

6 November 2014

[REDACTED]  
[REDACTED]  
[REDACTED]

By email: [REDACTED]

Dear [REDACTED]

### **Proposed NBN tower at Lillian Rock, Kyogle**

1. You have requested our advice regarding the legality of a proposed National Broadband Network (**NBN**) tower in the Lillian Rock/Barkers Vale area within the Kyogle local government area. In particular, you have sought advice about the lawfulness of the development and regulation of health impacts arising from the NBN tower. We have revised the information you have provided us in recent emails.
2. The advice we are able to provide is limited to our field of expertise, namely public interest environmental law. You may wish to raise your specific concerns about electromagnetic energy and radiation impacts on human health caused by the NBN towers with NSW Health or your local public health unit, if you have not already done so.

### **Advice in brief**

3. Our opinion is that the proposed NBN tower currently proposed at Lillian Rock is not complying development, despite it being characterised as such in a report by NBN Co titled 'Fixed Wireless Network Deployment, Kyogle Council, Strategic Engagement Report' dated November 2012 (**the NBN report**).
4. It is our view that this should be drawn to the attention of Kyogle Council, and NBN Co, and any purported principal certifying authority that NBN Co is seeking to use for its alleged 'complying development' as soon as possible.
5. The '*Radiation Protection Standard for Maximum Exposure Levels to Radiofrequency Fields – 3 kHz to 300 GHz 2002*' set by the Australian Radiation Protection and Nuclear Safety Agency (**ARPANSA**) establishes the requirements for radiation protection, exposure limits and safety. This Standard has been

accepted by the Court as the authority on electromagnetic energy exposure and emissions. Any challenge to the acceptability of such would require substantial scientific evidence that the consensus expert view of the standard has materially changed.

## Legal Framework for Approval

6. The legislative framework for the installation of telecommunications facilities is governed by a combination of Federal and NSW legislation. The *State Environmental Planning Policy (Infrastructure) 2007 (the SEPP)* is designed to facilitate infrastructure development across NSW. Under Schedule 3A the SEPP lists a number of telecommunication infrastructure projects that may be carried out without development consent, or that are able to be certified as 'complying development'.

### 'Complying development'

7. Complying developments can be approved through a ten-day process where a complying development certificate is issued by either a council or an accredited certifier.<sup>1</sup>
8. Clause 116A of the SEPP states that, as well as falling within the terms of Part 2 of Schedule 3A to the SEPP, to be complying development, development for the purpose of a telecommunications facility must comply with the requirements of clause 20B.
9. Clause 20B(2)(b) of the SEPP states that the development must "*be permissible, with consent, in the land use zone in which it is carried out*".
10. We understand that an NBN tower is proposed at 414 Lillian Rock Road, Lillian Rock. This land is zoned as RU1 Primary Production under the *Kyogle Local Environmental Plan 2012 (the LEP)*. This RU1 zone states the following land uses are permissible:<sup>2</sup>

#### 2 Permitted without consent

*Environmental protection works; Extensive agriculture; Home-based child care; Home occupations; Intensive plant agriculture*

#### 3 Permitted with consent

*identification signs; Business identification signs; Cellar door premises; Community facilities; Dual occupancies (attached); Dwelling houses; Environmental facilities; Extractive industries; Farm buildings; Flood mitigation*

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<sup>1</sup> See Environmental Planning and Assessment Regulation 2000 (NSW), cls. 125 - 137; Environmental Planning and Assessment Act 1979 (NSW), s. 85A.

<sup>2</sup> See the Land Use Table under the LEP at <http://www.legislation.nsw.gov.au/maintop/view/inforce/epi+25+2013+cd+0+N>

*works; Forestry; Helipads; Home businesses; Home industries; Industrial training facilities; Intensive livestock agriculture; Open cut mining; Recreation areas; Roads; Roadside stalls; Rural industries; Rural workers' dwellings; Turf farming; Veterinary hospitals; Water supply systems*

11. We are instructed that the land owner at this site has withdrawn their consent and that NBN Co is currently looking for an alternative site in the vicinity. The majority of the land in and around Lillian Rock and Barkers Vale is zoned RU1 and RU2 under the LEP.

