

18th February 2022



The Department of Infrastructure, Transport, Regional Development and Communications.
Via email: new.developments@communications.gov.au

RE: Review of instruments under Part 20A of the *Telecommunications Act 1997*

ACCAN thanks the Department for the opportunity to contribute to its consultation on the review of Instruments under Part 20A of the *Telecommunications Act 1997* (the Act). Part 20A of the Act supports the deployment of optical fibre in real estate development projects by requiring real estate developers to arrange for fibre-ready pit and pipe infrastructure (facilities) to be installed in proximity to building lots or building units. This must be done before developers sell or lease the building lots or units. These rules are subject to exemptions made by the Minister via legislative instruments. Exemptions have been made in a 2011 Instrument and a 2021 Instrument discussed below.

Telecommunications (Fibre-Ready Facilities in Real Estate Development Projects and Other Matters) Instrument 2011

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?

ACCAN considers that the 2011 Instrument remains important and should continue with a few minor changes mentioned below.

Section 5 of the Instrument exempts real estate development projects from providing fibre-ready facilities where prior to 2011, non-fibre fixed-line facilities were installed and the installation of the fixed-line is a minor modification, relocation or extension which includes extension of a non-fibre-ready facility of no more than 30 metres. An additional condition for the exemption is that it is not either reasonably practical (having regard to the direct cost associated with such an installation) or technically feasible to provide fibre-ready facilities. ACCAN questions whether the Instrument should be strengthened by removing the opportunity for development projects to be exempt from upgrading from non-fibre fixed-line to fibre-ready facilities due to the direct cost associated with such an installation. Removing Section 5(4)(c)(i) from the Instrument would ensure more developers provide fibre-ready facilities meaning that these development projects' telecommunications facilities are fit for purpose in the future.

The Instrument exempts development projects from requiring fibre-ready facilities to be installed where facilities are installed for use with copper-based or hybrid-fibre-coaxial (HFC) networks and either fibre-ready facilities have already been installed, are simultaneously installed, or where the person reasonably believes that fibre-ready facilities are to be installed in sufficient proximity within

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12 months. The Instrument defines when a person is taken to have a reasonable belief that installation of a particular type of fibre-ready facilities will occur in the project area within 12 months. This includes if a project area has been identified in published information by a carrier, carriage service provider or other telecommunications infrastructure provider as an area in which fibre-ready facilities will be installed within 12 months.

ACCAN considers that the Instrument could be brought more in line with the Government's Telecommunications in New Development's (TIND) policy.¹ This would be achieved by specifying that a person is taken to have a reasonable belief that installation of a particular type of fibre-ready facilities will occur in the project area within 12 months if the project area is at least 1 kilometre or less from the nearest point of NBN Co's fixed-line footprint boundary, unless they have been provided with information from NBN Co which indicates that NBN Co will not be installing fibre in the area. ACCAN would support a requirement to provide fibre-ready facilities beyond 1 kilometre of NBN's fixed line infrastructure.

ACCAN believes that the issues addressed in Part 20A are best dealt with through a combination of the Act and subordinate legislation. As new technological developments may change the way connectivity is delivered into the future, to allow greater flexibility we consider it appropriate for the Instrument to continue to be able to provide exemptions regarding fibre-ready facilities.

Telecommunications (Fibre-ready Facilities – Exempt Real Estate Development Projects) Instrument 2021

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 in a combination?

The 2021 Instrument provides a class exemption for real estate development projects located in areas where it is unlikely fixed-line network infrastructure will be installed in the foreseeable future, thus fibre-ready facilities are not warranted. The matters covered by the 2021 Instrument remain essential to the effectiveness of Part 20A of the Act. If the exemption instrument is too broad, the costs from retrofitting developments with fibre-ready facilities would need to be met at a higher cost than had they been installed by the developer. Whilst the instrument needs to strike the correct balance between capturing and excluding the appropriate development projects from the pit and pipe requirements, ACCAN considers that erring on the side of caution is preferable given the costs of retrofitting pit and pipe are higher than installing the facilities at an earlier stage. Additionally, it is important to consider what is meant by 'foreseeable future', as a house which might not have fixed-line connectivity available in the next 3 years, could do so in 7 or 10 years.

Section 5(1) of the Instrument provides the conditions in which a real estate development project may be exempt, such as the extent to which utility infrastructure has been or is planned to be installed, a lack of kerb, the length of the street frontage is 60 metres or greater, and no part of the project area is located inside NBN Co's fixed-line network. ACCAN supports the existing criteria, however they should be strengthened so that the developer is not exempted from providing fibre-ready facilities if the development project is at least within 1 kilometre from NBN Co's fixed-line network, to align more

¹ <https://www.infrastructure.gov.au/department/media/publications/telecommunications-new-developments>

closely to the Government's TIND policy. The developer should be required to receive confirmation from NBN Co that NBN Co does not plan to service the adjacent area with a fixed-line service, such as that which they are required to provide the Minister with under the TIND policy.

