



Consultation paper—Review of Instruments under Part 20A of the Telecommunications Act 1997

3 December 2021

Introduction

This paper seeks the views of stakeholders and other interested parties on the need to continue or modify exemptions from statutory requirements to install fibre-ready facilities, particularly, but not solely, underground pit and pipe.

The statutory provisions are contained in Part 20A of the *Telecommunications Act 1997*. The exemptions are currently set out in two legislative instruments:

- the Telecommunications (Fibre-Ready Facilities in Real Estate Development Projects and Other Matters) Instrument 2011 (the 2011 Instrument)¹; and
- the Telecommunications (Fibre-ready Facilities - Exempt Real Estate Development Projects) Instrument 2021 (the 2021 Instrument).²

The paper also asks whether the exemptions in these instruments, in whole or part, would be better included in the statute itself.

There are two main reasons for the review. First, one of the instruments will sunset in April 2022, and it is good practice to review the instrument to see whether it should continue, be amended and continue, or be allowed to sunset. Second, the Senate Standing Committee for the Scrutiny of Delegated Legislation has stated that the matters contained in the other instrument may be more appropriately placed in the statute.³ Accordingly, we are reviewing the instruments together and considering whether the matters should be placed in statute as well as whether they should continue, be amended, or sunset.

Taking into account the December–January break, written submissions are requested by 11.59 pm, Friday, 18 February 2022 and should be submitted to new.developments@communications.gov.au. The Department of Infrastructure, Transport, Regional Development and Communications (the Department) is also available to discuss the matter with stakeholders in advance of this date.

¹ Telecommunications (Fibre-Ready Facilities in Real Estate Development Projects and Other Matters) Instrument 2011 <https://www.legislation.gov.au/details/f2011L02808>

² Telecommunications (Fibre-Ready Facilities – Exempt Real Estate Development Projects) Instrument 2021 <https://www.legislation.gov.au/details/f2021C00771>

³ See Delegated Legislation Monitor 7 of 2021 (12 May 2021) at the Senate Committee’s page at https://www.aph.gov.au/Parliamentary_Business/Committees/Senate

Background

Part 20A of the *Telecommunications Act 1997* (the Act)⁴ sets out Commonwealth requirements on developers to install fibre-ready facilities (largely underground pit and pipe) in proximity to building lots or units before selling or leasing those lots or units. The requirements are designed to facilitate the ready provision of future-ready telecommunications services given their importance in modern life, something accelerated in importance by our experience with COVID-19 and lockdowns. By requiring the early installation of pit and pipe and other facilities, the requirements also help reduce the need for retrofitting and the attendant costs, delays and disruption this can involve.

Part 20A is complemented by the Commonwealth's *Telecommunications in New Developments* policy⁵, which sets out the roles of developers, NBN Co, other carriers, and property owners in having modern telecommunications provided in their developments.

The timely provision of telecommunications in new developments in rural and remote areas, a matter to which the 2021 Instrument directly relates, has been raised in the current 2021 Regional Telecommunications Review.⁶

The statutory requirements are high level and broad and rely heavily on subordinate legislation to fine tune their operation. As will be seen from the Instruments, they are detailed and complex, and such detail and complexity were not considered appropriate for the statute at the time it was drafted. As the default, therefore, Part 20A envisages fibre-ready facilities will be installed underground (rather than aboveground) and applies on a national basis to all real estate development projects as defined in the Act. However, subordinate legislation plays an integral role in the scheme as it has always been recognised the statutory requirements may not always be sufficient, particularly where above ground facilities are needed and in areas that are not likely to be serviced by fixed line in the foreseeable future, like some areas of rural and remote Australia.

As noted in the Introduction, exemptions have been made in the 2011 Instrument and the 2021 Instrument.

The 2011 Instrument covers three main matters.

First, given that Part 20A focusses on the provision of underground fibre-ready facilities, but above-ground facilities also need to be used, the 2011 Instrument specifies that certain above ground fixed-line facilities like poles are fibre-ready facilities for the purposes of the Act.

