 would benefit from a clearer explanation to industry and consumers that the application of the Division may apply to some, but not all, SIPs. nbn suggests that an explanatory note should be added which explains that Division 2 of the Determination is not applicable to any SIP that is captured by the supply obligation exception set out in section 360Q(2) of the Act. This explanation will help to inform readers as to the distinction between the different supply obligations.
N/A	Circumstances that are not covered in the proposed Determination	<p>There are circumstances in nbn's current Connection Approvals Policy that are not covered in the proposed Determination.</p> <p>The following are some examples of such circumstances where, under the current Connection Approvals Policy, nbn would consider it unreasonable to fulfil a request for connection:</p> <ul style="list-style-type: none"> - The CSP making the request refuses to accept the connection under nbn's terms and conditions, or there are reasonable grounds to believe that the CSP would fail to comply with the terms and conditions of the connection;

Clause	Proposed circumstance under which a SIP obligation would not arise	nbn comment
		<ul style="list-style-type: none"> - nbn is prevented at the time of request from approving the connection request due to circumstances outside its control (eg. Frustrated Premises); - There are legal impediments to the request, including (but not limited to) the connection of the premises would contravene an injunction, declaration, other order, declaration or determination of a court, regulator or other authority of competent jurisdiction; or - There are technical and environmental impediments to the request, including (but not limited to) unimpeded access to the premises (or associated land) is unavailable to enable nbn to complete the connection. <p>Should the Minister decide to make a Determination, nbn requests that the Minister take into account the above circumstances given that:</p> <ul style="list-style-type: none"> - they are not currently covered in the proposed Determination; and - it would be difficult to argue that it is reasonable for nbn to connect premises that are the subject of such circumstances.