

5 December 2014

Mr [REDACTED]
[REDACTED]
[REDACTED]
by email to: [REDACTED]om

Dear Mr [REDACTED]

NBN Co Fixed Wireless Tower – Woombah, NSW

Thank you for your recent correspondence in relation to the above facility. I apologise for the delay in responding.

In your email correspondence you have asked a number of questions about the regulations governing the installation of National Broadband Network (NBN) fixed wireless towers generally, including the application of the Mobile Phone Base Station Deployment Code (the Deployment Code) and the role of the Australian Communications and Media Authority (the ACMA) in regulating such matters. This letter is intended to provide a comprehensive response to the questions you have asked.

The regulatory arrangements for installation of radiocommunications facilities—including facilities installed by or behalf of NBN Co—can be summarised as follows:

- the installation of telecommunications facilities is subject to State, Territory and local government planning laws unless the installation relates to an authorised activity under Schedule 3 to the *Telecommunications Act 1997* (the Act);
- the installation of a "low-impact facility" is an authorised activity under Schedule 3 and therefore must comply with the Act and the *Telecommunications Code of Practice 1997* (the Code of Practice);
- the installation of mobile phone radiocommunications infrastructure (whether or not these facilities constitute a tower or low-impact facility) is subject to the Deployment Code.

As such, it is an important question whether a particular facility is a low-impact facility, because the installation of low-impact facilities is governed by Schedule 3 to the Act and the Code of Practice. The ACMA has responsibility for supervising compliance with the Act and the Code of Practice in relation to low-impact facilities.

In contrast, facilities that are not low-impact facilities are subject to State, Territory and local government planning laws. The ACMA plays no regulatory role in relation to the installation of such facilities.

I shall elaborate on these points in further detail below.

Schedule 3 to the *Telecommunications Act 1997*

Schedule 3 to the Act sets out a regime for carrier powers and immunities to enter land for the purposes of inspecting land, maintaining a telecommunications facility or installing certain types of facilities (such as low-impact facilities). Subject to the Act, carriers are exempt from State, Territory and local government planning approval requirements when exercising powers conferred under Schedule 3.

NBN Co holds a carrier licence and is therefore a carrier for the purposes of Schedule 3.

Low-impact facilities

Low-impact facilities are those which, because of their size and location, are considered to have a low visual impact and be less likely to raise significant planning, heritage or environmental concerns. Low-impact facilities are specified in the *Telecommunications (Low-impact Facilities) Determination 1997* (the Determination) made by the Minister for Communications under subclause 6(3) of Schedule 3, and include small radiocommunications antennae and dishes that may be erected on existing towers and buildings.

Facilities such as overhead cabling and freestanding radiocommunications towers are not classified as low-impact facilities and their installation must comply with relevant State, Territory and local government planning laws. However, the Determination identifies certain equipment as low-impact when it is mounted on existing structures such as buildings, poles or towers. It also classifies an extension of up to five metres on an existing tower as low-impact, provided the tower has not been previously extended.

Based on the available information, the NBN Co tower installed at Woombah is not a low-impact facility. On this basis, other NBN Co towers that share the same physical characteristics as the Woombah tower would also not be low-impact facilities.

The ACMA does not have a regulatory role in authorising or approving low-impact facility installations, nor does it assess installations to determine whether they are low-impact facilities. If there is any disagreement over whether a facility is a low-impact facility, it is open to the party objecting to the facility to seek independent legal advice and if it sees fit, commence proceedings in a court of law to determine the issue.

Telecommunications Code of Practice

The Code of Practice imposes a number of obligations on carriers when exercising powers and immunities under Schedule 3 to the Act, including requirements to:

- provide landowners and occupiers with notice before installing a facility;
- cause as little detriment, damage and inconvenience as practicable;
- comply with good engineering practice; and
- protect the environment.

The Code of Practice applies only in relation to the installation of low-impact facilities and other activities authorised under Schedule 3 to the Act.

The Code of Practice is directed at ensuring that carriers do all that is possible to share sites or co-locate facilities in order to minimise the proliferation of facilities across multiple sites. Under the Code of Practice, carriers must take all reasonable steps to co-locate proposed low-impact facilities with existing facilities of other carriers or public utilities.

Therefore, a carrier wishing to install a low-impact radiocommunications facility in the vicinity of an existing NBN fixed wireless tower would be obliged to investigate the possibility of co-locating on the NBN tower and any other relevant structure or facility in the area.

The ACMA is responsible for ensuring low-impact facilities are installed according to the Code of Practice. Where a carrier has breached the Code of Practice, the ACMA may take enforcement action, which may include giving formal warnings or directions to comply with the Code. However, complaints regarding compliance with the Code of Practice are handled in the first instance by the Telecommunications Industry Ombudsman.

