

# **nbn** submission to the Department– Consultation Paper: Exemptions for controllers of superfast fixed-line networks from separation requirements

5 February 2021



**nbn** submission to the Department of Infrastructure, Transport, Regional Development and Communications (the Department) – Consultation Paper: Exemptions for controllers of superfast fixed-line networks from separation requirements

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## Environment

**nbn** asks that you consider the environment before printing this document.

# 1 Introduction

1 **nbn** welcomes the opportunity to respond to the Department of Infrastructure, Transport, Regional Development and Communications (the Department) in relation to the consultation to exempt certain superfast fixed-line networks from structural and functional separation requirements.

2 **nbn** does not support the need for a class exemption of any size, including a potential extension of the existing exemptions from 2,000 customer to 12,000 customers. A class exemption has the potential to allow a vertically integrated operator to discriminate in favour of their own retail business, undermine competition and reduce incentives for investment.

3 As **nbn** has submitted in the past, the principle of regulatory symmetry is essential. **nbn** is concerned about the creation of small vertically integrated monopolies which are exempt from the requirement to comply with the wholesale-only obligations or functional separation requirements. There is a high degree of uncertainty about whether entry by these small vertically integrated monopolies will promote competition or efficient investment. For the reasons described in this submission, **nbn** does not support an increase to the class exemption limit to 12,000 customers.

## ***Regulatory symmetry is key to promoting a level playing field between superfast broadband networks***

4 To the extent that superfast broadband services are being provided over competing networks (i.e. both **nbn** and non-**nbn** infrastructure), then it is necessary to ensure that these services are subject to a comparable level of regulation.

5 **nbn** is mandated by legislation to be wholesale only and to provide non-discriminatory access to all RSPs. The terms on which we offer wholesale access to the **nbn** network has the positive effect of promoting competition in downstream wholesale and retail markets.

6 Where some superfast broadband networks are exempted from the requirement to comply with the wholesale-only obligations or functional separation requirements, this is likely to place the **nbn** network and other superfast broadband networks at a competitive disadvantage relative to those networks and potentially limit supply side substitution possibilities in relation to superfast broadband services. This is likely to undermine the prospect of competition for those services at both the infrastructure and retail level, as well as potentially undermining incentives for both **nbn** and other providers to invest in superfast broadband networks and services.

7 Vertically integrated operators have the incentive and the ability to advantage themselves over other RSPs because they are not subject to the same non-discrimination obligations as **nbn**. This means,

if some superfast broadband networks are allowed to compete at both the wholesale and retail level, the end-users on these networks will not receive the same benefits as those on the **nbn** network. **nbn** is also concerned that smaller operators who are exempted from the carrier separation requirements could cherry-pick high value markets.

***Increasing the class exemption size may result in localised monopolies and reduced retail competition***

- 8 Telecommunications networks are capital intensive and require large sunk investments; hence there are significant economic barriers to entry and expansion which make it inefficient for competitors to duplicate existing network infrastructure. This prevents multiple network providers from operating in the same service area and competing at a wholesale level. This results is often localised monopolies with the ability for the network provider to extract monopoly rents from end-users.<sup>1</sup>
- 9 There is little competitive restraint against these localised monopolies if **nbn** or other non-**nbn** superfast broadband networks do not rollout to those locations, which may result in reduced competition and choice for the end-users.

***Small network operators serving up to 12,000 customers are already exempt from the ACCC's Superfast Broadband Access Services (SBAS) Final Access Determination (FAD)***

- 10 **nbn** notes that small network operators with up to 12,000 customers are currently not regulated by the ACCC's SBAS FAD. This means that these network operators are not required to offer regulated wholesale access to their networks.<sup>2</sup>
- 11 Therefore, smaller network providers are not only not required to offer regulated wholesale access to their network (for SBAS), but they will also enjoy the economic advantages of being a vertically integrated provider. This puts **nbn** and other non-**nbn** superfast broadband networks at a significant competitive disadvantage.

***Increasing the class exemption size may not promote new entry***

- 12 The policy intention of the class exemption for small network operators is to promote entry by new providers and create more competition at the wholesale and retail level. **nbn** is of the view that increasing the class exemption limit to 12,000 customers is unlikely to achieve this objective, given

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<sup>1</sup> *Superfast Broadband Access Service and Local Bitstream Access Service declaration inquiry- Draft Decision*, December 2020, Australian Competition and Consumer Commission (ACCC), p.23.

<sup>2</sup> *Superfast Broadband Access Service and Local Bitstream Access Service Final Access Determination joint inquiry Final decision report*, May 2017, ACCC, p.9.

the significant economic and technical barriers to entry for a new entrant. The ACCC has echoed this view in its recent SBAS and LBAS Declaration:

*"...small network operators can elect to be bound by the class exemption...However, the ACCC considers it too early to form a view on the likely extent of new entry and potential competitive constraint on incumbent network operators. In areas with high costs and low density of end-users there is a heightened risk that competition will not develop at all in the future." (emphasis added)<sup>3</sup>*

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<sup>3</sup> ACCC, Superfast Broadband Access Service and Local Bitstream Access Service declaration inquiry Draft Decision, December 2020, p.24