

8 October 2014

Assistant Manager
Licensing Policy
Market Structure Branch
Department of Communications
GPO Box 2154
Canberra ACT 2615

By email: telcolicensing@communications.gov.au

Dear Sir/Madam,

Facilitating the use of private infrastructure to deliver telecommunications services

We refer to the Department's consultation paper relating to a proposal to introduce a carrier licence exemption to enable private telecommunications infrastructure owners to provide carriers with access to their private infrastructure without obtaining a nominated carrier declaration (NCD). As a company that has long demonstrated its commitment to ensuring communities in rural and regional Australia have access to a broad range of high quality telecommunications services, we welcome the opportunity to comment on the proposal.

We support the Department's stated aims of fostering more efficient use of private telecommunications infrastructure and of streamlining regulation to avoid disproportionate burden on business. Use of private infrastructure can be, and has been, useful in expanding the reach of telecommunications services to meet the needs of our customers in regional and remote areas.

Accordingly, our position is one of 'in principle' support for the Department's proposal; however we are concerned that the proposed exemption does not adequately meet these objectives for two reasons.

First, we are concerned that the proposed exemption might dilute some of the benefits of the existing regime. In particular, consideration should be given to whether additional conditions are necessary to ensure prudent obligations that currently apply do not 'fall away' where the exemption is used.

Second, if these issues can be addressed, we question whether an additional regulatory instrument, in the form of a class exemption from the NCD requirements, is the optimal way to achieve the Department's objectives. A more fundamental reform, that would result in even less 'red tape', may be possible.

Obligations that may not apply where the proposed exemption is used

Some of the obligations imposed on carriers under the *Telecommunications Act 1997* (the Act) are expressed to apply to persons who 'own or operate' network units. Under the terms of the proposed exemption, there will be cases where a carrier neither owns nor operates the

network units that are being used to provide carriage services to the public, so obligations expressed to apply in this way would not apply.

Section 81A of the Act was introduced specifically to address the same issue as it arose in the context of the NCD arrangements¹ and to ensure that nominated carriers are subject to these obligations. The section does this by providing that:

“If at any time the nominated carrier does not own or operate the network units, [the Act] nevertheless applies to the nominated carrier in relation to the network units as if they were owned or operated by the nominated carrier.”

Some examples of the ‘regulatory gaps’ that might arise if analogous arrangements were not applied in the context of the proposed exemption are identified below:

- **Access obligations under Schedule 1 of the Act**

Schedule 1 of the Act contains facilities access provisions that require carriers to provide other carriers with access to certain facilities ‘owned or operated’ by the first carrier, such as transmission towers, for the purpose of enabling the accessing carriers to supply carriage services.

If the proposed exemption is granted, those obligations may not apply to a carrier who obtains use of relevant private telecommunications infrastructure under the proposed exemption. This is because that carrier will not own the infrastructure, and may also not ‘operate’ the infrastructure for the purposes of the Act.

This will mean that other carriers will not have any legislative right of access to the infrastructure to provide carriage services, and will thus be ‘locked out’ unless the private owner grants them access or the infrastructure is captured by Division 4 of Part 20A of the Act (which only applies to certain fixed line facilities built after 27 September 2011).

We are not aware of any policy reasons why the same requirements that are applied under Schedule 1 in the context of relevant facilities owned or operated by carriers (or where they are deemed to do so under the NCD regime) should not also apply in relation to facilities used by carriers in the context of the proposed exemption.

- **Inspection and maintenance obligations**

Part 6 of Schedule 1 of the Act requires carriers to inspect and maintain certain facilities they ‘own or operate’. As per the comments above in relation to the facilities access regime, it is not clear these obligations will apply to a carrier who obtains use of private telecommunications infrastructure under the proposed exemption (in contrast to the situation relating to use pursuant to NCD arrangements). The obligations would also not apply to the private owners.

Accordingly, important related legislative requirements (such as to regularly inspect the facilities and take prompt remedial action if relevant problems or dangers are identified) will not apply. There is no obvious reason why the public policy rationale for these requirements in the context of Schedule 1 would not be equally applicable in the context of carrier use of the infrastructure under the proposed exemption.

We do not believe the exemption should be granted without ensuring that the current suite of carrier obligations, including those identified above (and others expressed to apply to network

¹ Explanatory Memorandum to the Telecommunications Amendment Bill (No. 2) 1997, p. 17.

units owned or operated), apply to the privately owned network units used to supply services to the public as they do under the NCD regime.

Opportunity for more fundamental reform?

Assuming the issue of carrier obligations identified above can be overcome, we have no objection to the exemption being granted. The proposed exemption will remove some administrative burden (the requirement to apply and pay for the NCD) from situations where carriers obtain access to private infrastructure to provide services to the public. However, if such a wide class exemption (as is currently proposed) is acceptable, we believe that this raises questions about whether the NCD regime itself can be further reformed to streamline and remove unnecessary bureaucracy in the application and registration process.

Closing comments

As a significant investor in telecommunications infrastructure in regional and remote Australia, we are committed to expanding the reach of our networks so that we can provide our customers with access to relevant and useful services. Accessing private infrastructure is one way of expanding our coverage; however we consider it important that any such partnership with private infrastructure owners be subject to the same regulatory obligations that apply to carriers elsewhere. The existing NCD process achieves that objective.

We do not believe the exemption should be granted in its current form. If the exemption proposal can be amended so as to ensure that the current suite of carrier obligations apply to privately owned network units, then we believe consideration should be given to more fundamental reform. We would welcome the opportunity to discuss these issues further, or as part of further consultation with industry.

Thank you for the opportunity to provide our views on the proposed exemption. Please do not hesitate to contact John Laughlin (03 8649 7638 or john.laughlin@team.telstra.com) if you would like to discuss any aspect of this submission.

Yours sincerely,



Jane van Beelen
Executive Director
Regulatory Affairs