12. The RU2 Rural Landscape zone states the following land uses are permissible:

*2 Permitted without consent*

*Environmental protection works; Extensive agriculture; Home-based child care; Home occupations; Intensive plant agriculture*

*3 Permitted with consent*

*Airstrips; Animal boarding or training establishments; Aquaculture; Bed and breakfast accommodation; Building identification signs; Business identification signs; Camping grounds; Cellar door premises; Cemeteries; Charter and tourism boating facilities; Community facilities; Crematoria; Dual occupancies (attached); Dwelling houses; Eco-tourist facilities; Environmental facilities; Farm buildings; Farm stay accommodation; Flood mitigation works; Forestry; Function centres; Helipads; Home businesses; Home industries; Industrial training facilities; Intensive livestock agriculture; Places of public worship; Recreation areas; Recreation facilities (outdoor); Restaurants or cafes; Roads; Roadside stalls; Rural industries; Rural workers' dwellings; Turf farming; Veterinary hospitals; Water supply systems*

13. Neither the RU1 nor RU2 zones under the LEP provide any reference to telecommunications facilities as permissible or permitted development. Telecommunication facilities (including NBN towers) are therefore a prohibited use within the zone and the proposed tower is therefore unable to comply with clause 20B.

14. In this regard, clause 115 of the SEPP allows NBN Co to nevertheless seek development consent from Council for the proposed tower. However, in our view, it cannot be carried out as complying development.

15. This should be drawn to the attention of Kyogle Council, and NBN Co, and any purported principal certifying authority that NBN Co is seeking to use for its alleged 'complying development' as soon as possible.'

16. We note that the Department of Planning has previously advised us that it agrees with the EDO's analysis and interpretation of this matter.

## **Development Consent**

17. Our view is that NBN Co would need to lodge an application for development consent with Kyogle Council for any new NBN tower on land zoned as RU1 or RU2. The development application should then be subject to assessment under Part 4 of the *Environmental Planning and Assessment Act 1979 (EP&A Act)* as well as public participation requirements under section 79A(2) of the EP&A Act:

### **79A Public participation—advertised development and other notifiable development**

*A development application for specified development (other than designated development or advertised development) must be notified or advertised in accordance with the provisions of a development control plan if the development control plan provides for the notification or advertising of the application.*

18. Chapter 6 of the Kyogle Development Control Plan 2014 (**the DCP**) sets out the requirements for public notification of development applications.<sup>3</sup> Whilst the DCP does not specify the notification requirements or exhibition period for telecommunications facilities, it provides that “Council will determine the appropriate level of public notification and public exhibition based upon an individual assessment of the proposal and having regard to the nature, scale and location of the development.”<sup>4</sup>

19. Given that the majority of development types listed under the DCP require a minimum of notification to adjoining or nearby property owners, it is our view that it would be appropriate that a new NBN tower also be notified in this way, if not by notice in a local newspaper.

20. If Council determines that the development application does require advertisement in a local newspaper, the period for making a submission about the application is 21 days from the day after the date of advertisement. If it is determined that only notification to nearby landowners is required, the submission period is 14 days from the day after the date of notification. Upon written request, Council may grant an extension of time for submissions.

21. The requirements for making a valid submission are set out at page 122 of the DCP, which can be accessed here:

[http://www.kyogle.nsw.gov.au/cp\\_themes/default/page.asp?p=DOC-FIJ-08-08-33](http://www.kyogle.nsw.gov.au/cp_themes/default/page.asp?p=DOC-FIJ-08-08-33)

22. Under section 115 of the SEPP, before determining a development application for a telecommunications facility, Council must take into account any guidelines concerning site selection, design, construction or operating principles for telecommunications facilities. For the proposed NBN tower, this would include the

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<sup>3</sup> The Kyogle DCP can be accessed here:

[http://www.kyogle.nsw.gov.au/cp\\_themes/default/page.asp?p=DOC-FIJ-08-08-33](http://www.kyogle.nsw.gov.au/cp_themes/default/page.asp?p=DOC-FIJ-08-08-33)

<sup>4</sup> See page 119 (Chapter 6) Kyogle Development Control Plan 2014.

*NSW Telecommunications Facilities Guideline including Broadband* dated July 2010 (**the Telecommunication Facilities Guideline**).<sup>5</sup>

23. In determining whether or not to approve a development application, Council must consider a number of matters listed under section 79C of the EP& A Act. Of those matters the most relevant in relation to your concerns include:

- any environmental planning instrument including the Kyogle LEP;
- the Kyogle DCP;
- the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality;
- the suitability of the site for the development;
- any submissions made in accordance with this Act or the regulations; and
- the public interest.

