

EXPLANATORY STATEMENT

Issued by the Authority of the Minister for Communications, Urban Infrastructure,
Cities and the Arts

Telecommunications Act 1997

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

Authority

Paragraph 372K(1)(b) of the *Telecommunications Act 1997* (the Act), together with paragraphs 372K(1)(c)-(f), allow the Minister to exempt, by legislative instrument, a real estate development project ascertained in accordance with the exemption instrument, from the scope of sections 372E, 372F, 372G and 372H of the Act. Subsection 372K(4) of the Act provides that an exemption made under subsection 372K(3) may be unconditional, or subject to specified conditions.

Subsection 13(3) of the *Legislation Act 2003* allows specification of matters by class or classes of matters.

Purpose

The purpose of the *Telecommunications (Fibre-ready Facilities — Exempt Real Estate Development Projects) Instrument 2021* (the Instrument) is to exempt real estate development projects situated outside of a National Broadband Network (NBN) fixed line rollout region from the requirements to install fibre-ready pit and pipe under Part 20A of the Act, provided the project satisfies certain other conditions relating to the average size of the street frontages and utility infrastructure. The Instrument continues the exemption arrangements put in place by the *Telecommunications (Fibre-ready Facilities — Exempt Real Estate Development Projects) Instrument 2016*.

Background

Part 20A of the Act provides for the installation of fibre-ready facilities like pit and pipe in new developments. It applies across Australia. The provisions are intended to support the installation of optical fibre cabling. Such pit and pipe can also be used for the installation of other fixed-line infrastructure, including copper cabling in areas still serviced by Telstra. In recognition that the pit and pipe requirements may not always be appropriate, Part 20A includes exemption mechanisms. The Minister may exempt developments from the requirement to install fibre-ready facilities like pit and pipe under section 372K of the Act.

The Minister is granting this exemption as laying pit and pipe in some kinds of developments would be very costly and it is unlikely to be required for the foreseeable future, if ever, given the telecommunications solutions that would be used due to the location and nature of these kinds of developments.

In many instances it is more cost-effective to deliver telecommunications to some types of developments in some bushland, rural, and remote locations using technologies that do not require pit and pipe. This includes the use of direct-buried cabling, wireless and/or satellite. While the use of pit and pipe in these scenarios would provide greater future flexibility, it may never be utilised in the locations concerned and would come at a significant cost. In these circumstances, it would not be cost-effective to require pit and pipe to be installed when a development of this kind is undertaken.

A number of developers and their representatives approached the Government seeking an exemption to deal with such situations as part of the development of the initial version of the Instrument in 2016. Subsequently, exemptions were granted during the period of operation of the initial version of the Instrument until its cessation on 31 December 2020 as follows: three in 2016, 257 in 2017, 233 in 2018, 196 in 2019 and 121 in 2020. As expected, the developments exempted typically involve large blocks in rural and bushland areas being serviced by wireless, satellite or direct buried cable. Given the use of the initial version of the Instrument, it is being remade to assist developers in similar situations pending a future review

In the event that an exempt development was further developed (e.g. to increase housing density), the requirement to consider whether to install pit and pipe would need to be considered again. It would also be open to carriers to require pit and pipe as a commercial condition of servicing a development.

Consultation

The draft earlier version of the Instrument was subject to consultation over a period of three weeks from 23 September 2016 to 14 October 2016. Submissions received (seven) and representations from other people were factored into the final drafting of the 2016 version.

Following the expiry of the 2016 version of the Instrument, the 2021 version is being remade in the same form as its predecessor.

Key stakeholders including NBN Co, Telstra, Uniti, the Communications Alliance, the Australian Communications Consumer Action Network (ACCAN), the Housing Industry of Australia and the Australian Local Government Association (ALGA) were consulted on the remaking of the Instrument. The intention is to further review the Instrument and a related instrument in the near term.

Regulation Impact Statement

The Office of Best Practice Regulation (OBPR) considers the impact of the Instrument is minor and a Regulatory Impact Statement is not required. The OBPR reference number is 43464.

Retrospective commencement of the accompanying Instrument

The Instrument commences retrospectively, i.e. on 1 January 2021. This provides continuity with the 2016–20 exemption arrangements and will cover projects for

which exemptions were required and qualify in the period from 1 January 2020. The Instrument is consistent with subsection 12(2) of the *Legislation Act 2003* in that it does not disadvantage a person's rights or impose a liability in relation to anything done, or omitted to be done, before the Instrument is registered and commenced.

Details of the accompanying Instrument

The Instrument is a legislative instrument for the purposes of the *Legislation Act 2003*. Details of the accompanying Instrument are set out in **Attachment A**.

Statement of compatibility with human rights

A statement of compatibility with human rights for the purposes of Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* is set out in **Attachment B**.

ATTACHMENT A

Details of the Telecommunications (Fibre-ready Facilities — Exempt Real Estate Development Projects) Instrument 2021

Section 1 – Name of Instrument

Section 1 provides that the title of the Instrument is the *Telecommunications (Fibre-ready Facilities — Exempt Real Estate Development Projects) Instrument 2021*.

