

EXPLANATORY STATEMENT

Issued by the Authority of the Minister for Communications

Telecommunications Act 1997

Telecommunications (Fibre-ready Facilities — Exempt Real Estate Development Projects) Instrument 2023

Authority

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

Purpose

The purpose of the *Telecommunications (Fibre-ready Facilities — Exempt Real Estate Development Projects) Instrument 2023* (the Instrument) is to repeal the *Telecommunications (Fibre-ready Facilities — Exempt Real Estate Development Projects) Instrument 2021* (the Previous Instrument) and replace it with a new instrument that updates the criteria for exempting real estate development projects from requirements under the Act to install functional fibre-ready facilities.

Background

Part 20A of the Act precludes developers from selling or leasing a building lot or a building unit in a real estate development project unless a functional fibre-ready facility has been installed in proximity to the lot or unit (sections 372G and 372H of the Act). It also provides that a person must not install a fixed-line facility in a project area unless the facility is a fibre-ready facility (sections 372E and 372F). The Previous Instrument sets out a class exemption from the requirements in sections 372E, 372F, 372G and 372H for projects outside NBN Co's fixed-line footprint, where it is unlikely that fixed-line infrastructure will be installed in the near future, subject to those projects meeting certain criteria (e.g. the absence of networked utilities and kerb and channelling, and average street frontage in developments).

The Previous Instrument was first made in 2016 and was remade in 2021. The Previous Instrument is scheduled to be repealed on 1 January 2024 (see section 6 of the Previous Instrument).

The Previous Instrument specifies four criteria, all of which must be met for a real estate development project to be exempt from the requirements in sections 372E, 372F, 372G and 372H. It must have:

- Only substantially above-ground electricity lines (excluding lead-ins to property) that form part of electrical supply network infrastructure, or no kind of utility

infrastructure installed or planned to be installed in proximity to each building lot situated in the project area of the project.

- No kerb and channelling constructed or planned to be constructed in proximity to each building lot situated in the project area.
- An average length of the street frontages of the building lots within the project area of 60 metres or greater.
- No part of the project area located inside an NBN fixed-line network rollout region.

In advance of the repeal of the Previous Instrument, the Department consulted stakeholders in 2022 and 2023. The consultation in 2022 formed part of a broader review of legislative instruments under Part 20A of the Act. The feedback in 2022 was that the criteria worked reasonably well but could be improved, particularly to better exempt rural and regional developments unlikely to receive fixed-line telecommunications technologies in the foreseeable future. A particular issue that was raised was that the criteria may have had some validity when Telstra deployed copper networks to new developments in rural and regional areas outside NBN Co's fixed-line footprint. However, since Telstra ceased this activity in 2021, the criteria have increasingly become less valid as they do not closely match NBN Co's technology choices. Small towns or villages, for example, could be within NBN Co's fixed wireless or satellite footprints, but have small average street frontages, kerb and channelling or networked utility infrastructure. A similar case could be made for areas on the outskirts or towns and even suburbs of urban areas like cities, which may all be served with fixed wireless or satellite.

The following points were also raised:

- The previous exemption criteria were based on NBN Co's fixed-line network, but fixed-line networks can also be provided by other Statutory Infrastructure Providers (SIPs).
- The requirement for a minimum average street frontage of 60 metres was especially unsuitable in indicating whether a development has rural or remote characteristics.
- It is important to be able to adjust the criteria as market circumstances change. They should therefore remain in a legislative instrument and not be placed in the statute.

On 16 August 2023, the Department sought views on a draft instrument including proposed changes to the exemption criteria. This consultation helped develop the following criteria, all of which must apply for a development to be eligible for an exemption:

- No part of the project area is located inside the fixed-line network region of a relevant SIP.
- A relevant SIP has provided written notice to the person responsible for the development that the SIP will not install a fixed-line network inside the project area.
- There is no new underground utility infrastructure installed or planned to be installed in proximity to each building lot situated in the project area, as part of the project or as headworks to service the project.

There is also a ‘fallback’ criterion, in case the developer does not meet the exemption criterion on no new underground infrastructure, but the SIP advises it does not intend to take ownership of developer-installed pit and pipe.

To prevent delays, there is a timeframe on the SIP providing advice of its intention not to install fixed-line infrastructure and of its intention not to take ownership of fibre-ready facilities. If the SIP does not reply within 30 business days of the developer’s enquiry, or otherwise by a later date agreed in writing between the parties, then the SIP is taken to have provided written notice and the project will be exempt from the requirement for fibre-ready facilities.