Mobile phone towers

The installation of mobile phone radiocommunications infrastructure (including mobile phone towers) is subject to the Communications Alliance Deployment Code.

The Deployment Code sets out the steps a carrier must take when deciding where to place such facilities and aims to have carriers apply a precautionary approach to the design, operation and selection of sites for mobile radiocommunications infrastructure. The Deployment Code also provides for greater participation by the community and councils in decisions made by carriers.

Where there is otherwise a breach of the Deployment Code, the ACMA may direct a mobile phone carrier to comply with the Deployment Code. However, it is important to note that the Deployment Code does not override either Schedule 3 (for low-impact facilities) or State, Territory and local government planning law (for facilities other than low-impact facilities).

The Deployment Code applies only to radiocommunications infrastructure that is mobile phone radiocommunications infrastructure. Because NBN Co's fixed wireless facilities are not mobile phone radiocommunications infrastructure, the Deployment Code does not apply to these facilities. The subsequent installation of a mobile phone tower on the NBN Co fixed wireless facility does not render the NBN Co tower retrospectively subject to the Deployment Code.

Non low-impact facilities

The installation of facilities other than low-impact facilities is subject to State, Territory and local government planning laws. These laws will vary between different jurisdictions. The ACMA does not have a regulatory role in investigating or reviewing a planning decision made under State, Territory or local government planning law. As noted in earlier correspondence, the installation of the NBN Co tower at Woombah was subject to the requirements of NSW planning law.

Carrier access to telecommunications transmission towers

Part 5 of Schedule 1 to the Act requires carriers to provide access to telecommunications transmission towers and the sites of transmission towers if requested by another carrier subject to certain conditions being met. A carrier is not required to provide access to a tower unless the access is for the sole purpose of enabling the requesting carrier to install a facility used or for used in connection with the supply of a carriage service by means of radiocommunications (this includes a mobile phone service) and the requesting carrier gives reasonable notice that it requires access.

A carrier may refuse to grant access to a transmission tower if the Australian Competition and Consumer Commission (ACCC) has issued a certificate that providing access is not technically feasible.

Part 5 of Schedule 1 to the Act is a standard carrier licence condition and non-compliance will be a breach of the Act. Where a carrier has breached the Act, the ACMA may take enforcement action, which includes issuing formal warnings or directions to comply with the Act.

The ACCC has developed a [Facilities Access Code](#)¹ to assist carriers when negotiating access to the facilities of other carriers. The Facilities Access Code was introduced in 1999 (and subsequently revised in 2013) to encourage carriers to co-locate their telecommunications transmission towers and other facilities where possible. It contains conditions that must be included in access agreements for facilities and sets out procedures and processes that must be followed when requests for access are made by one carrier to another.

Apparatus and spectrum licence obligations

NBN Co, as the holder of a spectrum and apparatus licence issued under the *Radiocommunications Act 1992*, is subject to conditions in relation to the electromagnetic radiation or emission (EME) from its licensed radiocommunications transmitters. The *Radiocommunications Licence Conditions (Apparatus Licence) Determination 2003* requires the transmitters operated under a spectrum or apparatus licence not to exceed levels for public exposure set out in the *Radiation Protection Standard for Minimum Exposure Levels to Radiofrequency Fields – 3 kHz to 300 GHz* published by the [Australian Radiation](#)

¹ A Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities, September 2013

Protection and Nuclear Safety Agency (ARPANSA), which is the Commonwealth agency charged with providing expert advice on radiation protection.

**Australian
Communications
and Media Authority**

www.acma.gov.au

NBN Co Fixed Wireless Tower in Woombah

Given that the NBN Co fixed wireless tower located at Woombah is not a low-impact facility, nor is the tower mobile phone radiocommunications infrastructure, the ACMA does not have the jurisdiction to review the process by which the tower was approved or the location at which the tower was installed. This approval was made under NSW environment and planning law and the ACMA is not in a position to review or otherwise investigate that approval process.

In relation to whether the Woombah tower may be used as a mobile phone tower in the future, NBN Co has advised that it has no current plans to lease space on the Woombah tower to mobile phone carriers. However, should a mobile phone carrier request access to the Woombah tower to install a low-impact radiocommunications facility on the tower, installation of the facility would need to comply with Schedule 3 to the Act, the Code of Practice and (assuming that the facility is mobile phone infrastructure) the Deployment Code.

Furthermore, if another carrier seeks access to the Woombah tower, NBN Co would be required to comply with the facilities access requirements under Part 5 of Schedule 1 to the Act.

In conclusion, please note that in the context of your questions regarding the installation of NBN Co fixed wireless towers, the ACMA's regulatory role relates to low-impact facilities only. Should you have concerns regarding the consultation process by which NBN Co has installed certain fixed wireless towers, I suggest that you address these concerns directly to NBN Co.

I trust that this letter provides a comprehensive response to the issues you have raised.

Yours sincerely



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