Section 2 – Commencement

Section 2 provides that the Instrument commences on 1 January 2021.

Section 3 – Authority

Section 3 provides that the Instrument is made under paragraphs 372K(1)(b), (c), (d), (e) and (f) of the *Telecommunications Act 1997*.

Section 4 – Interpretation

Subsection 4(1) provides interpretation of terms used in the Instrument, including terms key to the operation of the exemption provisions.

The term, ‘electrical supply network infrastructure’ does not include any infrastructure directly forming part of an electrical transmission grid as this does not form part of the electricity distribution network.

‘NBN Co’ means NBN Co Limited (ACN 136 533 741), as the company exists from time to time (even if its name is later changed).

‘NBN Co fixed-line network’ is defined by reference to the *Telecommunications (Migration Plan Principles) Determination 2015*. It means any fixed line telecommunications network that is owned or controlled by, or operated by or on behalf of, NBN Co or a related entity of NBN Co including fibre-to-the-premises, fibre-to-the-basement, fibre-to-the-node and hybrid fibre-coaxial cable access technologies, but excludes any telecommunications network deemed under the 2015 Determination to form part of the copper network or the hybrid fibre-coaxial network.

‘region ready for service date’ means the date published by NBN Co on its website as the disconnection commencement date for a particular rollout region. In turn, ‘rollout region’ means a geographic region with an ascertainable boundary that has been determined by NBN Co within which the NBN Co fixed-line network is deployed or planned to be deployed. NBN Co typically publishes information about its rollout on its website and operates an online pre-qualification tool for new developments. NBN Co has been asked to provide developers with information where this is necessary to meet the requirements of the exemption.

Subsection 4(2) provides three rules as to how the street frontage distance of a building lot (an exemption criterion) is to be calculated. The first rule relates to building lots which are battle-axe blocks. The second rule relates to building lots with

multiple street frontages (e.g. corner blocks). The third rule covers all other types of building lots.

Note 1 reminds readers that other words and expressions (such as, building lot, facility, real estate development project etc.) have the meaning given by section 7 of the Act. These are basic concepts used in the Instrument to identify real estate development projects and constituent building lots to which the exemption applies.

Note 2 reminds readers that section 372Y of the Act defines the term ‘proximity’.

Section 5 – Exempt real estate development projects

Section 5 specifies the kinds of real estate development projects which are exempt from the requirements in sections 372E, 372F, 372G and 372H of the Act. In addition to meeting the criteria in the table, the reporting requirements under subsection 5(2) must also be satisfied in order for the exemption to apply to the particular real estate development project.

The table accompanying subsection 5(1) sets out the four distinguishing characteristics of the real estate development project (and its associated project area) that must all be satisfied at the relevant time. The criteria, together, are intended to identify real estate development projects that are highly likely to be in areas that will be serviced by telecommunications technologies that do not require pit and pipe, and the provision of which would be unduly costly and inefficient. The criteria draw heavily on long standing industry practices.

‘At the relevant time’ is the point in time at which the exemption is claimed and notified. If the locality concerned is further developed in future, that new development would need to be assessed in terms of whether it was subject to Part 20A of the Act or would be exempt under the Instrument. For example, if blocks with street frontages of 60 metres or more were further subdivided into blocks with 30 metre street frontages the first exemption criteria would not be met.

There are four exemption criteria.

Firstly, only above-ground electricity lines are installed or planned to be installed in proximity to each building lot or there are no networked utilities installed or planned to be installed. That is, the development does not have mains water, sewerage, gas or underground electricity, indicating it is likely to be in a non-urban area.

Networked utilities are those provided to a property remotely by a supplier whose business is typically that of providing the services concerned using a network servicing multiple premises in the area. Examples are electricity, water and gas distribution companies. Networked utilities can be contrasted to utilities that may be provided directly on the property, for example, by way of on-site solar power, tank water or septic tank sewage treatment. The provision of such onsite utilities is not intended to invalidate the exemption.

Item 1(a) of the table sets out two alternative criterion relating to the availability of networked utilities to the building lots. Item 1(a)(i) of the table covers the availability of above-ground electricity alone. This recognises that many rural and remote

premises may be serviced by overhead electricity but may still not warrant the installation of fibre-ready pit and pipe. The criterion does, however, recognise that even if electricity is supplied to a property above-ground, in some instances a small part of the infrastructure (e.g. on property cabling like the lead-in) could be buried (i.e. 'substantially above-ground electricity lines'). While overhead electricity may also be used in urban areas where the installation of fibre-ready pit and pipe is warranted, the other remaining criterion in the table also needs to be satisfied in order for the exemption to be available.

While it could be inferred from item 1(a)(i), item 1(a)(ii) of the table covers the alternative scenario relating to network utilities. It explicitly refers to the situation where there are no networked utilities at all installed, or planned to be installed, at the property, not even above-ground. This could be, for example, a bush block that has no networked utilities due to its remoteness and all utilities will be provided on-site. Provided that the other remaining criteria and reporting condition are satisfied, a development comprising blocks with only on site utilities will still be able to claim the exemption.