Next, the 2011 Instrument also exempts real estate development projects from the requirement to install fibre-ready facilities in three circumstances, some of which reflect transitional requirements required in the early days of the rollout of the National Broadband Network:

- where facilities are installed for use with copper-based or hybrid-fibre-coaxial (HFC) networks and fibre-ready facilities have been installed or are also being installed (or, for small developments of no more than 10 building lots or building units, will be installed);
- where it is necessary to install supplementary facilities in a project area serviced by copper-based or HFC networks that existed prior to 27 September 2011, to facilitate minor works such as relocating facilities, carrying out minor network extensions, or replacing or modifying facilities; and
- where existing facilities were formerly used in connection with a copper or HFC line (prior to 27 September 2011) and can effectively be re-used for those networks.

Finally, the 2011 Instrument provides that, in the above three circumstances, projects are also exempt from requirements not to sell or lease building lots or units unless fibre-ready facilities have been installed in proximity.

⁴ Telecommunications Act 1997 <https://www.legislation.gov.au/details/C2021C00237>

⁵ Telecommunications in new developments policy www.infrastructure.gov.au/media-centre/publications/telecommunications-new-developments

⁶ For example, in the online consultation sessions for Southeast NSW 9 August 2021 and Mackay Region on 2 September 2021. Further information is available at www.rtirc.gov.au

The 2021 Instrument provides a class exemption for real estate development projects that are located in areas where it is unlikely fixed-line network infrastructure will be installed in the foreseeable future and fibre-ready facilities are not warranted. To qualify for this exemption, projects must meet all of the following criteria:

- no network utilities or only above-ground electricity lines will be installed in proximity to building lots (i.e. they are relatively remote and do not have mains water, sewerage, gas or underground electricity), and
- there is no kerb and channelling constructed, or planned to be constructed, and
- the average length of the street frontages of the building lots within the development is 60 metres or more (i.e. the lots are larger rural type blocks), and
- the development is not in a current or announced NBN fixed-line network rollout area.

The criteria seek to identify properties that are rural and remote in character and where it is unlikely fixed line telecommunications will be provided at present or in the foreseeable future. Noting that if an area is further developed the statutory requirements would reapply and the exemption criteria would need to be reapplied afresh.

This instrument was first made in 2016 and was re-made in 2021. It is regularly used, with the Department registering 931 real estate development projects as exempt from the Part 20A requirements by 18 November 2021⁷.

People wishing to claim exemptions under the 2021 Instrument are required to provide an attestation to the Department that their development projects meet the criteria for exemption, and to provide relevant details. The Department checks the details provided before adding the projects to the register of exemptions. Claimants are required to retain relevant documents. The Department makes further inquiries if the information provided does not appear to justify the exemption claimed.

In addition to these two legislative instruments, there are also powers under Part 20A of the Act for the Minister to exempt, by legislative instrument, specified real estate development projects from the requirements. These powers are not in scope for this review. Only one such exemption has been granted to date.⁸

The new developments market in Australia is open and competitive. As the largest wholesale infrastructure provider and the owner of ubiquitous local access networks, NBN Co Limited (NBN Co) services the majority of new developments. Where these developments are within its fixed-line footprint, it services them with fibre-based networks or occasionally HFC networks. Outside its fixed-line footprint NBN Co may often service smaller developments with its fixed wireless or satellite networks, although it may deploy fixed-line for larger developments. It may also install fixed-line networks where a development is adjacent to its fixed-line footprint (effectively expanding that footprint), or the development is of a character where fixed-line services are likely to be required (for example, the development is large with a high population density, one of several, or is a new factory site or a new medical or education facility).

Over 20 other telecommunications carriers compete with NBN Co for new developments. The largest of these is Uniti, which has about 180,000 active services in operation (including Velocity services it is acquiring from Telstra) and will have a network footprint that covers about half a million premises taking into account existing contracts. It largely deploys fibre, operating under the OptiComm brand. (Uniti purchased OptiComm and other carriers servicing new developments, such as LBN Co and OPENetworks, during 2019–20.)

Other carriers operating in the market are generally smaller. They include Advatel, CipherTel, CNT Corp (operating as RedTrain), Fiber Asset Management, Frontier Networks, Interphone, Lynham Networks, PIPE Networks, Real World Networks, Reddenet, TransACT and Vostronet. Most of these deploy fibre-based networks, although in rural areas some may deploy fixed wireless.

