

Regulation Impact Statement

Proposed changes to the *Telecommunications Infrastructure in New Developments* policy

This Regulation Impact Statement (RIS) looks at options to amend the *Telecommunications Infrastructure in New Developments* (TIND) policy to deliver a more efficient and sustainable market.

1. The Problem

The Australian Government has had a TIND policy since 2011, with the current version in place since March 2015. The policy is intended to guide stakeholders on their relative roles in ensuring telecommunications are readily available in new developments. This was seen as beneficial in light of significant changes in the telecommunications sector with the transition from Telstra to NBN Co Limited (NBN Co) as the primary provider of fixed-line infrastructure for most premises in Australia, noting this was taking place in a wider competitive marketplace.

While it refers to legislation where it is relevant, the TIND policy does not have the force of law. However, NBN Co is required to comply with it under its Statement of Expectations, which in effect makes it quasi-regulation binding on NBN Co. In practice, the policy complements relevant black letter law, notably the *Telecommunications Act 1997* and the *Competition and Consumer Act 2010*, and the Australian Government's Competitive Neutrality Policy.

When the 2015 policy was put in place, there were concerns about the potential impact NBN Co could have on small competitors. In addition to the existing regulatory mechanisms to protect competition under both generic and telecommunications law, four additional constraints were placed on NBN Co to foster competition by effectively protecting smaller providers, noting the policy was subject to future review:

1. NBN Co was required to charge fixed prices for servicing new developments to partially recover some of its costs upfront.¹
2. NBN Co was restricted from overbuilding developments serviced by other carriers unless it was commercial to do so and it had the approval of Shareholder Ministers. 'Overbuilding' here means deploying competing network infrastructure where another carrier had already deployed NBN-comparable networks.
3. An onus was placed on NBN Co to provide backhaul services to new development competitors if there was a commercial case to do so.
4. An onus was placed on NBN Co to provide access to competitors for its business-to-business (B2B) interface if there was a commercial case to do so.

¹ Some stakeholders have expressed the view that NBN Co's upfront charges relative to its costs in new developments mean it is not recovering its costs. We do not accept this view, which seems to confuse cost recovery with how costs are recovered. Setting aside its obligations as a default infrastructure provider to service premises even if they are non-commercial, as a commercial entity NBN Co must recover its costs overall. If new development costs are not recovered upfront (which could affect demand and be detrimental for developers and property buyers), they are recovered over time through ongoing wholesale charges. From our observation, this is the standard practice of carriers serving the new developments market. Part payment upfront and further payment over time is a common, familiar pricing practice in many contexts.

The pricing constraints were set because at the time NBN Co was not charging developers upfront to install networks in new developments, while competitors' models typically involved some upfront charging, making them potentially less attractive to developers. The overbuilding constraints reflected concerns from small competitors that if NBN Co overbuilt them this could damage their return on investment. The backhaul measure reflected small carriers' view that as Government funded infrastructure they should be able to share its use, reducing their costs, enabling them to better compete and service their developments. The B2B interface measure reflected the desire of competing providers to attract large retail providers to supply services on their networks. (Such providers may not wish to supply services on small networks as the revenues may be low and outweighed by B2B integration costs.)

As a matter of good regulatory practice, the policy was to be reviewed after three years and after five years it is now overdue. Generally the policy has been successful in ensuring new developments have ready access to modern telecommunications. There is some evidence, however, of limited non-compliance by small developers leading to delays and added costs for a small number of property buyers. More generally, a number of significant changes have occurred in the sector. The National Broadband Network (NBN) is now nearly complete. The legislative framework has shifted, with statutory infrastructure provider (SIP) laws now in place and setting 'must serve' obligations for carriers servicing new developments. Carrier separation rules have also been amended, creating new competitive opportunities for providers other than NBN Co. Some smaller providers have merged and expanded and others have entered the market. This raises questions whether the additional competitive constraints on NBN Co remain appropriate going forward or whether normal competition regulation should prevail. This is the key focus of this regulation impact assessment.

As a particular matter of immediate practical concern, the issue of small developer non-compliance with the policy is the subject of a separate regulation impact assessment and will not be dealt with in detail here.

Another issue of concern has been variability in the standard of technology and services across developments. In the 2015 policy the expectation was this would be dealt with through carrier licence conditions, but the Government then decided to use the proposed SIP laws. This approach was reiterated in the report on Part B of the Consumer Safeguards Review in December 2019. Accordingly, this issue is not considered further here as any such instruments will be the subject of a separate regulatory impact assessment.