24. If you make a submission to Council about the development it ought to focus on the proposed NBN tower in the context of the above listed matters. For example, you may wish to raise your concerns about the impacts of the NBN tower, as well as the inconsistency of the proposed NBN tower with the objectives of the zone, notwithstanding the SEPP says that it is permissible in the zone.

25. We note that if there is an inconsistency between a LEP and the Infrastructure SEPP, there is a general presumption that the SEPP prevails.

26. Clause 2.3(1) and (2) of the Kyogle LEP provides:

### **2.3 Zone objectives and Land Use Table**

*(1) The Land Use Table at the end of this Part specifies for each zone:*

- (a) the objectives for development, and*
- (b) development that may be carried out without development consent, and*
- (c) development that may be carried out only with development consent, and*
- (d) development that is prohibited.*

*(2) The consent authority must have regard to the objectives for development in a zone when determining a development application in respect of land within the zone.*

As we noted above, a telecommunications facility is prohibited development in RU1 and RU2 zones and therefore entirely inconsistent with the objectives of those zones. We are therefore of the opinion that telecommunications development would be inappropriate in those zones, and that the site is unsuitable. However, we note that even where a development type is prohibited

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<sup>5</sup> The Telecommunications Facilities Guideline can be accessed here: [http://www.planning.nsw.gov.au/Portals/0/PolicyAndLegislation/NSW\\_Telecommunications\\_Facilities\\_Guideline\\_Final\\_July\\_2010.pdf](http://www.planning.nsw.gov.au/Portals/0/PolicyAndLegislation/NSW_Telecommunications_Facilities_Guideline_Final_July_2010.pdf)

in a zone under a LEP, it may still be approved where the development achieves one of the SEPP's aims. This is because SEPPs tend to deal with matters of State significance and can override local planning controls in order to deliver State significant development or State planning objectives.

### **Public interest and protection against radiation**

27. Although the term 'public interest' is not clearly defined, the Courts have held that for the purpose of development assessment, it includes ecologically sustainable development (**ESD**). The Court has said that where there is a lack of scientific certainty, the precautionary principle must be used. This means that the decision-maker must approach the matter with caution but also requires the decision-maker to avoid, where practicable, serious or irreversible damage to the environment.<sup>6</sup>

28. In the case of *Telstra Corporation Ltd v Hornsby Shire Council [2006] NSWLEC 133*, Hornsby Shire Council refused a development application for a telecommunications facility (mobile phone base station) because it determined that the radio frequency electromagnetic energy (**RF EME**) emitted would be a health risk to local residents. Council therefore applied the precautionary principle and refused the development application.<sup>7</sup>

29. In his judgment, Chief Justice Preston of the NSW Land and Environment Court summarised the precautionary principle as follows:

*The application of the precautionary principle and the concomitant need to take precautionary measures is triggered by the satisfaction of two conditions precedent or thresholds: a threat of serious or irreversible environmental damage and scientific uncertainty as to the environmental damage. These conditions or thresholds are cumulative. Once both of these conditions or thresholds are satisfied, a precautionary measure may be taken to avert the anticipated threat of environmental damage, but it should be proportionate.*<sup>8</sup>

30. The proponent appealed Council's decision to the Land and Environment Court. Expert evidence was presented to the Court by an independent Court-appointed expert on the health effects of exposure to RF EME from the proposed telecommunications facility.<sup>9</sup>

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<sup>6</sup> *BGP Properties Pty Limited v Lake Macquarie City Council [2004] NSWLEC 399* at [113].

<sup>7</sup> You can read the judgment here:

<http://www.lawlink.nsw.gov.au/lecjudgments/2006nswlec.nsf/00000000000000000000000000000000/df89ace6e00928bca25713800832056?opendocument>

<sup>8</sup> *Telstra Corporation Ltd v Hornsby Shire Council [2006] NSWLEC 133* at [128].

<sup>9</sup> At paragraphs [78] – [90].