⁷ Register of developments exempted from Part 20A of the *Telecommunications Act 1997* under the Telecommunications (Fibre-ready facilities – Exempt Real Estate Development Projects Instrument 2021 www.infrastructure.gov.au/department/media/publications/2021-register-developments-exempted-part-20a-telecommunications-act-1997-under-telecommunications

⁸ Telecommunications (Fibre-ready facilities – Exempt Kiangatha Real Estate Development Projects) Instrument No. 1 of 2016 www.legislation.gov.au/Details/F2016L00780

While Part 20A of the Act focusses on developers installing fibre-ready facilities, there was and has been ongoing use of non-fibre facilities, including copper and HFC cabling. For example, initially during the transition to the NBN Telstra serviced small new developments (of less than 100 premises or lots) with copper and HFC infrastructure in advance of NBN Co overbuilding those areas and, later, in anticipation of NBN Co integrating these developments into its multi-technology mix network. The 2011 Instrument supported these arrangements. While Telstra has not been deploying copper in new developments since April 2021, the use of a multi-technology mix by NBN Co, and other providers, means the exemptions have ongoing relevance.

Telstra's decision to no longer provide copper in new developments does, however, have implications for the practical operation of the 2021 Instrument. In particular, where Telstra was still installing copper infrastructure in rural and remote areas, fibre-ready facilities like pit and pipe were useful to it, even if NBN Co was not providing fixed lines, and Telstra would generally have taken ownership of the pit and pipe. This is no longer the case, however, given it is no longer providing new copper in new developments. This makes it more important, for exemption purposes, to understand whether NBN Co (or another carrier) is likely to deploy fixed line infrastructure in rural and remote areas, or at least take responsibility for the fibre-ready facilities. If this is not the case, a developer may be required to install pit and pipe and incur the cost of doing so, even though they may not be used for the foreseeable future, and their installation would to be considered afresh if the area concerned was further subdivided in future. This is discussed further below.

Proposed approach and possible refinements

The review starts from the position that the matters contained in both instruments generally remain relevant and should largely continue, whether in instruments, the statute, or a combination. Equally, it is recognised some refinements may be possible.

The 2011 Instrument

The matters in the 2011 Instrument appear to remain generally relevant. It remains important that above-ground facilities, as defined in the 2011 Instrument, can be installed, and that carriers are able to install supplementary facilities in project areas serviced by pre-27 September 2011 copper or HFC networks, noting these have often been incorporated in the National Broadband Network. If this exemption were removed this could limit options for future network maintenance and replacement. Some of these matters, such as the provision of above-ground facilities and the use of non-fibre network components are so fundamental to day-to-day operations that they may be more appropriately included in the statute. Moreover, the 2011 Instrument is complex and detailed and there may be scope for simplification.

Question 1: Do the matters covered by the 2011 Instrument remain important and need to continue? Are refinements needed? Are the matters better dealt with in Part 20A, in subordinate legislation, or a combination?

The 2021 Instrument

The matters in the 2021 Instrument also remain relevant and should continue. The current process for claiming exemptions also appears to have worked well. However, some improvements to the exemption rules may be possible as discussed below. If the exemptions in the 2021 Instrument were allowed to lapse, real estate development projects in rural and remote areas where it is unlikely that fixed-line networks will be installed in the foreseeable future would be required to have fibre-ready facilities such as pit and pipe installed. This would often be an unnecessary expense and may discourage some development in such areas.

The fundamental objective of the 2021 Instrument is to exempt developments that are unlikely to be serviced by fixed-line in the foreseeable future. This fundamental objective appears to remain appropriate. However, in some circumstances the instrument may not be exempting developments that are unlikely to receive fixed-line in the foreseeable future, meaning that developers may incur expenditure on pit and pipe that is unwarranted. In other circumstances, the instrument may be providing exemptions where developments are likely to be serviced by fixed line in a reasonable timeframe. A key question is the relative balance between capturing and excluding developments in these circumstances and the optimal approach, and indeed, the wording, for doing this. If the current exemptions are not capturing developments that should be exempted, or are exempting developments that would be likely to receive fixed line, then there may be a need to adjust the Instrument (or statute) to refine their operation.

Question 2: Do the matters covered by the 2021 Instrument remain important and need to continue? Are refinements needed? Are the matters better dealt with in Part 20A or in subordinate legislation, or a combination?