Given the possibility of error where developers rely on the 30 business day rule, the Department will consult SIPs for confirmation that they did not reply within the timeframe, or attempt to agree a later timeframe.

The major changes between the Previous Instrument and the Instrument are:

- The removal of criteria relating to street frontage of 60 metres or greater, and kerb and channelling. These criteria are not representative of whether pit and pipe should be installed in a new development, given, as noted above, NBN Co may use fixed wireless or satellite technologies to service small towns or suburbs or urban areas.
- The criterion relating to the presence or absence of networked utility infrastructure has been changed to confer an exemption only if no new underground utility infrastructure will be installed or is planned to be installed. This is a more representative criterion, as generally, if new underground utility infrastructure is being installed, the developer will also be able to install fibre-ready facilities such as pit and pipe. Utilising shared trenching for telecommunications conduit (which is placed in the same trench above electricity cables/conduit) is a cost-effective way to install pit and pipe compared to independent trenching or boring.
- Broadening the focus of the Instrument so that it no longer applies only to projects outside NBN Co’s fixed-line network footprint but applies to projects outside all SIPs’ fixed-line network regions.
- A new criterion that developers must obtain a written notice from a relevant SIP on whether the SIP intends to install fixed-line infrastructure. This takes into consideration that the decision on which technology to deploy in an area is a commercial decision for the SIP, not the developer.
- A new fallback criterion, if new underground utility infrastructure is being installed, but the SIP provides written notice to the developer that it will not take ownership of fibre-ready facilities inside the project area. If a SIP refused to take ownership the developer or the local council could find itself required to maintain the facilities, and this would be an obligation that they are generally not resourced to undertake. Developers could therefore avoid developing areas where SIPs refuse to take ownership, or councils could seek to recover their costs from the local residents, which could lead to distorted outcomes for local communities. The criterion therefore

provides for exemptions to apply in this circumstance. It is anticipated that this would be a rare event, and the criterion is provided for the sake of prudence.

Consultation

A draft of the Instrument was published on the website of the Department of Infrastructure, Transport, Regional Development, Communications and the Arts (the Department) in August 2023, with submissions invited from interested parties. The Department also provided copies directly to key stakeholders including developer organisations, industry representatives, consumer groups and network providers operating in the new developments market. As noted above, the Department also undertook broader consultation on exemptions under Part 20A during 2022.

Regulatory Impact Statement

The Office of Impact Analysis (OIA) has confirmed that the Amendment Instrument is minor in nature and that a regulatory impact statement is not required (OIA23-05270).

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 **Attachment B**.

ATTACHMENT A

Details of the Telecommunications (Fibre-ready Facilities — Exempt Real Estate Development Projects) Amendment Instrument 2023

Section 1 – Name

Section 1 provides that the title of the Instrument is the *Telecommunications (Fibre-ready Facilities — Exempt Real Estate Development Projects) Instrument 2023*.

Section 2 – Commencement

Section 2 provides that the Instrument commences on the day after the instrument is registered on the Federal Register of Legislation.

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 – Definitions

Section 4 notes a number of expressions used in the Instrument are defined in the Act. Subsection 4(1) provides interpretation of terms used in the Instrument, including terms key to the operation of the exemption provisions.

The term ‘Act’ means the *Telecommunications Act 1997*.

‘Fixed-line SIP network’ means any fixed-line telecommunications network that is owned or controlled by, or operated by, or on behalf of, a relevant SIP or a related entity of a relevant SIP. NBN is the default SIP for all of Australia where no other SIP is defined. Fixed-line technologies include twisted-pair copper, Hybrid Fibre-Coaxial (HFC), Fibre to the Node (FTTN), Fibre to the Curb (FTTC), Fibre to the Basement (FTTB) and Fibre to the Premises/Home (FTTP/FTTH). These technologies are generally run through underground conduit in the access network. Almost all new fixed-line cabling in the access network rolled out by NBN or other SIPs will be placed in conduits, which future-proofs the network.

There are currently about 3,000 service areas that are serviced by SIPs other than NBN Co, or subject to anticipatory notices given by SIPs to the Australian Communications and Media Authority. There are currently 32 SIPs including NBN Co. Nearly all of these SIP areas are serviced using fixed-line technologies. While most SIP areas are located in urban areas, there are a number in regional areas.

