

11 September 2023

The Director
New Developments
Universal Services Branch
The Department of Infrastructure, Transport, Regional Development,
Communications and Arts
GPO Box 594 Canberra, ACT 2601

c-/ new.developments@infrastructure.gov.au

Dear Director,

Fibre-Ready Facility Exemption Amendments - Part 20A, Telecommunications Act 1997

Introduction

Thank you for the opportunity to comment on the Review of the Fibre-Ready Facility Exemptions under Part 20A of the *Telecommunications Act 1997* ("**the Exemptions**").

The UDIA is the development industry's most broadly representative industry association with more than 2,500 member companies – spanning top tier global enterprises, expert consultants, small-scale developers and local governments. The development industry is critical to the Australian economy, contributing 1.3 million jobs (11% of Australia's full time employment) and \$360 billion in GDP annually (9% of total GDP).

The UDIA is a strong supporter of the Pit and Pipe Exemptions. They will continue to be necessary to sensibly balance provision of NBN services by fixed line or other means as well as ensuring existing legacy/hybrid systems can be maintained without excessive cost on new, unnecessary infrastructure. Critically the exemptions avoid unnecessary and wasteful provision in areas where fixed line service will not be provided.

We support Pit and Pipe exemptions where:

- 1) no fixed line is being installed within the next 12 months; and
- 2) NBN or a suitable carrier ("**SIP**"), is not taking ownership of the pit and pipe.

Exemption from pit and pipe provision or inclusion of pit and pipe should be determined on whether the network is planned to be rolled out within 12 months and if they will take ownership of the pit and pipe. So long as NBN co has a binding undertaking that it will be installed and fit for purpose, this will ensure appropriate telecommunications are available for Australians.

Any answer to the negative on these two questions should result in Exemption (over and above any other exemptions ie: where services are already in place etc).

Prescriptive requirements that (for example), there can be no exemption if there are kerb/channel and powerlines etc is not appropriate where there is no plan for NBN any time soon and no carrier ownership of the pit and pipe.

We consider that these prescriptive requirements (identified as criteria 1, 3 to 5), are approximations of the primary threshold questions:

- 1) Are fixed lines going to be provided in a reasonable period of time (12 months)?
- 2) Will the provider put in place fixed lines in the project area?
- 3) Will the provider confirm they will ownership of the pit and pipe?

NBN co and carriers will need to indicate their position in a timely way or the presumption is that NBN co/carriers are not taking ownership and will not use pit and pipe within 12 months.

While we disagree that it is useful or practical to require **all the five** proposed criteria in the regulations to be satisfied for an exemption to apply, we see that the Department is far closer to the mark with their **Fallback Exemption Proposal** that allows exemption where:

- 1) a SIP advises it will not install fixed-line;
- 2) the development fails to have curbing/guttering, and/or no underground infrastructure, and/or lot size is over 1,000m squared; and
- 3) SIP refuses to take ownership of pit and pipe.

We see criteria two in the Fallback Exemption Proposal above as a redundant approximation of criteria one but we endorse criteria one and three of the Fallback Exemption Proposal as the relevant exemption rules. We assume also that this would apply even where part of the project is located in a fixed line SIP network region – it has already been shown no fixed line will be provided. We also assume failure of all three options in the second criteria is acceptable for the exemption to apply. We do however emphasise that in any outcome, there must be a timing deadline for SIPs to confirm the criteria after which there is deemed refusal for provision of fixed line and refusal of ownership. Without this provision, developments could be held up indefinitely until confirmed by the SIP and the SIP is in fact incentivised to ignore requests for confirmation.

The Fallback Exemption Proposal would be a suitable approach for the regulations with a suitable deadline for confirmation once requested (say one month), and deemed refusal provision.

The Detail Answers

The **Proposed Rules for an exemption** from pit and pipe for real estate development projects **requires all** of the following conditions:

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
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 1,000m² 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 **Fallback Exemption Proposal** is that an exemption applies were a SIP advises it will not install fixed-line, the development fails to meet one or more of criteria three to five above, and the relevant SIP also refuses to take ownership of the pit and pipe. We assume also that this would apply even where part of the project is located in a fixed line SIP network region – it has already been shown no fixed line will be provided. We also assume failure of all three options in the second criteria is acceptable for the exemption to apply.

Under the present exemptions, difficulties arise, when a development meets the intent of the exemption being a rural subdivision outside the fibre footprint but does not satisfy all of the exemption criteria. The proposed rules do not alter this obligation and imposes redundant criteria.

The unintended consequence is that these projects are required to provide pit and pipe and other facilities though the project may be of large size lots and rural in nature or a small local land division.

These sites are unable to obtain a carrier to supply services, are rejected by NBN co service (as outside the fibre footprint), and despite all other approvals, may not be permitted to sell any lots created (as the fibre has not been provided).

The primary criterion, should be whether the development is outside of the current and/or future planned expansion of the fibre footprint and would be rejected by NBN or other relevant carrier for ownership.