Question 3: Is the process by which developers claim exemptions appropriate? Can it be improved? If so, how?

These issues are discussed further below with reference to three different circumstances. There may be other circumstances we have not yet identified, so the Department welcomes submissions on the three circumstances and any others that are considered relevant.

Ensuring exemptions are available when fixed line is unlikely in the foreseeable future

The Department has found that some developments do not meet the requirements of the 2021 Instrument for exemption, even though the developments appear unlikely to receive fixed line telecommunications for the foreseeable future. This may be because they fail to meet one or more of the criteria, other than being in NBN Co's fixed wireless or satellite footprints, noting that all of the criteria must be met for an exemption to apply. These criteria are basically used as proxies to identify whether a development is in an area that may be more urban in nature than rural. They are, however, broad. For example, although relatively rural, a development would not be exempted if underground mains power is to be connected, or new roads need to have kerb and channelling, even though frontages may be 60 metres or more. In some instances the average frontage may be less than 60 metres, though this is less commonly an issue. It may be that the criteria should be refined, or augmented, or perhaps operate in a different way (e.g. require only some, but not all, criteria to be met to warrant an exemption).

In these circumstances, developers have looked at installing pit and pipe to meet the statutory requirement, even though it is unlikely to be needed in the foreseeable future. While the cost of this is relatively modest relative to the overall cost of development, its utility is questioned if it is not to be used for an extended period. While a developer may make its project more attractive by paying to have fixed line infrastructure extended, this is its commercial decision. The cost of paying to have fixed lines provided may be very high and considered prohibitive given the cost of providing backhaul to a distant development is generally high. For example, the Department is aware of cases where the backhaul may be more than ten times the cost of the pit and pipe.

A further issue is who will have ongoing responsibility for the pit and pipe. Normally the carrier providing fixed line infrastructure would, but if there is no such carrier that is not an option. If this is not the case, the responsibility would generally lie with the developer unless it is vested with the local council. This would mean that the developer or council may need to maintain pit and pipe for a long period of time. Over time the pit and pipe could fall into disrepair, meaning there is a risk of liability if it has not been properly maintained. In this context, it is worth noting some developers may be project-specific entities with a short term existence and not continue in perpetuity.

Another consideration where pit and pipe is installed in a development with relatively large blocks (e.g. 5 ha) is whether it would actually be cost-effective to retrofit this for a further development involving smaller residential blocks (e.g. 500 m²) in future, for example, when pipes may need to be broken into to have additional pits installed.

NBN Co has recently indicated that it is considering implementing a new approach under which it may take ownership of pit and pipe in rural and remote developments in its fixed wireless and satellite footprint where it meets its long term strategic plans, network design specifications and is economically viable. If a developer was required to confirm whether NBN Co or another operator was prepared to take ownership of such pit and pipe, that may mitigate against otherwise giving an exemption in such circumstances. Other carriers could consider similar arrangements. Provision of pit and pipe

infrastructure in such areas could allow for ease of network expansion and provide NBN Co (or industry generally) with a consistent database of existing network facilities when the time comes for fixed-line to be installed. Conversely, where no one is prepared to take ownership of the pit and pipe, it could further warrant an exemption.

Where local councils require compliance with Commonwealth requirements, as they are encouraged to do, they may also be criticised for requiring pit and pipe when there is no foreseeable need for it. We therefore seek views on whether there may be merit in local government confirming that a development is unlikely to receive fixed line as a decisive factor in gaining a pit and pipe exemption.

However, this approach points to another issue, although it is not clear it can readily be dealt with through the mechanisms being discussed here. It is possible that local councils could require fixed line infrastructure in their rural developments, even though this is not always the default solution that would be offered by NBN Co or other carriers, and is not required under Commonwealth arrangements. This could expose the developers of these properties to significant costs, especially when backhaul costs are considered, discouraging regional development. However, if such local rules did apply, it would follow that pit and pipe should be required, and no exemption should be possible. Alternatively, if the Commonwealth does not require pit and pipe, it may be considered more appropriate for local governments not to require fixed line solutions.

Views are invited on these issues and the best approach to dealing with them. For example, should it be an additional criterion for exemption that the statutory infrastructure provider for the area in which the development is located confirms to the developer that it will not take ownership of the pit and pipe?

