



Australian Government

Department of Infrastructure, Transport,  
Regional Development, Communications and the Arts

# Consultation Paper—Possible amendments to pit and pipe exemption criteria under Part 20A of the *Telecommunications Act 1997*

August 2023

## Purpose

The Department of Infrastructure, Transport, Regional Development, Communications and the Arts (the department) seeks views from stakeholders and other interested parties on possible amendments to the class exemption criteria from requirements to install pit and pipe infrastructure under Part 20A of the *Telecommunications Act 1997* (the Act). The object of this paper is to present, discuss, and seek feedback on, the possible amendments. Your feedback will help us in advising the Minister for Communications on these options.

## Background

The Australian Government considers it is important for people moving into new developments and buildings to have ready access to modern telecommunications when they occupy their new properties. To support this outcome, the Government has published the Telecommunications in New Development (TIND) Policy<sup>1</sup>. The TIND Policy sets out the different roles that developers, telecommunications providers and consumers need to play so people have ready access to telecommunications services in new developments. This includes developers organising telecommunications pit and pipe for their developments where needed, and a carrier to service their developments. The Policy provides for infrastructure providers like NBN Co and its competitors to provide infrastructure, while consumers typically order services from retail service providers once these other processes are complete.

The TIND Policy is supported by two main sets of Commonwealth legislation. First, Part 20A of the Act sets out Commonwealth requirements for developers to install fibre-ready facilities (largely underground pit and pipe) in proximity to building lots or building units prior to sale or lease. The requirements are designed to facilitate the ready provision of fixed-line telecommunications. Second, Part 19 of the Act sets out the statutory infrastructure provider (SIP) regime. This makes NBN Co the default SIP for the whole of Australia, thereby ensuring NBN Co is available to provide broadband telecommunications infrastructure if required. If a developer contracts to use another infrastructure provider to service their development, the SIP

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<sup>1</sup> <https://www.infrastructure.gov.au/media-centre/publications/2020-telecommunications-new-developments-policy>

regime also provides for that provider to become the SIP for that development so that occupants in the development will have a provider to supply them with services if required.

These laws are relevant to the exemption criteria as Part 20A gives rise to the pit and pipe obligations to which the exemptions relate, while the SIP regime in Part 19 supports implementation of the exemptions.

During 2022, the department consulted on the existing statutory requirements on developers not to sell or lease building lots or units unless fibre-ready facilities such as pit and pipe have been installed. The consultation sought the views of stakeholders and other interested parties on two legislative instruments that outline fibre-ready facilities requirements, and the class exemption criteria from these requirements. These instruments are:

- *Telecommunications (Fibre-Ready Facilities in Real Estate Development Projects and Other Matters) Instrument 2011* (the 2011 Instrument)
- *Telecommunications (Fibre-Ready Facilities – Exempt Real Estate Development Projects) Instrument 2021* (the 2021 Instrument)<sup>2</sup>.

Based upon feedback from the previous consultation, the previous Minister remade the 2011 instrument with only minor amendments. The remade *Telecommunications (Fibre-Ready Facilities in Real Estate Development Projects and Other Matters) Instrument 2022*<sup>3</sup> is available to view on the Federal Register of Legislation.

## Existing pit and pipe exemption criteria

The default requirement for real estate development projects is that fibre-ready facilities are installed in proximity to building lots and units, unless the development meets the criteria for an exemption from pit and pipe requirements.

For a development to be eligible for a class exemption, it must meet all of the following requirements:

1. Either:
  - a. The only kind of utility infrastructure installed or planned to be installed in proximity to each building lot situated in the project area is substantially above ground electricity lines that form part of electrical supply network infrastructure (other than electrical lead ins to each building unit); or
  - b. There is no kind of utility infrastructure installed or planned to be installed in proximity to each building lot situated in the project area;
2. There is no kerb and channelling constructed (or planned to be constructed) in proximity to each building lot situated in the project area;
3. The average length of the street frontages of the building lots within the project is 60 metres or greater; and
4. No part of the project area is located inside an NBN Co fixed-line network rollout region in which the region ready for service date:
  - a. Has occurred; or

<sup>2</sup> <https://www.legislation.gov.au/Details/F2021C00771>

<sup>3</sup> <https://www.legislation.gov.au/Details/F2022L00328>

- b. Will occur within 3 years from the date the project received planning approval or consent under the applicable State or Territory law, as based on public announcements made by NBN Co or information provided to NBN Co to the person responsible for the project.

Developments that do not meet the criteria for a class exemption also have the option to seek an individual exemption from the Minister. The department receives approximately two requests for such Ministerial exemptions per year, and the process to prepare a case for a Ministerial exemption can be extensive. Individual exemptions granted are legislative instruments, and only two Ministerial exemptions have been granted to date. These two Ministerial exemptions are:

- *Telecommunications (Fibre-Ready Facilities – Exempt Kiangatha Real Estate Development Projects) Instrument No. 1 of 2016*<sup>4</sup>
- *Telecommunications (Fibre-Ready Facilities – Exempt Lockhart River Aboriginal Shire Council Piiramo Street Subdivision Real Estate Development Project) Instrument 2022*<sup>5</sup>

## Issues raised with the existing exemption criteria

During 2022, we sought views on the existing criteria in the 2021 Instrument, including whether they should be included in the statute.<sup>6</sup> The feedback then was they had worked reasonably well. Some stakeholders argued they could be improved, particularly to better exempt non-urban developments unlikely to receive fixed line telecommunications technologies in the foreseeable future (a five-year timeframe). The general view was also that the exemptions should be kept in an instrument to retain regulatory flexibility.