Secondly, there must be no kerb and/or channelling constructed (or planned to be constructed) on the street frontage. Again, this would suggest the locality is not urban.

Thirdly, the average length of the building lots' street frontages must be 60 metres or greater in length. Again, this would suggest the locality is not urban. As this is an average distance, it is possible for some of the building lots of the particular project area to have a frontage of less than 60 metres in length, however, the average of all the lots considered together must be greater than or equal to 60 metres. For example, if the total frontage of a development was 200 metres and it consisted of four lots, it would not satisfy the criterion (i.e. average of 50 metres); however, if there was only three lots, the criterion would be satisfied (i.e. an average of 66.6 metres).

In a battle-axe block scenario, the average length of the building's street frontage is the distance of the rear side of the building lot running parallel to the public street and the same rules as above apply. In regards to building lots with more than one street frontage (e.g. corner blocks), the average street frontage should be taken from the longest side of the boundary facing the public street.

Finally, the project area for the real estate development project must be located outside of a current or announced rollout region for NBN Co's fixed-line network. This would be demonstrated by reference to material either published by NBN Co or based on written information which NBN Co has directly provided to the developer about its current or announced rollout region for NBN Co's fixed-line network. NBN Co currently publishes an interactive online map of its areas of rollout at: www.nbnco.com.au/learn/rollout-map. NBN Co also operates an online pre-qualification tool for new developments and has been asked to provide developers with information where this is necessary to meet the requirements of the exemption.

Subsection 5(2) sets out an additional condition that needs to be complied with in order for the real estate development projects that meet the criteria in subsection 5(1) to be exempt. The developer (or a person on its behalf) must provide written notice to

the Secretary of the Department setting out the following details about the projects for which an exemption under the Instrument is claimed:

- a) the development's name (if available);
- b) the stage name or number of the development (if available);
- c) the type of development, in terms of whether it is 'residential', 'commercial', 'industrial', 'mixed development', 'public/private institution' or 'other';
- d) how many building lots/building units that will be in the development;
- e) the average length of the street frontages of the building lots within the development; and
- f) location information.

The relevant Department is that responsible for the administration of the Part 20A of the Act under the Administrative Arrangements Order in force at the time. This is currently the Department of Infrastructure, Transport, Regional Development and Communications.

A building lot is an area of land as defined in the Act; a building unit includes both a single dwelling building and also a unit within a multi-unit building (like a business park or apartment block).

The written notice under subsection 5(2) is for transparency, monitoring and planning purposes. It is not an application for approval to the Department. The established practice is that written notices are sent to the Department via an online system it has created and operates and processed by officers acting on behalf of the Secretary. This system is also used to provide a public register of projects which developers have notified as exempt under the Instrument.

Developers should retain evidence of the notification to the Secretary of the Department and the information on which it is based to substantiate that their particular real estate development project met the conditions of the exemption under subsection 5(1) at the relevant time. This should include the information indicating the development is not in a current or announced rollout region for NBN Co's fixed-line network, for example, taken from NBN Co's website or information given by NBN Co to the developer. In the event that the regulator identified that a development did not satisfy the exemption criteria, and no passive infrastructure had been installed as otherwise required by the Act, there would be a contravention of section 372E or 372F.

ATTACHMENT B**Statement of Compatibility with Human Rights**

Prepared in accordance with Part 3 of the
Human Rights (Parliamentary Scrutiny) Act 2011

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

The *Telecommunications (Fibre-Ready Facilities — Exempt Real Estate Development Projects) Instrument 2021* is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Instrument

The Instrument has been made by the Minister for Communications, Urban Infrastructure, Cities and the Arts (the Minister) under paragraph 372K(1)(b), together with paragraphs 372K(1)(c)-(f) of the *Telecommunications Act 1997* (the Act).

The Instrument provides a mechanism for exempting real estate development projects from the requirements under Part 20A of the Act to install fibre-ready facilities like pit and pipe.

Pit and pipe facilities are not required for real estate development projects developments which satisfy the four criteria set out at subsection 5(1) of the Instrument. This is because such developments are most likely to be serviced by telecommunications facilities (such as direct buried cable, wireless and/or satellite) that do not require pit and pipe, and any pit and pipe provided may not be used in the foreseeable future, if ever. In these circumstances, it would not be cost-effective to require pit and pipe to be installed when a development of this kind is undertaken. Not installing pit and pipe in these kinds of developments will reduce development costs. Occupants of the developments will nevertheless have access to both voice and broadband services via technologies that do not need pit and pipe. Alternatively, a carrier can require pit and pipe as a commercial condition of servicing the development.

No human rights issues were raised during consultation on the proposed draft earlier version of the Instrument in 2016.

NBN Co, Telstra, the Communications Alliance, the Australian Communications Consumer Action Network (ACCAN) and the Housing Industry of Australia were consulted as key stakeholders on the remaking of the Instrument. The intention is to further review the Instrument and a related instrument in the near term.

Human rights implications

This Instrument does not engage any of the applicable rights or freedoms.

Conclusion

This Instrument is compatible with human rights as it does not raise any human rights issues.