‘Fixed-line SIP network region’ means a geographic region with an ascertainable boundary that has been determined by a relevant SIP within which a fixed-line telecommunications network is deployed or planned to be deployed. If a SIP rolls out a fixed-line network, all premises (existing and future) within that defined geographical region will have access to broadband services through fixed-line cabling. Under the *Telecommunications in New Developments* (TIND) policy, developers of new estates are expected to arrange for the lots or premises to be connected to a telecommunications network. They are free to choose which carrier does this, but under the SIP arrangements, if the developer asks the SIP to connect the estate then the SIP would be required to do so. The default technology under the SIP arrangements is fixed-line, so if the SIP wishes to use that technology then the developer would be expected to arrange for fibre-ready facilities and contract the SIP to install network using the facilities. Generally, then, where the SIP wishes to install fixed-line, the developer would provide the pit and pipe and the SIP would haul new cabling through conduit to the customer premises. As a result, consumers should expect to be able to order voice and broadband services when they occupy new premises.

‘Headworks’ means underground utility infrastructure that is installed at the point from which existing underground infrastructure ends, to the boundary of a real estate development

project. Some new developments will have existing underground infrastructure along the frontage of their street-facing boundary, so no new headworks infrastructure will need to be installed. However, many new developments are situated at a distance from where existing underground infrastructure terminates. This termination could be down the street at the next property, or much further away for regional and rural new developments. The installation of pit and pipe headworks is essential for connecting the existing fixed-line network to the new development premises.

‘Relevant SIP’ means a statutory infrastructure provider for a service area within which a project area is located. Most new developments will be either fully or partially located within the boundary of one fixed-line SIP network region. In this case, the ‘relevant SIP’ is one SIP. However, the drafting allows for the possibility that there may be more than one SIP for the region. It is not unknown for there to be two SIPs for a single region (as, for example, Opticomm and Telstra are currently both the SIPs for the Velocity networks) but this is generally rare and in special circumstances, such as the transition from Telstra’s operational control to Opticomm’s operational control in the Velocity network areas.

In another comparatively rare scenario, a new development project area may be located across two or more fixed-line SIP network regions. This would be more likely with larger estates, particularly multi-stage developments. In this case the ‘relevant SIP’ could apply to any one of those SIPs. The developer or their representative would need to contact *only one* of the SIPs who have a fixed-line SIP network region which the new development project area resides inside.

Section 5 – Schedules

Section 5 provides that each instrument that is specified in a Schedule to the Instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to the Instrument has effect according to its terms.

Section 6 – Exempt real estate development projects

Section 6 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 6(4) must also be satisfied in order for the exemption to apply to the particular real estate development project.

Item 1 of the table accompanying subsection 6(1) sets out the three distinguishing characteristics of the real estate development project (and its associated project area) that must all be satisfied at the relevant time. Item 2 is a ‘fallback’ mechanism that exempts projects if they fail the new underground utilities criterion at item 1(c) but the relevant SIP does not intend to take ownership of developer-installed fibre-ready facilities. The criteria, together, are intended to identify real estate development projects that are highly likely to 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 include measures

that more accurately represent the absolute need for pit and pipe in the post-NBN rollout telecommunications landscape.

‘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 lots with no underground utilities provided were further subdivided into lots that had underground electricity supplied, then item 1(c) would not be met.

Exemption criterion 1(a) requires no part of the project area to be located inside the fixed-line SIP network region of a relevant SIP. Developers can determine this by entering a suburb or address into the interactive SIP Map available on the [SIP Register on the ACMA website](https://www.acma.gov.au/sip-map) (<https://www.acma.gov.au/sip-map>). ‘Relevant SIP’ is defined in Section 4 (see discussion against that item). Although there would usually only be one SIP per development, there could be scenarios where a larger development extends across the boundaries of more than one SIP network region. If none of these SIP network regions are fixed-line (only fixed-wireless or satellite), the exemption criterion will be met.

Exemption criterion 1(b) requires that the relevant SIP has provided written notice, to the person responsible for the project, that the relevant SIP will not install a fixed-line network inside a project area. If the developer is unsure of which SIP applies in their project area, refer to the [SIP Register on the ACMA website](https://www.acma.gov.au/sip-map). The developer should keep the SIP’s written response to provide to the Department in order to claim an exemption. The Department would contact the SIP to confirm the advice prior to registering the project as exempt.