The RIS:

- sets out the options available, and the strengths and weaknesses of those options;
- assesses the impacts of those options on stakeholders; and
- assesses the costs of the options.

2. Government's objectives

The Government's objective is that people moving into new premises continue to have ready access to telecommunications services, and the optimal market settings to achieve this on a sustainable basis into the future are in place, noting the default setting is an open and competitive marketplace.

3. Overview of options

Options 1 and 2 are effectively the status quo. Options 3 and 4 are deregulatory. Option 5 involves further regulation and is included for comprehensiveness and comparison.

1. *Do nothing.* Under this option, the policy would remain in place, and would not be updated to reflect changes in the market like the passage of the SIP legislation and the completion of the NBN. Overbuilding restrictions would remain and NBN Co would continue to have fixed charges and would be limited from responding to competitors who do not have to offer fixed charges. Backhaul and interface issues could be raised by alternative providers with NBN Co, and those providers could seek regulatory intervention if required.
2. *Limited Update.* This option entails a minimal update of the current policy with regard to the changes in the legislative and policy framework within which the policy operates (i.e. the SIP legislation), without addressing concerns about the competition constraints.
3. *Move to more normal arrangements.* Under this option NBN Co's current developer and end-user charges would become price caps, overbuilding restrictions would be removed, developers would remain responsible for ensuring developments are connected to telecommunications networks, infrastructure provider arrangements would be based on the SIP legislation and access to backhaul and NBN Co's interface would remain matters for commercial agreement or for the industry regulators
4. *No policy.* This option entails the withdrawal of the TIND policy and reliance on market forces within the normal legislative framework.
5. *Strengthen regulation of NBN Co.* This option would see the competitive constraints on NBN Co under the 2015 TIND policy formalised in law and potentially strengthened given concerns from smaller operators about otherwise competing with NBN Co.

4. Analysis of the options

Option 1 (status quo) does not generally impose any additional regulatory costs on developers, carriers or consumers. Small competitors may continue to receive some protection, primarily from the pricing limitations on NBN Co, noting NBN Co can overbuild when it is commercial and Shareholder Ministers would not be expected to oppose commercial activities of a Government Business Enterprise (GBE). However, in the long run this could lead to a less efficient market as there would be less competition on new development solutions and their pricing, with flow-through costs for developers and consumers. There would also be some potential for confusion for stakeholders if the policy is incompatible with legislated requirements such as the SIP regime.

Option 2 (limited update) would not impose additional regulatory costs on industry. While the TIND policy would be updated to reflect the SIP legislation, which does require carriers to take on 'must serve' obligations in developments they are contracted to service, carriers are required to comply with the SIP regime in any event regardless of whether the TIND policy is changed. Consequently the change in policy would not impose new costs. This option would remove potential confusion caused by differences between the TIND policy and SIP legislation. However, in the long-term it could lead to a less efficient market, for the same reasons as outlined under option 1.

Option 3 (normalisation with guidance) addresses the constraints on competition imposed by the current policy. The changes would enable the market to operate more efficiently as NBN Co could respond to competitive pressure on pricing, noting that as a GBE and corporation it is obliged to operate commercially. Strong competition in the marketplace should foster the growth of robust businesses that are sustainable over the long term and able to invest and maintain service levels

rather than let service levels slip and potentially fail, to the detriment of consumers and the long term cost to the community (e.g. by having to replace or retrofit failed networks). The growth of stronger larger competitors should also increase incentives for retail service providers to operate on such networks, not simply the NBN. The qualification to this would be NBN Co would remain subject to caps on the proportion of costs it recovers upfront (as opposed to over time) so increases in upfront charges do not discourage development and property purchases, particularly given concerns about housing affordability.

While there are concerns that NBN Co could use its position in the market to engage in anti-competitive practices, it would remain subject to extensive generic and telecommunications-specific regulation of anti-competitive practice (e.g. section 46 and Part XIB of the *Competition and Consumer Act 2010*) which is more authoritative than quasi-regulatory policy and is enforced by the independent competition regulator. NBN Co would also remain subject to the Australian Government's Competitive Neutrality Policy, which provides for complaints to be investigated by the Australian Government Competitive Neutrality Complaints Office. Option 3 also addresses access to backhaul and NBN Co's interface by clarifying that, where there is no commercial case for NBN Co to offer these products, there are long-standing regulatory mechanisms that may be invoked and more effective if regulation is genuinely warranted.