Question 4: Should pit and pipe exemptions generally remain available in rural and remote areas where the provision of fixed lines is unlikely for the foreseeable future? If so, do the exemption criteria need to be refined and, if so, how? For example, are the utility, frontage and kerb and channelling requirements valid and appropriately worded?

Question 5: Should the willingness of NBN Co or another entity to take ownership of pit and pipe in a rural and remote area be a criterion in considering whether an exemption to install pit and pipe be granted? What proof should be required that a developer has contacted NBN Co or another appropriate entity?

Question 6: What role, if any, should local governments play in setting telecommunications requirements in their jurisdictions and the grant of exemptions? What should happen if there are differences between Commonwealth policy and local government requirements, noting Commonwealth law would prevail over inconsistent local requirements? Should Commonwealth policy generally apply? Do Commonwealth requirements need to be clearer in this regard?

Ensuring exemptions are not available for developments that may receive fixed line

In addition to exempting developments that should be exempted, we need to ensure that developments that should have pit and pipe are not inappropriately exempted. If this happens, the problems the statute is meant to address could arise.

Two particular issues have been identified to date.

First, some developments may be adjacent to NBN Co's fixed line footprint (i.e., within 1,000 metres). Under the Telecommunications in New Developments (TIND) policy, NBN Co would be expected to consider using fixed-line technology for developments that are adjacent to its fixed line footprint, including whether it is cost effective for NBN Co to do so⁹. However, developers may not always approach a carrier up front about servicing a development with fixed lines if it is designated as being fixed wireless or satellite by NBN Co. In these circumstances, the development would proceed on the basis it would be serviced by NBN Co fixed wireless or satellite, and assuming all the other exemption criteria are met, pit and pipe would not need to be installed. However, when the occupants of new premises take possession of their buildings and approach retail providers for telecommunications services, they may be concerned to learn they are receiving fixed wireless or satellite services, given people in nearby buildings may already have fixed line. In the event NBN Co later decided a technology change was warranted, or the occupants wanted to pay for a technology

⁹ Telecommunications in new developments policy www.infrastructure.gov.au/media-centre/publications/telecommunications-new-developments, section 3.6, p.9.

change, the cost of retrofitting pit and pipe would need to be met, when it may have been more efficient for this to be installed by the developer.

While the other criteria in the 2021 Instrument are intended to capture such developments if they are likely to be urban in nature and eventually serviced by fixed line, there is always the risk the criteria are too narrow. In instances of adjacency, stricter exemption criteria may be appropriate (e.g. the closest boundary of any development must also be more than 1,000 metres from NBN Co's fixed line footprint). Alternatively, a requirement could be placed on developers to confirm with NBN Co that NBN Co does not plan to service the adjacent area with fixed line given, for example, the development's characteristics. Such a confirmation process may also help identify multiple development projects taking place in an area that, taken together, would help move the area from fixed wireless or satellite to fixed line. There have been instances to date where this has been a relevant consideration.

Question 7: Should exemptions from pit and pipe installation not be available where a development is within 1,000 metres of the NBN fixed line network? Should countervailing factors still apply (e.g. the development is adjacent but blocks are still 10 ha each, or a carrier is not prepared to take ownership for the pit and pipe)?

Second, a similar issue arises with developments located in or near towns in areas that are strategic 'growth corridors' slated for future development, or are within ready commuting distance of a major town or city, say, around one hour's commuting time. These areas may, over time, become more densely populated, and people living and working in them may then consider they should be provided with fixed line services. This could suggest the exemption criteria should be amended so that any development within a designated strategic growth corridor or similar area should remain subject to Part 20A and have pit and pipe if it is in such an area. Conversely, developments outside such areas would be eligible for exemption, providing any other criteria were met. Such growth areas could be taken to be those designated as such by State, Territory and local governments. Alternatively, this may be an issue better considered on a commercial basis by a carrier at the time, and it may be worth considering whether developers should again be required to check with NBN Co or another appropriate operator whether it will take ownership of pit and pipe at an early date, which it could then use when the areas warrant deploying fixed line.

