



18 February 2022

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Department of Infrastructure, Transport, Regional Development and Communications

cc: new.developments@communications.gov.au

Dear Philip,

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

nbn welcomes the opportunity to respond to the Department's consultation paper on the exemption instruments that apply to the requirement to install fibre ready facilities as defined by section 20A of the *Telecommunications Act 1997* (**the Act**). The fibre ready facilities framework (including exemptions) sensibly balances the future needs of end-users to have access to fixed line telecommunications services, with the commercial interests of developers who should not be required to build fibre ready infrastructure that is unlikely to ever be required. **nbn** considers the exemptions set out in the 2011 and 2021 instruments are working well today, and with a few minor clarifications and adjustments would remain fit for purpose for the foreseeable future.

Appendix 1 contains **nbn**'s specific responses to the questions set out in the consultation paper.

1. The subjects of the 2011 and 2021 instruments remain important and should continue to apply

nbn considers the exemptions arrangements set out in the 2011 and 2021 instruments remain important today and will continue to do so into the future. As noted in the discussion paper, the instruments provide much of the detail that is relevant for the successful operation of the fibre ready facilities framework.

nbn agrees that where detail in instruments is stable, it should be moved to the statute. For example, the exemption circumstance relating to above ground cabling. Having said that, the telecommunications aspects of the new developments industry are currently in a state of change with the introduction of Statutory Infrastructure Provider (**SIP**) rules and the decision by Telstra to stop delivering copper to new developments in regional areas. As such, **nbn** suggests it would be pragmatic to extend (and vary as appropriate) the exemptions within the legislative instruments for a period of at least 3-5 years. This recognises the need to preserve flexibility while these industry changes settle, while also allowing any variations determined by this consultation to be reviewed following a period of time in operation.

Additionally, Comms Alliance are currently convening a working committee tasked with creating a Code for In Building Pathways (WC103) as fibre ready facilities in new developments. This work is expected to update and enhance the definitions relevant to SIPs and developers and to ensure consistency with other relevant legislation.



nbn suggests following this work it may be appropriate to review similar definitions within Part 20A of the Act as well as the 2011 and 2021 instruments to ensure consistency and clarity.

2. nbn generally takes ownership of pit and pipe infrastructure where an exemption is not granted

Currently, **nbn** has a process in place in which we generally agree to take ownership of pit and pipe in situations where we do not have immediate plans to deploy fixed line networks to the development, but the developer has not been granted an exemption due to not meeting all the relevant criteria. In these situations, when a developer engages **nbn**, we work with the developer to ensure the pit and pipe is built to appropriate specifications, after which we enter into a vesting agreement and take over responsibility for the pit and pipe.

This process, and the requirement for developers to install fibre ready facilities in these circumstances, remains important. Whilst **nbn** may decline to deliver fixed line services to a development upon initial application, in many cases it would be unreasonable to believe that these areas may not require upgrading to some type of fixed line connection in the future. This reflects the sensible underlying intent of this legislation.

3. The exemption process needs to balance future proofing the communications needs of developments and the commercial interests of property developers.

nbn appreciates the Department's consideration of different exemption criteria to narrow the scenarios in which a developer would be exempted from pit and pipe obligations. In particular, the '**nbn** adjacency' rule (within 1,000m) and the designated strategic growth corridor approach. In principle, these are both areas in which **nbn** considers an exemption should be generally inappropriate. However, there is significant difficulty in appropriately defining these rules in a way that doesn't simply introduce a range of new edge cases. For example, 1,000 metres may be an appropriate distance where a development is underway on the urban fringe of capital and larger regional cities, but it may be excessive when considering a small development 950m from a small rural town.

Likewise, setting an appropriate definition of what constitutes a strategic growth corridor will be challenging. Given the myriad of planning, infrastructure and local and state government agencies involved, a practical definition that gets it right enough of the time to make sense is likely to be very hard to make.

In both of these cases, the potential implications of not granting an exemption inappropriately does mean an increase in the developers cost base, but this needs to be balanced against the potential implication that granting an exemption inappropriately is likely to undermine the fundamental intent of this legislation – to reduce the need for retrofitting and the attendant costs, delays and disruptions that arise when installing fixed infrastructure to existing developments.

As such, **nbn** considers there is a middle ground that suitably addresses the grey area where an exemption under current rules is not granted, yet no provider wishes to take ownership of the pit and pipe. Under this middle ground approach, **nbn** would take on the obligation of determining whether we consider pit and pipe infrastructure is likely to be required in the future to support fixed line services. If it is not likely, a duly authorised **nbn** representative will issue a notice to the applicant developer to this effect that could be combined with the existing attestation process to support an exemption application with the Department.