Option 3 is likely to produce minor one-off costs on NBN Co from adjusting its marketing material for developers and retail providers, to reflect its greater charging flexibility. Further information on these costs is provided in section 5.

Option 4 (no policy) would have the deregulatory benefits of option 3 but would have two particular impacts for developers and consumers. First, a benefit of having a policy in place is that it provides a clear pathway for developers, consumers, owner-builders and State, Territory and local governments to navigate the complexities of having appropriate telecommunications services provided in new developments. Removing the policy would remove this guidance, which could lead to information asymmetries and transaction costs for developers (particularly owner-builders) and carriers, and also a lack of clarity for consumers. While only a small number of developers do not follow common industry practice today despite the policy, there is a risk this could increase in the absence of the policy, with cost impacts for consumers and carriers. These costs include higher retrofitting costs as well as the cost of inconvenience and delay given the importance of telecommunications.

Second, in the absence of a policy, there would be no cap on the proportion of its costs NBN Co could charge upfront. While this would be consistent with less regulated commercial operation, it could see NBN Co increase upfront costs (in the absence of effective competition) with cost impacts for developers and consumers, and potentially housing affordability. Overall, then, we would expect option 4 to deliver fewer consumer benefits than option 3 given these concerns.

The treatment of backhaul and NBN Co's interface would be the same under option 4 as under option 3.

Option 4 is likely to produce minor, one-off regulatory costs for NBN Co, other carriers and State, Territory and local governments. These costs are likely to be somewhat higher than those in option 3 (see Section 5).

Option 5 (stronger regulation) would be similar to option 2 but would see the competitive restrictions on NBN Co enshrined in black letter law and likely strengthened on the basis competitors needed to be further protected and policy alone cannot do this. As such option 5 would have the substantive problems of options 1 and 2 in terms of market operation and efficiency, but with the

added disadvantages of embedding them in laws that may not easily be changed even if market conditions warranted it. It would also ignore the fact that the telecommunications sector is already subject to strong and extensive anti-competitive conduct regulation under both generic and telecommunications-specific laws. Should option 5 be implemented with the competitive restrictions largely as set out in the TIND policy, there should not be any new regulatory costs, but this would depend on the final form of the legislation. This is discussed further in Section 5.

5. Analysis of the Costs

Option 1 (status quo). This option does not generally impose any additional regulatory costs on developers, carriers or consumers, but if the policy is left as it is stakeholders may be confused by inconsistencies between the policy and legislated requirements such as the SIP regime. This could lead to some administrative costs as stakeholders seek to obtain correct information. We have not sought to cost these as they would be expected to be minor and are also not directly caused by any change to the existing policy.

As discussed above, in the long-term this option could also deliver an increase in costs as distortions created by the policy deliver less effective competition, with flow through costs to developers and consumers.

Option 2 (limited update). This option does not impose any additional regulatory burden on developers, carriers or consumers. It avoids the probable administration costs under option 1 but also may produce extra costs for developers and consumers in the long-term given less effective competition.

Option 3 (normalisation with guidance). Option 3 is likely to produce minor one-off costs for NBN Co from adjusting its marketing material for developers and retail providers, to reflect its greater charging flexibility.

We estimate the time taken to amend NBN Co's standard marketing material to be very low (perhaps 20 hours, including legal clearances). This would lead to a one-off cost to it of \$1,461 (using the average hourly labour rate of \$73.05, including 75 per cent on-costs.² There may then also need to be some training for outward-facing personnel, which we also estimate to be very low (five hours training for 100 people, at a total of \$36,525).

These costs are likely to be more than offset by potential savings for developers and consumers directly caused by the option. With NBN Co able to adopt more flexible pricing, a proportion of developments should obtain lower prices than in the current market regardless of whether the developers choose NBN Co or an alternative provider.

While it is difficult to be definitive about the exact quantum of savings, some estimates can be made. Currently, about 20 carriers (including NBN Co) compete to deploy infrastructure in new developments, and deal with several thousand developer businesses.

We estimate NBN Co's competitors contract about a third of all new premises in the market each year.³ NBN Co also services a wide range of developments. It is the primary carrier servicing

² As set out in the Regulatory Burden Measurement Framework:

https://www.pmc.gov.au/sites/default/files/publications/regulatory-burden-measurement-framework_0.pdf

³ This information has been obtained from discussions with carriers, the information available online at the Telecommunications in New Developments Map (available at <https://www.communications.gov.au/what-we-do/internet/competition-broadband/telecommunications-new-developments-map>), figures released by OptiComm and Uniti in 2019 in issuing prospectuses to the Australian Stock Exchange and testimony by

owner/builders subdividing their land, where one or a few premises may be built as a result. These are generally unattractive to competitors as these are best serviced by being connected to the broader existing network (which will generally be the National Broadband Network).