ACCAN is aware of instances where NBN Co is providing Fixed Wireless or satellite in new developments in regional areas because developers have not considered or elected to pay more to have fibre installed, even though they are adjacent to the existing fixed line footprint.² Requiring development projects adjacent to NBN's fixed line footprint to have fibre-ready facilities will hopefully encourage more developers to install fibre, and at a minimum provide future residents the opportunity to have fibre installed without needing to retrofit pit and pipes.

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

Section 5(2) requires the real estate developer to provide the Department with written notice detailing the project for which the exemption is claimed. ACCAN is unaware of any issues with the process by which developers claim exemptions, however we recommend that public consultation be introduced to the process to allow local communities to have a say in decisions affecting the connectivity available in their area.

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?

ACCAN considers that pit and pipe exemptions should generally remain available for developments in remote areas. When it comes to regional areas, a more nuanced approach needs to be taken as these areas could see upgrades to their access technologies in the coming years. Indeed, Federal and State Governments are investing in numerous projects to improve connectivity in the regions.³ The conditions for exemption as specified in Section 5(1) with the addition that a development project is not within 1 kilometre of a fixed network footprint are appropriate. It is important that development projects should have to meet all the conditions listed, as it is possible for a property to meet one of the conditions, for example a property's frontage could be over 60 metres, if it's a large property, yet still be located in a relatively built up area and thus may expect to receive a fixed line connection in the future. Similarly, a property could be entirely self-sufficient for sustainability reasons, consequently meeting condition (a)(ii) of Section 5(1), yet again be located in a relatively built up area.

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?

² Regional Telecommunications Independent Review Committee (RTIRC), 2022, *2021 Regional Telecommunications Review*.

³ For example [Connecting Victoria](#) - Victoria State Government, [Gig State](#) - NSW Government, [Regional Connectivity Program](#) - Australian Government.

Whilst it is sensible for the developer to request that the Statutory Infrastructure Provider (SIP) of an area takes responsibility for the pit and pipes, we are concerned that the willingness of NBN Co or another entity to take ownership of pit and pipe may result in a weakening of Part 20A of the Act. This is due to the following considerations. Firstly, it is fair to assume that the longevity of the buildings in a new development will be far greater than NBN Co's network extension plans, which could result in exemptions being granted for developments that may receive fixed line connections in the future. Secondly, as NBN Co would risk being liable where pit and pipes fall into disrepair, it could have the incentive to reject their ownership. Therefore ACCAN considers it is reasonable for SIPs to automatically be responsible for the pit and pipes in the areas that they service.

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?

Whilst Commonwealth law prevails over inconsistent local requirements, we consider that there needs to be space for local governments' requirements to be taken into consideration in whether exemptions are to be granted. Indeed, the latest Regional Telecommunications Review found a need to increase coordination and investment between governments and other relevant sectors to address connectivity in the regions.⁴

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)?

As mentioned above, we consider that exemptions from pit and pipe installation should not be available where a development is at least within 1 kilometre of the NBN fixed-line network. We would also support amending the exemption requirement to have a broader scope by extending the fibre-ready facilities requirement to development projects well beyond 1 kilometre of the fixed line footprint.

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)?

ACCAN supports a requirement for pit and pipe installations in developments which are in strategic growth corridors and commuting zones. Areas that are eligible should be identified by appropriate State and Territory Government departments or authorities and potentially listed on a public register. As mentioned previously, there needs to be greater coordination amongst different levels of governments, and the connectivity initiatives and development strategies of local, State and Territory governments should be taken into account when granting exemptions. We would also support the

⁴ RTIRC, 2020.

requirements for developers to approach a carrier and to demonstrate that they have received a quote from the SIP for the area.

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?

ACCAN considers that there needs to be a more nuanced place based approach to granting exemptions. The topography and location of the development subject to the exemption request needs to be considered to determine whether the type of access technology is appropriate. For example, in high rainfall areas such as across Northern Australia, satellite technologies will not work as well due to rain fade. Additionally mountains and trees can potentially obstruct a Fixed Wireless signal. Furthermore, the network capacity for an area must be taken into account, to accommodate any risk of congestion on a Fixed Wireless tower. Lastly the risk of natural disasters and bushfire should be considered, where underground telecommunications facilities may be more appropriate and resilient.

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?

ACCAN considers that the matters discussed above are best suited to legislated instruments to allow for greater flexibility to be amended in the future.

Please do not hesitate to contact us should you require clarification or additional information on any of the issues raised in our response.

Sincerely,

Megan Ward
Economic Adviser