# NBN Developments

**Last updated: August 2014**

These Fact Sheets are a guide only and are no substitute for legal advice. To request free initial legal advice on an environmental or planning law issue, please visit our website\(^1\) or call our Environmental Law Advice Line. Your request will be allocated to one of our solicitors who will call you back, usually within a few days of your call.

<table>
<thead>
<tr>
<th>Region</th>
<th>Contact Details</th>
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<tbody>
<tr>
<td>Sydney</td>
<td>02 9262 6989</td>
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<tr>
<td>Northern Rivers</td>
<td>1800 626 239</td>
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<tr>
<td>Rest of NSW</td>
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</tbody>
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## Overview

The National Broadband Network (NBN) is being rolled out across Australia. The NBN is an upgrade to existing fixed-line phone and internet network infrastructure. New towers and other infrastructure are being built as part of the rollout. This Fact Sheet is designed to assist the community to understand when development consent is and is not required in relation to NBN developments, the type of environmental assessment that needs to be carried out, and when the community is required to be consulted about a proposed NBN development.

### Do NBN developments need development consent?

NBN developments are governed by a number of laws, including both Commonwealth and NSW telecommunications laws, and NSW planning laws.

Some NBN developments need consent from the local council or the NSW Planning Department, while others do not – it depends on a number of things, including the type and scale of the development, and the environmental sensitivity of the area where the development is proposed.

Some types of NBN developments can be classified as ‘low-impact’ facilities under Commonwealth law, which means that they do not require any form of development consent. Others may be classified as ‘exempt or complying

development’ under NSW planning laws, while larger scale developments may need development consent, and may also be required to be publically exhibited.

In addition to telecommunications and planning laws, there are a number of guidelines, codes of practice, and standards for telecommunications developments:

- **Commonwealth Telecommunications Code of Practice**
- **NSW Telecommunications Facilities guideline Including Broadband**
- **Register of Codes under the Telco Act**
- **Register of Standards under the Telco Act**

The **NSW Telecommunications Facilities guideline Including Broadband** is a useful guide detailing the processes that must be followed for each category of NBN development.4

**Low impact facilities**

It is important to ascertain whether the development can be classified as a ‘low-impact’ facility because such facilities will not need to undergo any environmental assessment, and will not require development consent.5 It may also mean that public consultation is not required for the development.

In order to establish whether a proposed NBN development can be classified as a ‘low-impact’ facility, you need information about the type and scale of the development, including the length, diameter, base size, and colours of the proposed structure, as well as information about the land use zone of the area where the development is proposed. Examples of low-impact facilities are:

- Panel antenna that are flush mounted and colour matched to an existing structure in a residential area;
- Omnidirectional antenna shorter than 4.5 metres long in a rural area; or
- A bundle of optical fibre line links suspended above the surface of land in an industrial area;

There are limits to activities being classified as ‘low-impact’. For example, a ‘tower’ cannot be specified as ‘low-impact’ unless it is attached to a building or is less than 5m in height.6

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Facilities cannot be classified as ‘low-impact’ facilities if the area for the proposed development is an ‘area of environmental significance’. These include:

- World Heritage properties,
- Properties listed on the Commonwealth, National, or State Heritage registers;
- Protected areas such as national parks; and
- Places of significance to Aboriginal or Torres Strait Islanders that are listed on a register or otherwise identified under State or Commonwealth law.

Read more about protected areas in our Fact Sheet.

While ‘low-impact’ facilities are exempted from most environmental assessment, heritage and town planning laws, they are not exempted from laws providing for the ‘protection of places or items of significance to the cultural heritage of Aboriginal persons or Torres Strait Islanders’. This means that even if a development is classified as ‘low-impact’ and does not require any form of development consent, the laws protecting Aboriginal cultural heritage will still apply. Read more about the laws protecting Aboriginal cultural heritage in our Fact Sheet. If you are aware of any item of Aboriginal cultural heritage or if the land itself is of significance, you should notify the developer, as well as the Office of Environment and Heritage. You may also wish to contact your Local Aboriginal Land Council.

Developers of low-impact facilities are required to comply with the requirements of the Telco Act and Regulation, and the conditions of the Telco Code. These requirements relate to:

- the notification of landholders prior to entering land,
- objection procedures relating to proposed land entry,
- the restoration of land following maintenance activities, and
- the requirement to comply with industry standards.