NBN Co's competitors generally target larger developments with 20 or more premises. These larger developments are therefore more likely to be contested under this option. Of these larger developments, about 75 per cent would be single dwelling units and about 25 per cent would be units in multi-dwelling buildings.⁴ If we assume developer charges could fall by half, this could produce total reductions of around \$50 million per year

Savings should, given the competitiveness of the property market, ultimately be passed on through new house prices or leasing costs. To the extent that NBN Co can match competitors' pricing, it should be able to win some business from them, but this is also likely to spur further innovation and service quality improvements from its competitors in response. NBN Co's competitors also can grow their businesses in other market sectors than new developments, as demonstrated by Uniti's recent announcement that it is considering overbuilding other providers in brownfields, especially commercial estates, where it can leverage its network assets.⁵

It is not clear that any providers would exit the market. There has been some consolidation in the market in the past two years, with Uniti first buying some smaller providers and now in the process of acquiring OptiComm. This is likely to provide NBN Co with a competitor of reasonable scale. Some smaller providers also have grown strongly recently, such as Lynham Networks, partly through adopting aggressive pricing strategies, and these strategies are unlikely to be affected by the changes proposed to the TIND policy.

Option 4 (no policy). Option 4 is likely to produce minor, one-off regulatory costs for NBN Co, other carriers and State, Territory and local governments. These costs are likely to be somewhat higher than those in option 3.

NBN Co would face the costs outlined above under option 3, but other carriers, developers and State, Territory and local governments would also need to consider whether their marketing material, standard contracts or planning documents include elements from the TIND policy and need to be amended. Again, it is difficult to estimate the number of organisations that may need to consider their documents. Based on information provided to us by carriers, we estimate there are about 1,000 larger developers in the market and over 10,000 smaller developers. There are also 537 local councils in Australia. 284 local councils are in New South Wales, Queensland and Victoria, where State planning rules require them to make provision for telecommunications infrastructure to be installed in new developments and many local planning documents already refer to Commonwealth requirements and reflect the TIND policy. Some individual councils in other states or

OptiComm Chair, Mr Paul Cross, to the Senate Environment and Communications Legislation Committee, on 30 January 2020, that its share of the new developments market is about 25 per cent.

⁴ This is the breakdown between single dwelling units and premises in multi dwelling buildings identified by the Housing Industry of Australia in its Research Note on *The Changing Composition of Australia's New Housing Mix* June 2018: <https://hia.com.au/-/media/HIA-Website/Files/IndustryBusiness/Economic/discussion-papers/the-changing-composition-of-australia-new-housing-mix.ashx?la=en&hash=5C6948C6D70E5856F29100D9D55A72301E133C03>; and by the Reserve Bank of Australia in its publication on *Houses and Apartments in Australia* June 2017: <https://www.rba.gov.au/publications/bulletin/2017/jun/pdf/bu-0617-1-houses-and-apartments-in-australia.pdf>.

⁵ *Communications Day* 25 August 2020, 'Uniti to expand fibre to brownfields, wants RBS levy extended to wireless'.

territories also refer to the TIND policy in their planning documents even if there are no State-level requirements.

Based on these figures, we estimate about 11,300 organisations would need to review their documents. We further estimate that while this could be straightforward for most organisations, about 1,000 organisations (largely local, State and Territory governments and carriers with some larger developers) may need to undertake a more detailed review which could involve up to 10 hours per organisation. We therefore estimate one-off review costs of up to \$730,500.

Option 5 (stronger regulation). Option 5 would involve amending legislation to place NBN Co's current fixed charges in statute, and also to establish a statutory restriction on NBN Co overbuilding other carriers unless it is commercial to do so and it has first received Shareholder Ministers' approval. Given these obligations already exist in the TIND policy, option 5 is unlikely to impose additional regulatory costs on industry, though this would depend on the final form of the legislation. Any costs would be considered at the time legislation (if adopted) is introduced.

6. Preferred option

Option 3 is the preferred option, because it delivers a more efficient and sustainable market structure which allows competitive forces to operate while recognising the strong protections that already exist in competition law and competitive neutrality policy, and produces greater overall benefits for consumers and industry. Its regulatory costs are minor and, though it is difficult to estimate benefits given the complex range of factors involved in industry pricing decisions, any costs are likely to be more than offset by potential benefits for industry and consumers through reductions in charges.