This has been addressed in the Fallback Exemption Proposal.

Critically, the Fallback Exemption Proposal allows a pit and pipe exemption where there is confirmation that no fixed line will be installed by the SIP and the relevant SIP also refuses to take ownership of the pit and pipe. This is the necessary criteria for exemption, however also requires one or more of the other criteria three to five in the proposed rules, to also be failed. The criteria three to five are unnecessary since they only approximate the possibility of fixed line provision. If the SIP confirms they will not install fixed-line in any event, criteria three to five are largely redundant. **We query why not simply allow exemption if criteria one and three of the fallback exemption proposal were satisfied.**

If no carrier is prepared to take ownership of the pit and pipe, then an exemption should be allowed. The proof required for an exemption should be an NBN (or other carrier), confirmation letter or email. We note SIPs are already issuing these for areas not within the fibre footprint.

There does however need to be a time deadline on any SIP confirmations because the developer is wholly reliant on the SIP to provide in writing that it will not install a fixed-line network and refuse to take ownership of pit and pipe. Delay in obtaining the notice is relevant and could very substantially affect delivery of the proposed housing and by extension wider productivity in the industry. The developer could also effectively held to ransom if it is not provided in a timely way. The written notice should be required to be provided by the SIP in a stipulated reasonable time period (say one month) or be deemed to confirm no fixed line and no acceptance of ownership.

Deeming provisions are necessary because without them the SIP can simply force pit and pipe installation at the expense of the developer AND never have to undertake to put in fixed line nor accept ownership of the pit and pipe structure. Some SIPs would in fact be incentivised to ignore requests for confirmation.

Where the NBN co or carrier confirm ownership and that fixed line using the pit and pipe is (or will be) provided within 12 months, the undertaking should be binding on the carrier to ensure services are delivered and NBN co should warrant that whatever service is installed, it will be fit for purpose. These undertakings should be documented in any relevant strata records.

In answer to the specific questions posed at the end of the consultation paper we recommend:

- **Should the possible changes be adopted in full, or part, or not?**

The Fallback Exemption Proposal criteria one (no fixed line by SIP) and three (SIP refusal of ownership) are the critical elements for determining exemption and the second criteria is redundant – the circumstances referred to the second criteria should not factor into the exemption.

Ensure exemptions are allowed where SIP will not take ownership of the pit and pipe, and a fixed line to use such facilities will not be installed within 12 months by a carrier. The confirmation should be provided within one month of any request or deemed to confirm no fixed line and no acceptance of ownership.

Undertakings should be binding on SIP to confirm their position on this with the Developer and the SIP should warrant that any service provided will be fit for purpose. These undertakings should be documented in any relevant strata records.

- **Should alternative proposals that have been rejected (adjacency, growth areas, and minimum number of lots) still be considered?**

The alternative proposals are not necessary – the issue is whether the SIP involved with the development will install the fixed line in a reasonable timeframe and whether it accepts ownership of the pit and pipe.

- **Are there other exemption criteria that could be considered as well?**

The existing criteria for SIP confirmation of fixed lines and ownership must have deadlines attached which have a penalty or be deemed to confirm no fixed line and no acceptance of ownership after 4 months of no reply.

- **Is 1,000m² a reasonable average lot size for exempting developments?**

This is an irrelevant consideration as it only approximates the possibility of fixed line provision – the developer will already confirm provision/rejection of fixed line. The approximations are unnecessary.

- **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?**

Each of three, four and five approximate the possibility of fixed line provision, not actual fixed line provision – the developer will already confirm provision/rejection of fixed line. The approximations are unnecessary.

- **Would criteria 1, 2 and 6 discussed above work by themselves as threshold criteria, without the need for criteria 3, 4 and 5?**

The proposed rules for an exemption only needs criteria two and six (the key points of the Fallback Exemption Proposal). It is irrelevant whether the project is within a fixed-line SIP, if the relevant SIP already confirms they will not install fixed line nor accept ownership of the pit and pipe. As noted above, criteria three, four and five are unnecessary.

- **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?**

If no carrier is prepared to take ownership of the pit and pipe, (criteria 6), then an exemption should be allowed. The proof required for an exemption should be a SIP, confirmation letter or email. They are already issuing these for areas not within the fibre footprint.

There does however need to be a time deadline on any SIP confirmations (regardless of which option the department pursues), because the developer is wholly reliant on the SIP to provide in writing that it will not install a fixed-line network and refuse to take ownership of pit and pipe. Delay in obtaining the notice will very substantially affect housing supply and productivity in the industry - a developer could effectively held to ransom if it is not provided in a timely way. The written notice should be required to be provided by the SIP in a stipulated reasonable time period. If not provide within one month, it is deemed to be refusal of pit and pipe and refusal of ownership.

We are keen to workshop any amendments you propose to implement and look forward to meeting with you at your convenience. You can contact Andrew Mihno, Head of Policy and Government Relations on 0406 45 45 49.



Maxwell Shifman
UDIA National President