Before engaging in a low-impact facility activity, a carrier must give written notice of its intention to do so to the owner of the land where the activity is proposed, and any other occupiers of the land. An owner or occupier can lodge a written

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7 Telecommunications (Low-impact Facilities) Determination 1997 (Cth), cl 3.1(2).
8 Telecommunications (Low-impact Facilities) Determination 1997 (Cth), cl 2.5.
10 Telecommunications Act 1997 (Cth), Schedule 3, cl 37(3).
11 See our Fact Sheet on Aboriginal cultural heritage: http://www.edonsw.org.au/aboriginal_communities
15 Telecommunications Code of Practice 1997 (Cth), cl 6.23.
objection with the carrier at least five business days before the carrier proposes to commence the activity. The objection must be on the basis of one of the following:  

- Using the objector’s land to engage in the activity;  
- The location of a facility on the objector’s land;  
- The date when the carrier proposes to start the activity, engage in it or stop it;  
- The likely effect of the activity on the objector’s land; or  
- The carrier’s proposals to minimise detriment and inconvenience, and to do as little damage as practicable, to the objector’s land.

The carrier must make reasonable efforts to consult the objector about the objection within 5 business days after receiving the objection. The carrier must also make reasonable efforts to resolve the objection by agreement with the objector within 20 business days after receiving the objection.  

If the objection is not resolved by agreement between the carrier and objector or if the objector is not satisfied with the carrier’s response to the objection, the objector may ask the carrier, in writing, to refer the objection to the Telecommunications Industry Ombudsman within 5 business days after the objector receives the carrier’s response to the objection. The carrier must comply with such a request.  

If the objection has been validly made, the activity can only go ahead in one of the following circumstances:

- The objection is resolved by an agreement between the carrier and objector;  
- A request from the objector to refer the objection to the Telecommunications Industry Ombudsman is not received by the carrier within the 5 business days;  
- The Telecommunications Industry Ombudsman deals with the objection without giving a direction to the carrier, and the Ombudsman informs the carrier in writing of that outcome;  
- The Telecommunications Industry Ombudsman gives a direction to the carrier.

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17 *Telecommunications Code of Practice 1997* (Cth), cl 6.33.
18 *Telecommunications Code of Practice 1997* (Cth), cl 6.33.
20 *Telecommunications Code of Practice 1997* (Cth), cl 6.35, 6.36.
If a development cannot be classified as low-impact, construction would require either a facility installation permit from the Australian Communications and Media Authority (ACMA), or some form of development consent under NSW planning law.\(^{22}\)

**Exempt development**

In practice, many NBN developments are pursued as exempt development or by way of a complying development certificate (see below).

If a development is categorised as ‘exempt development’ in an environmental planning instrument (such as an State Environmental Planning Policy), it can be carried out without development consent and without undergoing any environmental assessment.\(^{23}\)

Exempt developments must comply with any specified development standards set out in the relevant instrument and must only be carried out on land to which the instrument applies. Exempt development cannot be carried out on land that is critical habitat or land that is part of a wilderness area.\(^{24}\)

There are also standard requirements applying to all exempt development, including: \(^{25}\)

- It must meet the relevant deemed-to-satisfy provisions of the Building Code of Australia, or if there are no such relevant provisions, must be structurally adequate,
- It must be carried out in accordance with all relevant requirements of the Blue Book,
- If it is likely to affect a State or local heritage item or a heritage conservation area, must involve no more than minimal impact on the heritage significance of the item or area, and
- It must not involve the removal or pruning of a tree or other vegetation that requires a permit or development consent for removal or pruning, unless that removal or pruning is undertaken in accordance with a permit or development consent.\(^{26}\)

Some of the NBN developments categorised as exempt development include: \(^{27}\)

\(^{22}\) *Telecommunications Act 1997* (Cth), Schedule 3, cl 6.

\(^{23}\) *Environmental Planning and Assessment Act 1979* (NSW), s. 76(3)

\(^{24}\) *Environmental Planning and Assessment Act 1979* (NSW), s. 76(3)

\(^{25}\) *State Environmental Planning Policy (Infrastructure) 2007*, cl. 20(2).

\(^{26}\) Note. A permit for the removal or pruning of a tree or other vegetation may be granted under a local environmental plan. A development consent for the removal of native vegetation may be granted under the Native Vegetation Act 2003.

\(^{27}\) *State Environmental Planning Policy (Infrastructure) 2007*, cl. 116 and Schedule 3A.
- Above ground cable for subscriber connection or fibre-optic cable for broadband for pole to premises installation;
- Conduit or cable within a building for subscriber connection or fibre-optic cable for broadband;
- Replacement of a tower;
- Equipment shelters; and
- Underground housing.

Note: to qualify as exempt developments, these developments must meet development standards set out in *State Environmental Planning Policy (Infrastructure) 2007*.  

Exempt development can be carried out without any prior notification to neighbours or the general public.

**Complying development**

As stated above, many NBN developments are pursued as exempt development or by way of a complying development certificate.

A wide range of infrastructure projects can be certified as complying development. This means that, providing the development is categorised as complying development in an environmental planning instrument (such as a State Environmental Planning Policy), it can do not need development consent, but can instead be issued with a complying development certificate. This is a simpler and faster process than the development consent process. A complying development certificate can be issued by either a council or an accredited certifier. The time limit for determining an application for a complying development certificate is 10 days. A certifying authority must not issue a complying development certificate unless a site inspection has been conducted and recorded.