7. Consultation

The Department issued a discussion paper for the review of the TIND policy on 25 November 2019 and then issued proposed changes to the policy for comment on 27 April 2020. The draft policy was based on option 3. The Department also held a number of discussions with stakeholders to explore issues raised in submissions.

Submissions were received from industry, developers, consumer groups and other agencies.

Developers and consumer groups generally supported option 3. For example, Landcom, the Property Council of Australia, the Real Estate Institute of Australia and the Urban Development Institute of Australia supported changes to NBN Co's pricing, and Landcom noted that relaxing restrictions on overbuilding by NBN Co could provide consumer benefits such as faster access to the range of retail providers available on the NBN.

The Australian Communications Consumer Action Coalition highlighted that the proposal to make NBN Co's charges caps could stimulate NBN Co's competitors to focus on improving quality in order to attract developers, but cautioned against competition that would lead competitors to reduce service quality. In this regard, it noted that standards that could be made under the SIP legislation could be used to improve service quality. (This is a matter being considered separately as noted on page 2.)

NBN Co's competitors in the new developments market generally supported retaining the status quo or imposing stronger obligations on NBN Co (option 5), arguing that NBN Co could use its market power and Government funding to exclude smaller operators from the market. OptiComm, Uniti

and Vostronet made submissions arguing these points either on the discussion paper or on the draft policy.

The Australian Competition and Consumer Commission (ACCC) also expressed concerns that the proposed changes to NBN Co's charges and overbuilding restrictions could allow NBN Co to seek to exclude smaller operators from the market. The ACCC did, however, support overbuilding to allow NBN Co to deploy targeted point-to-point fibre services to business customers, as the market for business customers is generally seen to be very competitive and this competition has intensified since NBN Co's entry into the market.

These competition concerns were assessed carefully. In particular the Department noted that NBN Co had in practice engaged in very little overbuilding despite the scope available to it under the current policy. Moreover, as a GBE, it is required to operate commercially, meaning investment would be made on the basis of the commercial return expected, not simple exclusionary intent. Little real evidence was provided to justify concerns that anti-competitive conduct would occur, existing mechanisms could not deal with them, or that the revised TIND policy would not promote a more efficient and competitive market.

It was nevertheless accepted that NBN Co would have incentives to exclude competitors, but in this regard there are strong *ex post* mechanisms to deter and respond to any anti-competitive conduct that NBN Co might consider. The overall view is that the current approach distorts competition and end-user outcomes and the outcomes are not sustainable in the long term. By contrast, a move to a more normal operating environment will provide more effective competition and improve efficiency and sustainability, delivering benefits for developers and consumers, while risks of anti-competitive conduct can be managed using the established and intended mechanisms available.

Noting the concerns raised, however, as added safeguards, the draft policy was amended to make it clear that NBN Co must keep records and provide regular reports to the Government on its activities, including its proposed schedule of charges, the charges it has applied and its reasons for charging below the caps, records of decisions to build competing infrastructure in new developments being serviced by other carriers and the commercial case for such activities. The policy was also amended to note that this information will provide the Government with ongoing visibility of such matters, and that NBN Co will also be better able to assist the ACCC or the Australian Government Competitive Neutrality Complaints Office (AGCNCO) if required.

Finally, the policy was also amended to note that the Government will closely monitor NBN Co's conduct in the market and that the Government reserves the right to adjust the policy or take other remedial steps if needed, and that the Government also expects the ACCC and the AGCNCO to be equally vigilant.

8. Implementation and Evaluation

Implementation is relatively straightforward. As this is a policy, the Government will publish the new policy and also draw the changes to the attention of stakeholders, including developer organisations, network providers, state and territory governments and consumer groups. Ongoing awareness-raising activities are planned. Implementation risk are considered low because the policy largely allows the market to operate with minimal intervention and relies on extensive, established mechanisms to deal with anti-competitive conduct. It is a requirement of the policy that NBN Co keep the specified records and charging schedule and provide them promptly.

When the new policy is published it will take effect from that date, and the previous TIND policy will cease to apply. While NBN Co would be free to adopt the new requirements from that date, the new policy does not in itself affect existing contracts.

The Government will monitor the impacts of the revised policy on the telecommunications sector, and in particular the impacts on NBN Co and its competitors. The Government expects to review this policy in five years' time, but will do so earlier if warranted by changes in the market. The policy states that the Government envisages this may be the final TIND policy, as one may not be required given the normalisation of the market.