

8 June 2020

Department of Infrastructure, Transport, Regional Development and Communications  
By email: [new.developments@communications.gov.au](mailto:new.developments@communications.gov.au)

Dear Sir/Madam

## **Re: Proposed update of the Telecommunications in New Developments policy**

VostroNet welcomes the opportunity to provide this submission in relation to the Department's proposed update of the Telecommunications in New Developments (TIND) policy.

Our views are informed by our experience as a private operator which specialises in deploying and operating telecommunications infrastructure in new developments across Australia. We agree with the stated objectives of the policy, which are:

1. to provide people moving into new developments with ready access to modern telecommunications, both voice and broadband; and
2. to support a competitive and sustainable market for the provision of such infrastructure, thereby fostering efficiency, innovation and choice.<sup>1</sup>

Our submissions will focus upon two sections of the policy – charging and overbuilding.

### **Overview**

- There is a material competitive imbalance in the market for the provision of telecommunications infrastructure at new developments, which overwhelmingly favours NBN Co.
- Despite these market conditions, the existing TIND policy settings have facilitated the development of contestability in the narrow section of the market where the alternative carriers currently compete.
- Without addressing NBN Co's entrenched advantages, the proposed updates to the TIND policy in relation to charging (section 3.7) and overbuilding (section 3.8) will act contrary to the TIND policy's stated objectives, by reducing competition in the market without providing an improvement in the provision of access to modern telecommunications.
- The following factors must be addressed before the proposed updates to charging and overbuilding are implemented:
  1. Access to the major RSPs (including Telstra, Optus and TPG) should be facilitated for alternative carriers. This could be achieved through a single shared B2B interface – as favoured by Telstra<sup>ii</sup>, Opticomm<sup>iii</sup> and Uniti<sup>iv</sup>.
  2. Established competitors should be subject to equivalent taxing regimes in relation to new developments – i.e. NBN Co should be required to pay an amount equivalent to the Regional Broadband Scheme charge (to an unaffiliated body) in relation to contested developments.

## Market Context

The market for the provision of telecommunications infrastructure to new developments is highly concentrated. NBN Co accounts for over 80% of new builds in the greenfield market and will likely control over 95% of the fixed broadband market once the NBN build is completed<sup>v</sup>.

In addition to its position as default provider and possessing a dominant market position, NBN Co has other significant advantages when competing for new developments:

1. NBN Co has access to the major RSPs (including Telstra, Optus and TPG) which as a practical matter are not currently able to operate on alternative carrier networks<sup>vi</sup>. The value of NBN Co's pool of RSPs as a distortive advantage cannot be overstated – in our experience, many developers will not consider alternative carriers without these major RSPs.
2. The Regional Broadband Scheme was recently passed. The tax of \$7.10 per month for all non-NBN Co connections will create a substantial advantage for NBN Co in terms of marginal cost.
3. NBN Co enjoys perceived legitimacy from being government-owned and through its intense media coverage. We have found that many people believe that an NBN connection is a standalone form of technology and/or that the NBN is inherently faster than an alternative fibre connection.
4. NBN Co is a government-owned corporation which can operate at a massive scale and without the financial constraints of smaller private competitors. NBN Co is not operating under ordinary commercial requirements regarding returns (forecast 3.2% return<sup>vii</sup>) and enjoys cheap and easy access to capital.

It is our experience that most new developments are awarded to NBN Co without being opened for tender or otherwise contested.

To our knowledge, there has been no review to conclude that there is an underlying issue with NBN Co's market share that requires correction. We also note that each premises connected by an alternative carrier saves taxpayers more than \$1,491 on a net basis.<sup>viii</sup>

## Charging (Section 3.7)

Within the context described above, we do not believe it is appropriate to amend the policy in such a way as to increase the competitive capacity of NBN Co in a market where it is already so dominant.

We have found that the ability to offer flexible pricing options is one way for us to differentiate ourselves from NBN Co, which enables us to open a dialogue with prospective clients. We are concerned that the proposed policy change will close what is already a small window in which private operators can successfully operate in the market.

## Overbuilding (Section 3.8)

The previous version of the policy – which noted that “there is no policy basis and little commercial reason for NBN Co to overbuild” – was entirely appropriate.

From our experience, in almost all cases, overbuilding is wasteful and non-commercial. It is a hostile act and we are concerned that the power to overbuild would be utilised by NBN Co for the purpose of damaging competitors, rather than legitimate commercial reasons.

We anticipate that overbuilding by NBN Co will, in most cases, amount to a breach of Section 46 of the *Competition and Consumer Act 2010*, which prohibits an entity with a substantial degree of market power, such as NBN Co, from engaging in conduct that has the purpose, effect or likely effect of substantially lessening

competition in a market. In our view the Department should prevent overbuilding at a policy level to avoid unnecessary and expensive disputation.

We think it is reasonable to allow some mechanism for NBN Co to overbuild if special circumstances exist. The previous policy allowed for overbuilding with Ministerial approval, which was an appropriate safeguard. In our opinion the removal of Ministerial scrutiny will inevitably result in damaging behaviour by NBN Co sales staff and an obfuscation of NBN Co's activities.

## Summary

We encourage the Department to conduct a review of the market share of NBN Co at new developments and to reconsider the proposed policy changes in relation to pricing and overbuilding. In our view, the Department should not allow NBN Co to further tighten its grip on the greenfield market, as this will lead to outcomes which are contrary to the policy's stated objectives, including the support of a competitive and sustainable market in order to foster efficiency, innovation and choice.

Further, we submit that NBN Co is a statutory provider of last resort and there is no reason for it to engage in predatory practices such as undercutting and overbuilding at new developments at the expense of private competitors. NBN Co's effective monopoly in this market is unnecessary and undesirable, and should not be assisted through the loosening of regulatory policy.

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<sup>i</sup> Telecommunications in new developments policy Draft for comment—updated 24 April 2020, page 4

<sup>ii</sup> Telstra Submission to the Department of Communications and the Arts regarding the review of the 2015 Telecommunications in New Developments, pages 12 and 13

<sup>iii</sup> Opticomm Review of the 2015 Telecommunications in New Estates (TIND) Policy Response, page 4

<sup>iv</sup> Uniti Response to the Department of Communications and the Arts Request for Comments on its Review of the 2015 Telecommunications in New Development (TIND) Policy, page 2

<sup>v</sup> Estimate per Opticomm Review of the 2015 Telecommunications in New Estates (TIND) Policy Response, page 2

<sup>vi</sup> Telstra Submission to the Department of Communications and the Arts regarding the review of the 2015 Telecommunications in New Developments, pages 12 and 13

<sup>vii</sup> NBN Co Corporate Plan 2020–23, page 6

<sup>viii</sup> Per NBN Co Third Quarter Results FY2020, NBN Co's FTTP Greenfields builds (the least expensive) currently cost \$2,128 per premises to connect. The current Developer contribution of \$364 (ex GST) and End-User contribution of \$273 (ex GST) cover only 30% of the cost, resulting in net \$1,491 cost per premises of taxpayer funding. Where alternative carriers deploy infrastructure, there is no cost for taxpayers. The proposed updates will have the following effect:

1. Increase the net cost to taxpayers (above \$1,491) by providing the scope for NBN Co to reduce the amount the Developer pays
2. Increase the number of builds by provide the scope for NBN Co to duplicate infrastructure.

This activity is undesirable and is, by definition, to the detriment of existing private operators.