31. The Court considered the appropriateness and application of the ‘*Radiation Protection Standard for Maximum Exposure Levels to Radiofrequency Fields – 3 kHz to 300 GHz 2002*’ (**Radiation Protection Standard**) set by the Australian Radiation Protection and Nuclear Safety Agency (ARPANSA).<sup>10</sup> It was noted that Radiation Protection Standard is based on the 1998 *Guidelines of the International Commission on Non-Ionising Radiation Protection set by the International Commission on Non-Ionizing Radiation Protection (ICNIRP)*. The Radiation Protection Standard has reworked the ICNIRP specifications to improve technical specifications or complete specifications where incomplete in the ICNIRP Guidelines.<sup>11</sup>
32. The Court also outlined the difficulty in dealing with “scientific uncertainty” and addressed how much uncertainty is acceptable in science.<sup>12</sup>
33. In making his judgment, His Honour held that it would not be appropriate for a Court to disregard the Radiation Protection Standard, that the Court should accept and apply the Radiation Protection Standard, and that that the Radiation Protection Standard embraces a precautionary approach.<sup>13</sup> His Honour noted further that it was not appropriate for a court to pioneer standards of its own, and that creation of new standards is the responsibility of other authorities with special expertise, such as ARPANSA.<sup>14</sup>
34. The Court ultimately found that the estimated RF EME from the proposed telecommunications facility was within the range of safety under the Radiation Protection Standard, and the appeal was upheld.

## Legal Challenges

35. We are not aware of any case law that has overturned the Court’s position on the precautionary principle and the Radiation Protection Standard as established in the *Telstra v Hornsby Shire Council* case above.
36. Consequently, if you were to seek to rely on arguments regarding the health impacts of RF EME or radiation generally resulting from the proposed NBN tower, you would need to prove that the emissions from the proposed tower would not satisfy the requirements of the Radiation Protection Standard. This may involve showing that not only are the levels of radiation outside the safety spectrum under the Standard, but the measures to reduce the risk of radiation are not proportionate. This may require technical expertise from a relevant expert.

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<sup>10</sup> At paragraph [91] – [106]. The Radiation Protection Standard can be accessed here: [http://www.arpansa.gov.au/RadiationProtection/Factsheets/is\\_rfStandard.cfm](http://www.arpansa.gov.au/RadiationProtection/Factsheets/is_rfStandard.cfm)

<sup>11</sup> At paragraphs [91]-[93].

<sup>12</sup> At paragraphs [144] – [149].

<sup>13</sup> At paragraphs [98], [100] and [101].

<sup>14</sup> At paragraph [99].

37. Our view is that it is unlikely that that Council would refuse a development application based on the perception of an adverse impact to health without credible evidence that the proposal does not comply with acceptable and credible standards.
38. If you wished to challenge the Court's broadly accepted position and argue that the Radiation Protection Standard is not adequate in addressing radiation protection and health impacts, you would need strong expert evidence to present to the Court.
39. Any person can bring an action in the Land and Environment Court to restrain a breach of the EPA Act.<sup>15</sup> You must show that the correct legal procedure was not followed in the granting of the development approval (or complying development certificate if relevant). You have three months from the granting of the approval to do this.
40. Finally, we note that another NBN tower is proposed at Summerland Way, Kyogle and that this development is characterised as 'low impact' development. New towers may only be classified as 'low impact' development if they are attached to a building or are less than 5m in height: *Telecommunications Act 1997* (Cth), Schedule 3, cl 6(5).

## **Conclusion**

41. The proposed NBN tower at Lillian Rock is not complying development in our view. If NBN Co attempt to build the proposed NBN tower at Lillian Rock or in a nearby RU1 or Ru2 zone as complying development, you may be able to seek an injunction in the Land and Environment Court. However, we caution that injunction proceedings are difficult and costly and require a large volume of evidence and furthermore it is not certain an injunction will be granted as the Court has very broad discretion to grant or refuse to grant an injunction. It is much more efficient and effective to seek to have the matter dealt with by Council to avoid any illegality.
42. In order to object to a development application for the proposed NBN tower on grounds of health impacts from RF EME, you would need to show that the proposal does not satisfy the requirements of the Radiation Protection Standard.
43. It would be difficult to challenge the Court's current position on the Radiation Protection Standard.
44. In making a submission about the development, you may wish to give reasons as to why the proposal would not be consistent with the objectives of the relevant zone under the LEP. Further, it should be submitted that the proposal would be

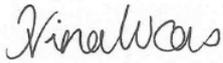
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<sup>15</sup> *Environmental Planning and Assessment Act 1979* (NSW), s 123.

prohibited development under the LEP, which is an important consideration under Section 79C of the EPA Act. Notwithstanding that the SEPP allows such development, Council still has discretion to refuse the development for reasons including that it is not consistent with the zone objectives.

45. We trust this information is of assistance. If you require clarification on any point in our advice, please do not hesitate to contact Nina Lucas of our office.

Yours sincerely,  
**EDO NSW**

A handwritten signature in cursive script that reads "Nina Lucas".

Nina Lucas  
Outreach Solicitor

Our Ref: NL 1421315