However, submissions noted:

- the existing exemptions are based on NBN Co's fixed line network, but fixed line networks can also be provided by other SIPs and this should be considered; and
- the requirement for a minimum average street frontage of 60 metres may not be a suitable indicator of whether a development has rural, bushland or remote characteristics, and as such it may prevent the exemption of developments in areas that will most likely be served with fixed-wireless or satellite technologies.

Further information can be found in our earlier consultation paper<sup>7</sup>.

## Possible amendments to the exemption criteria

We are now seeking views on possible changes to the exemption criteria, as outlined in the attached draft instrument.

The proposed revised criteria are:

1. No part of the project area of the development is located inside the fixed-line SIP network region of a relevant SIP.
2. A relevant SIP has provided written notice to the developer that it will not install a fixed-line network inside the project area.

<sup>4</sup> <https://www.legislation.gov.au/Details/F2016L00780>

<sup>5</sup> <https://www.legislation.gov.au/Details/F2022L01042>

<sup>6</sup> <https://www.infrastructure.gov.au/have-your-say/review-fibre-ready-facilities-exemptions-under-telecommunications-act-1997>

<sup>7</sup> <https://www.infrastructure.gov.au/department/media/publications/consultation-paper-review-instruments-under-part-20a-telecommunications-act-1997>

3. No underground utility infrastructure (electricity, gas, mains water, and sewerage) is installed or planned to be installed in proximity to each building lot situated in the project area.
4. The average lot size in the development must be 1,000m<sup>2</sup> or greater.
5. There is no kerb or channelling constructed or planned to be constructed in proximity to each building lot situated in the project area.

The department is also considering a ‘fallback’ criterion where a SIP advises it will not install fixed-line, but the development fails to meet one or more of criteria 3-5 above, and the relevant SIP also refuses to take ownership of pit and pipe. In these circumstances the development would be eligible for an exemption.

## Discussion of possible amendments

### **1. no part of the project area of the development is located inside the fixed-line SIP network region of a relevant SIP.**

If a development is located inside the fixed-line SIP network region of NBN Co or another SIP, the developer would be expected to arrange for fixed-line telecommunications services, and the development would not be eligible for an exemption from pit and pipe requirements. This proposed change considers that, while NBN Co is the default SIP for Australia, and must provide telecommunications services where no other carrier will, the telecommunications market in Australia is competitive, and has a number of other network providers who have deployed fixed-line networks in numerous areas, that are technically outside NBN Co’s fixed-line footprint.

If a SIP other than NBN Co has contracted to service an area of land with fixed line infrastructure, it is also appropriate that any development in that area be subject to pit and pipe requirements and not be exempt from them.

### **2. A relevant SIP has provided written notice to the developer that it will not install a fixed-line network inside the project area.**

To be eligible for exemption now a developer must check that their development is outside NBN Co’s fixed line footprint by using NBN Co’s online map or otherwise consulting it and obtaining confirmation by NBN Co in writing. We expect that if a developer has a large project they will generally contact NBN Co or another carrier, which may then advise they would service the development with fixed line, meaning the fixed line footprint would effectively be expanded and pit and pipe would be required. However, if a developer does not approach NBN Co or another SIP, there is a risk they will assess that they meet the current exemption criteria and proceed with their development without installing pit and pipe. This will mean the development will be more likely to be serviced by fixed wireless or satellite, due to additional costs required before the fixed line network can be extended. This possible new exemption criterion would require all developers of projects outside a SIP’s fixed-line footprint to check with the SIP for the area (‘the relevant SIP’ in the attached draft instrument) whether it would service the project with fixed line. If the SIP advises it will use fixed line, the onus would be on the developer to provide pit and pipe on the basis fixed line will be installed and no exemption will be available. The developer would still be free to choose another carrier to service the estate, but the requirement would be that if NBN Co or the other SIP would provide a fixed line solution, the pit and pipe should be installed.

### **3. No underground utility infrastructure (electricity, gas, mains water, and sewerage) is installed or planned to be installed in proximity to each building lot situated in the project area.**

To be eligible for exemption now, a development must not have any networked utilities, or no networked utilities other than overhead electricity. This criterion is used to characterise developments as more urban or rural in nature. The current drafting of the exemption is complex, and we often find that developers fail to record a complete answer when submitting their exemptions for registration. Accordingly, we propose to simplify the drafting so that the test is just whether or not any underground networked utilities are in place. Where underground utilities are being deployed, then generally it should be possible to install pit and pipe.