Complying developments must comply with any specified development standards set out in the relevant instrument and must only be carried out on land where

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28 See Schedule 3A, Part 1
29 *Environmental Planning and Assessment Act 1979* (NSW), s. 76A(5).
30 *Environmental Planning and Assessment Act 1979* (NSW), s. 77(b). *Environmental Planning and Assessment Regulation 2000* (NSW), cls. 125 - 137; Sch 1 (Part 2, cls. 3-4) sets out the information to be included in an application for a complying development certificate, and the documents which must accompany one.
31 *Environmental Planning and Assessment Act 1979* (NSW), s. 85A(1).
32 *Environmental Planning and Assessment Regulation 2000* (NSW), Part 7.
33 *Environmental Planning and Assessment Regulation 2000* (NSW), cl 129B, 129(C).
such development is permissible with consent under the Local Environmental Plan.\textsuperscript{34}

There are also standard requirements applying to all complying development, including:\textsuperscript{35}

- The development must not be exempt development under State Environmental Planning Policy (Infrastructure) 2007;
- The development must meet the relevant provisions of the \textit{Building Code of Australia};\textsuperscript{36}
- The development must not involve the removal or pruning of a tree or other vegetation that requires a permit or development consent for removal or pruning, unless that removal or pruning is undertaken in accordance with a permit or development consent;\textsuperscript{37} and
- The development must not be located in an ‘environmentally sensitive area’.\textsuperscript{38}

Some NBN developments that may be categorised as complying development include:\textsuperscript{39}

- An extension to a tower in specified zones;
- Replacement of existing towers in specified zones;
- Some underground and above-ground housing and cabling.

Note: to qualify as complying developments, these developments must meet development standards set out in \textit{State Environmental Planning Policy (Infrastructure) 2007}.\textsuperscript{40}

Councils or private certifiers are not required to publically advertise applications for a complying development certificate. However, they are required to advertise their determination of applications for a complying development certificate by

\begin{itemize}
  \item \textit{State Environmental Planning Policy (Infrastructure) 2007}, cl 20B.
  \item \textit{State Environmental Planning Policy (Infrastructure) 2007}, cl 20B.
  \item \texttt{http://www.abcb.gov.au/about-the-national-construction-code/the-building-code-of-australia}
  \item Note. A permit for the removal or pruning of a tree or other vegetation may be granted under a local environmental plan. A development consent for the removal of native vegetation may be granted under the \textit{Native Vegetation Act 2003}.
  \item Within the meaning of \textit{State Environmental Planning Policy (Exempt and Complying Development Codes) 2008: State Environmental Planning Policy (Infrastructure) 2007 (NSW)}, cl 116A(2)(c). Environmentally sensitive areas include:
    \begin{itemize}
      \item Land within 100 metres of a Ramsar wetland;
      \item Land identified in any environmental planning instrument as being of high Aboriginal cultural significance or high biodiversity significance;
      \item Land that is identified critical habitat; and
      \item World Heritage Areas.
    \end{itemize}
  \item \textit{State Environmental Planning Policy (Infrastructure) 2007 (NSW)}, Schedule 3A, Part 2.
  \item See Schedule 3A, Part 2.
\end{itemize}
publishing a public notice in a newspaper describing the land subject to the certificate. This notice must state that the determination is available for public inspection, free of charge, during ordinary office hours at the council’s offices.  

**Part 5 Assessments**

Some developments do not need consent but still need to undergo an environmental assessment. In this case, assessment is carried out under Part 5 of the EP&A Act and is known as a Part 5 assessment.

Part 5 places a duty on the ‘determining authority’ to consider the environmental impacts of a proposed activity. The determining authority may vary depending on the type of activity for which approval is being sought.

There are a number of factors that the determining authority must take into account when considering the likely impact of an activity on the environment. These include the impact of the activity on critical habitat, threatened species, populations and ecological communities, and their habitats, and any other protected fauna or protected native plants.

Also, matters such as:

- any environmental impact on a community,
- any transformation of a locality,
- any environmental impact on the ecosystems of the locality,
- any reduction of the aesthetic, recreational, scientific or other environmental quality or value of a locality,
- any long-term effects on the environment,
- any reduction in the range of beneficial uses of the environment,
- any pollution of the environment, and
- any cumulative environmental effect with other existing or likely future activities.

Note that while these are matters that the determining authority is required to take into account, they are not ascribed any particular weight.

In practice, there are two key methods of measuring the environmental impacts of a proposed development or activity: a statement of environmental effects (SEE) and an environmental impact statement (EIS).