In the scenario that the new development extends across the boundary of 2 or more SIP network regions, the developer only needs to receive written notice from *one* SIP that the SIP does not intend to install fixed-line infrastructure (under criterion 1(b)) or take ownership of pit and pipe (under criterion 2(b)) to receive an exemption. Although the other SIPs do not need to be consulted in this scenario, a developer may approach all relevant SIPs if they wish.

Exemption criterion 1(c) requires that there is no new underground utility infrastructure installed or planned to be installed in proximity to each building lot situated in the project area, as part of the project, or as headworks to service the project. Depending on the specific project, underground utility infrastructure could include electricity, gas, water, sewerage, or storm water infrastructure. In the Instrument, new underground utility infrastructure refers only to ‘networked utilities’, that is, 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. Networked utilities can be contrasted to utilities that may be provided directly on the property, such as on-site solar power, tank water or septic tank sewage treatment. The provision of such on-site utilities is not intended to invalidate the exemption. For example, while an on-site septic tank is an underground utility, because

it is not connected to a utility network in the area provided by a business, it is not included in the definition of ‘underground utility infrastructure’ for the purposes of the Instrument.

Generally, if new underground utility infrastructure is being installed, then fibre-ready facilities can also be installed at very little additional cost, given that developers generally utilise shared trenching for telecommunications conduit (which is placed in the same trench above electricity cables/conduit) as this is a cost-effective way to install pit and pipe compared to independent trenching or boring.

The reference to ‘headworks’ in the criterion is to ensure that pit and pipe is considered by the developer not just within the boundaries of the development project area, but also between where the existing underground infrastructure ends, to the boundary of the real estate development project. For example, if underground electricity was supplied from a termination point down the street to the development boundary, then continued underground to each lot/premise, pit and pipe should be installed along with the underground electricity infrastructure in the development area as well as the headworks area. While it is acknowledged that the termination points of mains electricity and telecommunications networks may not be contiguous, this criterion aims to leverage the advantage of shared trenching during the narrow window when pit and pipe can be installed at a far cheaper cost.

Any decision on pit and pipe provision, route, and cost allocation is at the discretion of the relevant SIP. Developers (or their representatives) should consult as early as possible with the SIP on requirements, provide comms plans (pre-construction communications infrastructure diagrams) to the SIP for pit and pipe planned to be installed in the project area, comply with pit and pipe specifications in industry guideline [G645:2017](https://www.commsalliance.com.au/Documents/all/guidelines/g645) (www.commsalliance.com.au/Documents/all/guidelines/g645), and coordinate with other utility providers where necessary.

Item 2 of the table in subsection 6(1) is the ‘fallback mechanism’. Exemption criterion 2(a) requires the development to fulfil criteria 1(a) and 1(b). That is, no part of the project area is located inside the fixed-line SIP network region of a relevant SIP, *and* a relevant SIP has provided written notice to the person responsible for the project that the relevant SIP will not install a fixed-line network inside a project area.

Once it is established that items 1(a) and 1(b) apply, exemption criterion 2(b) requires that a relevant SIP has provided written notice to the person responsible for the project that the relevant SIP will not take ownership of any fibre-ready facilities (pit and pipe) located inside a project area.

The purpose of the fallback mechanism is to deal with the unlikely scenario in which the development does not meet the criterion of no new underground infrastructure (1(c)), but the SIP advises it does not intend to take ownership of developer-installed pit and pipe. As noted above, this scenario would place liability for maintaining the pit and pipe on developers or

councils, who generally lack the resources and expertise to undertake this role. If criteria 2(a) and 2(b) are met, the exemption will apply in such circumstances.

Subsection 6(2) places a timeframe for the SIP to respond to a written request from the developer. This reflects the fact that discussions between the developer and the SIP may be iterative, with the SIP requiring additional information before it can decide on the appropriate technology or whether to take ownership of pit and pipe. It also addresses the possibility that the developer may attempt to ‘game’ the exemption by refusing to provide such additional information. If a relevant SIP does not provide written notice within 30 business days of the day after receiving the developer’s written request, or otherwise by a date agreed in writing between the parties, the development will receive an exemption from installing pit and pipe. This would apply under Item 1(b) or 2(b), depending on the developer’s original request.