### **4. The average lot size in the development is 1,000m<sup>2</sup> or greater**

To be eligible for exemption currently, the average street frontage of the lots in a development must be 60 metres or more. Again, this seeks to characterise a development as more urban in a nature on the basis street frontages are relatively narrow.

Stakeholder feedback from our initial consultation was that this criterion is problematic. Our own data indicate that, where developments have been submitted to us and are in NBN Co's fixed wireless or satellite footprints, they most frequently fail to qualify for an exemption because the lots may have average street frontages below 60m. For example, there may be small towns where vacant lots have smaller average street frontages, but NBN Co uses fixed wireless or satellite. Some developments may also have unusual lot shapes which do not meet the average street frontage requirement but are nonetheless larger rural-type lots.

The department therefore proposes changing the criterion to focus on average lot size. Lots of over 1,000m<sup>2</sup> would meet the criterion for an exemption. 1,000m<sup>2</sup> is a generous lot size for most urban residential blocks. Australian Bureau of Statistics data from 2019-2020 indicate the average lot size for house blocks in Australian capital cities was 467m<sup>2</sup> (urban and suburban lots).

The 60 metre street frontage requirement assumes a square lot will have a size of approximately 3,600m<sup>2</sup>, so a possible minimum lot size of 1,000m<sup>2</sup> is likely to be a better proxy for rural town and village developments.

### **5. The development does not have kerb and channelling constructed or planned to be constructed.**

To be eligible for exemption now, a development must also not have kerb and channelling or must not have it planned. Kerb and channelling is generally a feature of more urban and suburban developments that have a higher density, and are more likely to fall within the fixed-line service footprint. However, we would welcome views on whether or not the criterion remains relevant and should be retained.

### **6. NBN Co or another SIP will not take ownership of the pit and pipe.**

In the Department's experience, developments may sometimes fail to meet one or more of the exemption criteria and the developer is then required to install pit and pipe. While the likelihood of this occurring should be reduced by checking with a relevant SIP if it will install fixed-line, it may still happen. In this case, developers expressed concern that they may be responsible for maintaining the pit and pipe, and potentially liable for injuries caused by pit and pipe that are broken (e.g. if someone falls into a pit).

In recent years, where developers fail to obtain an exemption but NBN Co will not install fixed-line, NBN Co has taken ownership of the pit and pipe. It does this on a commercial basis, so there is a risk for developers that they may not always be able to rely on a SIP taking ownership of pit and pipe. Accordingly, we are proposing a 'fall back' criterion that would exempt developments where:

- the relevant SIP will not install fixed-line, but
- the development fails to meet another exemption criterion, and
- the SIP then advises it will not take ownership of the pit and pipe.

## **Other amendment options considered but not recommended at this stage**

We have also considered other possible criteria:

- not allowing an exemption for a new development within 1,000 metres of the fixed line footprint of NBN Co or another SIP – this would be on the basis such developments would more likely receive fixed line infrastructure in the foreseeable future and aligns with working assumptions in the TIND Policy;
- not allowing an exemption for a new development within a strategic growth area – again on the basis such developments would be more likely to receive fixed line infrastructure in the foreseeable future; and
- not allowing an exemption where a development had more than a specified number of lots or units – e.g. more than 50 or 100 lots or units.

The first two of these were discussed in our 2022 consultation paper.

We are concerned these criteria are too broad to support efficient outcomes. For example, even a large development of a specified number of relatively large lots, like a rural lifestyle development, could be spread over a large area, even in a strategic growth area, and would likely best be serviced by fixed wireless or satellite.

A further consideration in the case of strategic growth areas is they can be defined in many ways across local government areas and there is no great consistency between such definitions.

In practice, more tailored exemption criteria would still need to be applied to further filter criteria like these, and as such tailored criteria are already proposed. However, we would be interested in hearing views from stakeholders.

## **Next steps – Have your say**

The 2021 Instrument is due to sunset on 1 January 2024. We are therefore seeking stakeholder feedback to determine whether the instrument should be remade with possible amendments discussed here, remade without amendments, or allowed to sunset.

In preparing comments, stakeholders may like to consider the following questions:

- Should the possible changes be adopted in full, or part, or not?
- Should alternative proposals that have been rejected (adjacency, growth areas, and minimum number of lots) still be considered?
- Are there other exemption criteria that could be considered as well?
- Is 1,000m<sup>2</sup> a reasonable average lot size for exempting developments?
- Should criteria 3, 4 and 5 all need to be met to give rise to an exemption or would it be sufficient for one or two of them to be met to warrant an exemption being available?

- Would criteria 1, 2 and 6 discussed above work by themselves as threshold criteria, without the need for criteria 3, 4 and 5?
- Would criterion 6 above give SIPs too much discretion, allowing them to exercise quasi-regulatory functions, and would arrangements for taking ownership of pit and pipe where fixed line infrastructure was not being immediately provided be better left to purely commercial processes?

We would be grateful if you could provide your comments to us by email to [new.developments@infrastructure.gov.au](mailto:new.developments@infrastructure.gov.au).

We would appreciate receiving your comments by 6.00 pm 11 September 2023.