A SEE is also known as a review of environmental factors or REF. It is a preliminary investigation of the likely impacts of a proposed activity on the environment, including any proposed strategies to mitigate those impacts. An EIS

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41 Environmental Planning and Assessment Act 1979 (NSW), s. 101; Environmental Planning and Assessment Regulation 2000 (NSW), cl. 137.
42 Environmental Planning and Assessment Act 1979 (NSW), s. 111.
43 Environmental Planning and Assessment Regulation 2000 (NSW), cl. 228(2).
is a more comprehensive analysis of all the likely impacts of a proposal on the environment and must address a number of specific factors. An EIS is only required where there is likely to be a significant impact on the environment as determined by the REF.

There may not be an opportunity to view or comment on a SEE prior to an activity going ahead, although it is now common to place SEEs on public exhibition. If an EIS is prepared, it must be placed on public exhibition for at least 30 days, during which time the public can make submissions.\(^44\)

You can read more about how to make an effective submission on our Have Your Say website.\(^45\)

After considering the environmental impacts, the determining authority can decide to carry out the activity, modify it, or refrain from doing it.

Read more about Part 5 Assessments in our Development Applications and Consents: Environmental Impact Assessment Fact Sheet.\(^46\)

**Development consent**

If a NBN development needs consent but cannot be classified as a ‘low-impact’ complying development, it will require development consent from the local council or the Department of Planning and Environment under the EP&A Act.

The land use zones in the LEP may be relevant to determining whether or not a particular development can be approved within a certain land use zone. However, the provisions of the LEP may be trumped by a State Environmental Planning Policy. The Infrastructure SEPP allows development for the purposes of telecommunications facilities to be carried out by any person on any land with consent from the relevant consent authority.\(^47\) At this stage, it is still unclear whether the Infrastructure SEPP overrides conflicting provisions in LEPs to allow NBN developments in zones where they would otherwise be prohibited.

Read more about the development consent process in our Fact Sheets.

Whether or not a development application is required to be advertised depends on type of development and the provisions of Council’s development control plan (DCP) that deal with notification.

A statement of environmental effects (SEE) is required to be submitted with all development applications, except for designated development or State significant development, which require an environmental impact statement (EIS).\(^48\)

\(^{44}\) Environmental Planning and Assessment Act 1979 (NSW), s 113.

\(^{45}\) See: [http://www.edonsw.org.au/having_your_say_before_a_decision_is_made](http://www.edonsw.org.au/having_your_say_before_a_decision_is_made)


\(^{47}\) State Environmental Planning Policy (Infrastructure) 2007 (NSW), cl 115.

\(^{48}\) Environmental Planning and Assessment Act 1979 (NSW), s. 105; Environmental Planning and Assessment Regulation 2000 (NSW), Schedule 1.
application is proposed on land that has been listed as critical habitat or is likely to significantly affect listed threatened species, populations or ecological communities or their habitats, a species impact statement is required (SIS).

SEEs do not generally contain the same level of detail as EISs.

Applications accompanied by a SEE are not automatically required to be advertised, as it will depend on what the Council’s DCP says. For example, The Hills Shire Council DCP classifies telecommunications facilities which are not complying or exempt development as ‘notifiable development’. This means that under the DCP, the Council is required to notify each landowner whose property adjoins the site of the proposed development and those directly opposite the site, place an advertisement in the local newspaper advising of the proposal and the period for submissions, and place a notice on the site.

If the development is designated or State significant development the application is required to be publically exhibited for 30 days, during which time any person can make a submission about the development.

Read more about the development consent process in our DAs and Consents Fact Sheets.

Taking Action

Whether any challenge to a NBN development is available to you will depend on a number of things, including the type and scale of the development, how the development is classified and assessed, and whether you made a submission during any public exhibition period. It is important to get legal advice early in the process so that you are aware of your rights should the development go ahead. You can read more about your legal options in our DAs and Consents and Land and Environment Court Fact Sheets.

There are many options available to the community other than taking legal action, including speaking to the relevant decision-makers, working with your community, and liaising with developers. You can read more about how to influence decisions affecting the environment on our Have Your Say website.

Glossary

**Key terms used in this Fact Sheet**

**Carrier** means a holder of a carrier licence granted under the Telco Act

**Council** means a local council

**EP&A Act** means the *Environmental Planning and Assessment Act 1979* (NSW)

**Infrastructure SEPP** means *State Environmental Planning Policy (Infrastructure)* 2007
**LEP** means a local environmental plan

**NBN** means the National Broadband Network

**Planning Department** means the NSW Department of Planning and Environment

**SEPP** means a State Environmental Planning Policy

**Telco Act** means the *Telecommunications Act 1997* (Cth)

**Telco Code** means the *Commonwealth Telecommunications Code of Practice*

**Telco Determination** means the *Telecommunications (Low-impact Facilities) Determination 1997* (Cth)