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Assistant Manager
Licensing Policy
Market Structure Branch
Department of Communications

By email

RE: 'Facilitating the use of private infrastructure to deliver telecommunications services' consultation paper

Nextgen welcomes the opportunity to make a submission on the Department's recent consultation paper on 'Facilitating the use of private infrastructure to deliver telecommunications services'.

While we are generally supportive of moves to ease regulatory burdens, there are various reasons why the current proposal requires careful consideration. These reasons are elaborated upon below in our responses to the consultation paper's questions.

1. What large private infrastructure networks exist?

Nextgen does not have any substantive knowledge as to the existence of private infrastructure networks, and notes that such information is not generally publicly available.

The absence of publicly available information about the existence of private infrastructure networks — not to mention their location and scale — makes it difficult to properly assess the merits or otherwise of the proposed exemption because the potential impacts cannot be fully gauged ex ante, meaning there is some uncertainty about what might result were the proposal to be implemented.

2. What benefits may accrue from facilitating greater infrastructure sharing along the lines proposed?

Nextgen recognises that there are some benefits which may be realised from increased use of private infrastructure to deliver telecommunications services, especially if this (a) occurs in areas where there is no other (or very limited) infrastructure is available and (b) is implemented in a way which does not create distortions to the broader transmission services market.

In the absence of information about the scale and location of private infrastructure networks, however, it is difficult to see how the current proposal could facilitate any substantive benefits given the existing ability to seek a section 51 exemption. Furthermore, Nextgen does not associate the current proposal with any benefits in the form of increased competitive dynamics.

Noting that the current proposal is advanced in the context of reviewing regulatory arrangements, of the various rationales cited in the consultation paper the most relevant would appear to be 'out of date'. The other rationales — ineffective, imposes significant costs and/or uncertainty over obligations — appear to be of little relevance.¹ On the basis of this observation, the central question would seem to be if the current provisions are indeed 'out of date', what type of revision represents the best approach moving

¹ By way of elaboration, given exemptions can already be — and have been — granted we submit that the current provisions cannot be characterised as ineffective. Similarly, as the infrastructure in question is privately owned (for the realisation of private benefits) we submit it cannot be reasonably characterised as imposing significant industry costs or a source of uncertainty.

forward? Nextgen submits that a minor as opposed to major revision is the most appropriate so the risk of distortions to the broader transmission market is minimised.

3. Is the proposed exemption a practical and useful approach?

Whether or not the proposed exemption is practical and useful depends on:

- (a) the scale of private infrastructure networks;
- (b) the extent to which these private infrastructure networks are located in areas where there is a mismatch between supply and demand; and
- (c) the extent to which usage of private infrastructure networks adversely impacts on the operations and/or investments of privately owned telecommunication carriers.

In relation to the last point above, it is noted that the ACCC's recent consideration of Australia's transmission market has revealed increasing competitive dynamics driven by continued private-sector investment in transmission infrastructure.² As a result of this market-led investment, regulatory oversight of the transmission sector has been scaled back and is focused on access and pricing considerations in those areas where competition is weak.

In light of the uncertainties attached to the current proposal, Nextgen submits that some 'checks and balances' are required to avoid the creation of distortions in the broader transmission services market. Our thoughts on the potential form of these are outlined in response to questions 6 and 7.

4. If not, are there alternatives to the exemption model outlined which should be considered?

No response.

5. What risks may arise from the proposed exemption?

The primary risks associated with the proposed exemption are the creation of new distortions in the broader transmission services market. These distortions could have various forms, including:

- The creation of a 'second tier' within the transmission market, which is advantaged relative to privately owned telecommunication carriers on account of being exempted from regulatory obligations, including those tied to carrier licenses;
- The creation of an uneven playing field in respect of the privately owned infrastructure, in that some parties may be able to access to the infrastructure in question while others cannot;
- A diminishment of investment incentives for privately owned telecommunication carriers; and
- General inconsistency with the DTCS regulatory framework, which applies to a substantive part of the domestic transmission market.

In relation to the first point above, the possibility that infrastructure owned by state or territory Governments could be eligible for an exemption is of particular concern to Nextgen. Entities such as VicTrack in Victoria have substantial fibre assets and look to avail these on a 'low cost' basis in settings such as the Mobile Blackspot Program whilst also turning a blind eye to the obligations they have under national competition policy agreements, especially competitive neutrality. This type of behaviour is

² See: <https://www.accc.gov.au/regulated-infrastructure/communications/transmission-services-facilities-access/domestic-transmission-capacity-service-declaration-2013-2014/final-decision>

highly contrary to the intent of the national competition policy framework, and should not be aided in any way as part of moves to revise the operation of section 51 of the *Telecommunications Act 1997*.

6. Would inclusion of an open access condition mitigate risk for carriers?

The inclusion of an open access condition would mitigate some of the risk associated with the proposal for carriers, but not all of it. In particular, such a condition may help with the maintenance of a 'level playing field' assuming there is capacity for more than one access seeker to utilise the private infrastructure in question. On the other hand, however, the inclusion of an open access condition would do little to mitigate carrier risks in the form of demand substitution which could in turn undermine incentives for continued infrastructure investment.

In the absence of information about the location and scale of privately owned infrastructure which could be used to deliver telecommunications services, it is difficult to obtain an in-depth understanding about the magnitude of the 'demand substitution' risk referenced above.

7. Should the proposed exemption be limited, for example by inclusion of a competition test or geographic limitation?

Nextgen submits that there should be some limits or oversight attached to the proposed exemption.

Given that the DTCS is subject to regulatory oversight — based in part on the application of a competition test — it would seem incongruous to allow unchecked usage of privately owned infrastructure for telecommunication purposes in parallel to the DTCS framework.

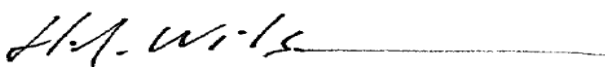
In order to avoid the emergence of distortions in the broader transmission services market, an assessment which took account of the following considerations would seem warranted:

- The presence of infrastructure owned by a licensed carrier;
- The likelihood of a licensed carrier investing in infrastructure in the area concerned in the short to medium term;
- Evidence of an enduring bottleneck in terms of being able to acquire telecommunication services;
- The attributes of the privately owned infrastructure, especially the distance and transmission capacity associated with the proposed service(s) and the geographical attributes of the area in question.

Nextgen also submits that the ACCC should be consulted on the proposed exemption and its possible impact on the broader transmission market, given their access to detailed infrastructure information and knowledge of the domestic transmission market.

Nextgen would be happy to discuss any aspect of this submission in greater detail with the Department, and we look forward to ongoing participation in the current process. I can be contacted via email on hugh.wilson@nextgengroup.com.au or via phone (03) 8620 6482.

Yours faithfully



Hugh Wilson
Manager, Regulatory & Public Policy
NEXTGEN GROUP