This approach has several benefits:

1. **nbn**, as the national default SIP, assumes the responsibility of taking ownership of pit and pipe infrastructure, or otherwise notifying a developer that **nbn** does not foresee a need for pit and pipe.
2. It builds in a degree of flexibility by relying on **nbn**'s internal planning teams to, in effect, identify growth areas, removing the need for this to be defined in statute or legislative instrument.
3. It avoids the possibility of developers 'SIP shopping' to acquire evidence of a network owner not wishing to take ownership of the pit and pipe.

This approach also retains the flexibility that developers have today to negotiate with any of the non-nbn providers in relation to communications services for their developments, including transfer of pit and pipe infrastructure ownership.

nbn suggests that one potential way to accommodate this approach within the 2021 Instrument is through the minor drafting changes proposed below, although we are happy to engage with the Department and industry if an alternative approach is to be considered.

5 Exempt real estate development projects

- (1) Pursuant to paragraph 372K(1)(b) of the Act, a real estate development project ascertained in accordance with the following table, is exempt from the requirements in sections 372E, 372F, 372G and 372H of the Act, provided that subsection (2) is satisfied.

Item	Exemption
1	<p>Any real estate development project in which (at the relevant time):</p> <p>(a) either:</p> <p>(i) 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</p> <p>(ii) there is no kind of utility infrastructure installed or planned to be installed in proximity to each building lot situated in the project area;</p> <p>(b) there is no kerb and channelling constructed (or planned to be constructed) in proximity to each building lot situated in the project area;</p> <p>(c) the average length of the street frontages of the building lots within the project is 60 metres or greater; and</p> <p>(d) 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:</p> <p>(i) has occurred; or</p> <p>(ii) 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</p> <p>(iii) is not considered likely to be located inside an NBN Co fixed-line network rollout region in the future, as specified in or</p>



information provided by NBN Co to the person responsible for the project.

- (2) The person responsible for the real estate development project (or a person on its behalf) has provided to the Secretary of the Department a written notice setting out the following details about the project for which the exemption under this Instrument is claimed:
- (a) the name of the development (if available);
 - (b) the development's stage name or number (if available);
 - (c) the development type, in terms of whether it is 'residential', 'commercial', 'industrial', 'mixed development', 'public/private institution' or 'other';
 - (d) the total estimated number of building lots or building units in the development;
 - (e) the average length of the street frontages of the building lots within the development; and
 - (f) any of the following:
 - (i) the location and boundary of the development; or
 - (ii) the lot/plan number of the development; or
 - (iii) the address of the development.
 - (g) if applicable, a notice issued by NBN Co stating that NBN Co does not consider the development is likely to be located inside an NBN Co fixed line network rollout region in the future.

4. Local governments should align planning policies to Commonwealth arrangements

Generally, **nbn** considers that local governments should ensure planning policies adhere as closely as possible to Commonwealth arrangements for telecommunications in new developments, particularly in relation to exemptions from fibre ready facilities. Where local governments have more stringent requirements for fixed line services as part of developments in their areas, it follows that pit and pipe should also be required and no exemption should be possible. In these circumstances it would be a commercial matter between developers and infrastructure providers to determine the most appropriate method for delivering services to the development.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]



Appendix 1: Answers to specific questions

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?

nbn response: These matters are important and should continue in subordinate legislation for the next 3-5 years. See section 1 above for more detail.

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?

nbn response: These matters are important and should continue in subordinate legislation for the next 3-5 years. See section 1 above for more detail.

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

nbn response: The current processes appear to be working well, however could be improved by utilising the process outlined in section 3 above.

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?

nbn response: Exemptions should remain available as they are today, with the addition of the option for **nbn** to notify a developer that we do not consider fixed line infrastructure to be required in the future. This could support a developer exemption application. See section 3 for more detail.

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?

nbn response: The willingness of **nbn** as the national default SIP to take ownership of pit and pipe in rural and remote areas should be a criterion in considering whether to allow an exemption. See section 3 for more detail.

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?

nbn response: Generally, Commonwealth policy should apply. See section 4 for more detail.

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)?

nbn response: Including new factors like 1,000m adjacency or strategic growth corridors will likely add complexity to the process for handling exemptions. **nbn** suggests the process outlined in section 3 above achieves the same objectives without requiring the drafting complexity.



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)?

nbn response: Including new factors like 1,000m adjacency or strategic growth corridors will likely add complexity to the process for handling exemptions. **nbn** suggests the process outlined in section 3 above achieves the same objectives without requiring the drafting complexity.

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?

nbn response: None applicable.

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?

nbn response: As outlined in section 1 above, **nbn** considers the exemptions should be retained in legislative instruments for 3-5 years to allow flexibility while industry change settles down.