Subsection 6(3)(a) clarifies that in the event there is more than one relevant SIP for a service area, provided the development meets the other exemption criteria, the developer will be able to satisfy items 1(b) or 2(b) in the table to subsection (1) through written notice from only *one* of the relevant SIPs. The developer will not need written notice from all the relevant SIPs in the development project area.

Subsection 6(3)(b) clarifies that in the event there is more than one relevant SIP for a development project area, provided the development meets the other exemption criteria, subsection (2) will apply if *one* relevant SIP has received a written request from the developer (or their representative). In other words, the fallback mechanism applies if *one* relevant SIP provides notice they will not take ownership of pit and pipe. The developer will not need written notice from all relevant SIPs in the development project area.

Subsection 6(4) describes the information the developer (or their representative) must provide to the Department in a written notice in order to claim an exemption from installing pit and pipe. This information includes:

- (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 number of building lots or building units in the development;
- (e) whether any part of the project area is located inside the fixed-line SIP network region of a relevant SIP;
- (f) whether there is any new underground utility infrastructure installed or planned to be installed in proximity to each building lot situated in the project area, as part of the development, or as headworks to service the development;
- (g) location information, such as the address of the development; and
- (h) in circumstances where subsection (2) (the fallback mechanism) *does not apply*, the written notice provided by a relevant SIP pursuant to item 1(b) or item 2(b) in the table to subsection (1).

- (i) in circumstances where subsection (2) (the fallback mechanism) *applies*, either (as applicable):
 - (i) the written request sent to the relevant SIP to which the relevant SIP did not provide written notice; or
 - (ii) the written correspondence between the developer (or their representative) and the relevant SIP agreeing to a later date than 30 business days of the day after the relevant SIP receives the written request.

The written notice under subsection 6(4) 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 under a delegation from 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 6(1) at the relevant time. This should include information indicating that no part of the development project area is located inside a fixed-line SIP network region of a relevant SIP (taken from the interactive SIP Map available on the ACMA website), and any correspondence with a relevant SIP relating to the exemption request. In the event that the regulator identified that a development did not satisfy the exemption criteria, and no fibre-ready facilities had been installed as otherwise required by the Act, there would be a contravention of section 372E or 372F.

Schedule 1 – Repeals

Schedule 1 repeals the Previous Instrument, as this is to be replaced by the Instrument.

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 2023

The *Telecommunications (Fibre-Ready Facilities — Exempt Real Estate Development Projects) Instrument 2023* 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 (the Minister) under paragraph 372K(1)(b), together with paragraphs 372K(1)(c)-(f) of the *Telecommunications Act 1997* (the Act).

Part 20A of the Act precludes developers from selling or leasing a building lot or a building unit in a real estate development project unless a functional fibre-ready facility (pit and pipe) has been installed in proximity to the lot or unit (sections 372G and 372H of the Act). It also provides that a person must not install a fixed-line facility in a project area unless the facility is a fibre-ready facility (sections 372E and 372F). The Instrument sets out a class exemption from the requirements in sections 372E, 372F, 372G and 372H for projects outside a SIP's fixed-line region, subject to those projects meeting exemption criteria.

There are 3 exemption criteria described in Item 1 of the table in subsection 6(1). For a development to be exempt, the following must apply: No part of the project area is located inside the fixed-line network region of a relevant SIP; A relevant SIP has provided written notice to the person responsible for the development that the SIP will not install a fixed-line network inside the project area; and there is no new underground utility infrastructure installed or planned to be installed in proximity to each building lot situated in the project area, as part of the project or as headworks to service the project. Item 2 of the table is a 'fallback' criterion which stipulates if the development does not meet the exemption criterion on no new underground utility infrastructure, but the SIP advises it does not intend to take ownership of developer-installed pit and pipe, the development is exempt. Subsections 6(2) to 6(4) provide clarification on the process if there are multiple SIPs in the project area and written notice requirements for developers.

These exemption criteria are designed to consider large developments outside the fixed-line footprint that could potentially be serviced by fixed-line infrastructure in the near-future,

while avoiding unnecessary capital expenditure by developers in regions that are not likely to need pit and pipe.

The Department consulted with industry stakeholders on the remaking of the Instrument. No human rights issues were raised during consultation. The intention is to further review the Instrument periodically to ensure it remains fit for purpose.

Human rights implications

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

Conclusion

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