Ultimately, whether or not fixed line is deployed should be determined on a commercial basis, but if a carrier is willing to make that commercial decision now once approached, then there may be merit in amending the 2021 Instrument to require a developer to approach a carrier. For example, where a development is in a strategic growth corridor, developers could be asked to demonstrate that they have received a quote from the statutory infrastructure provider for the area to service the development, including the preferred technology to be deployed.

Question 8: Should exemptions from pit and pipe installation not be available where a development is in a strategic growth corridor, or commuting zone, or similar? If so, how should such areas be identified? Should countervailing factors still apply (e.g. the development is in such an area but blocks are still 10 ha each on average, or a carrier is not prepared to take ownership for the pit and pipe)?

Question 9: Are there other circumstances that need to be considered in terms of exemptions being available or not available? If so, what are they, how should they be handled?

Possible inclusion in statute

In addition to the way matters are treated in the Instruments, there is the question of whether the matters in the Instruments would be better moved into the statute.

One issue, depending on the level of detail required, could be the sheer complexity and volume of drafting required for the exemptions, particularly those in the 2011 Instrument, and whether this is appropriate for the statute.

Another risk would be the loss of flexibility to adjust exemptions in light of changing circumstances in both the telecommunications and new development markets, noting COVID, for example, seems to be encouraging some regional migration and development at present.¹⁰ This could be partly addressed by retaining the ability to modify statutory exemptions or provide new exemptions by legislative instrument. However, there would be a risk of adverse outcomes if exemptions that are set out in statute could not be adjusted by legislative instrument, and statutory change required to do this. This is a longer and less certain process.

Conversely, some of the matters covered in the Instruments, and particularly, the 2011 Instrument (see p. 5 above), may be considered so fundamental to Part 20A's operation and of enduring importance, that they are worth including in the statute if this can be done in an effective way.

The views of stakeholders and other interested parties are therefore being sought on the appropriate course of action.

Question 10: Should some or all of the matters in the two instruments be moved into statute? Are there particular issues best suited to statute, or to legislative instruments?

Key questions

For convenience, this section lists the key questions asked in the paper. However, people responding to the paper are free to address other issues they consider relevant.

1. Do the matters covered by the 2011 Instrument remain important and need to continue? Are refinements needed? Are the matters better dealt with in Part 20A, in subordinate legislation, or a combination?
2. Do the matters covered by the 2021 Instrument remain important and need to continue? Are refinements needed? Are the matters better dealt with in Part 20A, in subordinate legislation, or a combination?
3. Is the process by which developers claim exemptions appropriate? Can it be improved? If so, how?
4. Should pit and pipe exemptions generally remain available in rural and remote areas where the provision of fixed lines is unlikely for the foreseeable future? If so, do the exemption criteria need to be refined and, if so, how? For example, are the utility, frontage and kerb and channelling requirements valid and appropriately worded?
5. Should the willingness of NBN Co or another entity to take ownership for pit and pipe in a rural and remote area be a criterion in considering whether an exemption to install pit and pipe be granted? What proof should be required that a developer has contacted NBN Co or another appropriate entity?
6. What role, if any, should local governments play in setting telecommunications requirements in their jurisdictions and the grant of exemptions? What should happen if there are differences between Commonwealth policy and local government requirements, noting Commonwealth law would prevail over inconsistent local requirements? Should Commonwealth policy generally apply? Do Commonwealth requirements need to be clearer in this regard?
7. Should exemptions from pit and pipe installation not be available where a development is within 1,000 metres of the NBN fixed-line network? Should countervailing factors still apply (e.g. the development is adjacent but blocks are still 10 ha each, or a carrier is not prepared to take ownership for the pit and pipe)?
8. Should exemptions from pit and pipe installation not be available where a development is in a strategic growth corridor or similar? If so, how should such areas be identified? Should countervailing factors still apply (e.g. the development is in such an area, but the blocks are still 10 ha each on average, or a carrier is not prepared to take ownership for the pit and pipe)?
9. Are there other circumstances that need to be considered in terms of exemptions being available or not available? If so, what are they, how should they be handled?
10. Should some or all of the matters in the two instruments be moved into statute? Are there particular issues best suited to statute, or to legislative instruments?

¹⁰ Provisional Regional Internal Migration Estimates (PRIME) March 2021 <https://population.gov.au/data-and-forecasts/data-and-forecasts-data-release-prime-release-march-2021.html>