

Regulation Impact Statement

Consultation Draft

Proposed amendments to Part 20A of the *Telecommunications Act 1997* to reduce delays and costs to consumers

This Regulation Impact Statement (RIS) looks at options for reducing delays and costs for consumers when developers (largely unincorporated developers) do not install appropriate facilities in new developments.

The Department of Infrastructure, Transport, Regional Development and Communications (the Department) is seeking comments on this RIS and the accompanying exposure draft of legislation. It will consider comments before providing advice to the Government on the proposed way ahead. The Government may decide to proceed with some aspects of the legislation, all of it, or none of it. The Department is keen to receive data from submitters on benefits, costs or other impacts for consumers and developers of the different options considered in this RIS.

Submissions on the RIS and the exposure draft of the legislation should be provided to new.developments@communications.gov.au by 30 September 2020.

1. The Problem

The fundamental problem is a small number of premises are built in Australia, in areas serviced by fixed-line telecommunications networks, without telecommunications pit and pipe, leading to inconvenience and additional costs for occupants of these premises when they want to use fixed-line telecommunications like high-speed broadband.

Telecommunications is a key infrastructure integral to most aspects of everyday life. This has been underlined during the COVID-19 pandemic, with network usage on the National Broadband Network at 7 August 2020 increasing by 72 per cent on pre-COVID-19 levels.¹

To help provide access to telecommunications in new developments, under Part 20A of the *Telecommunications Act 1997* (the Act), incorporated developers are prohibited from selling or leasing a building lot or a building unit if 'fibre-ready facilities' (basically, pit and pipe infrastructure) have not been installed in proximity to the lot or unit. Requiring the installation of the pit and pipe infrastructure ensures it is relatively easy for a carrier to install telecommunications infrastructure. People moving into new properties expect ready access to modern telecommunications services, and can be disadvantaged if this is not the case. Access to telecommunications is easier and quicker if appropriate pipe and pit is installed during construction for subsequent use by telecommunications carriers.

Data available to the Government indicates that most developers do install pit and pipe infrastructure. However, complaints received from the occupants of some new developments, and advice provided to the Government by industry, indicate that some developers do not install pit and pipe. These are typically small and frequently unincorporated developers (i.e., natural persons or businesses that do not operate as companies). Some developers may also install pit and pipe that is

¹ See <https://www.nbnco.com.au/corporate-information/about-nbn-co/updates/dashboard-may-2020> (accessed 12 August 2020).

defective and needs to be remediated, again leading to inconvenience and costs for consumers and carriers.

We estimate that up to 3,000 premises per annum may be affected to varying degrees (see below in section 4). While the incidence of the problem is relatively limited, the impact can be significant on those affected, both in terms of inconvenience and costs (e.g. lack of service, delays in service, organising retrofitting, cost of retrofitting, cost of interim services). For example, in 2017 residents of three houses in a subdivision in Balga, Western Australia, were quoted a price of \$10,000 to install pit and pipe after the developer failed to install it. This case was debated in the Western Australian Parliament. Similarly, the length of delays can be extensive and involve periods of several months to over one year.

The current legislation and policy

As noted above, incorporated developers are prohibited from selling or leasing a building lot or a building unit if fibre-ready facilities have not been installed in proximity to the lot or unit. These obligations do not apply to unincorporated developers, as this was the approach taken at the time.

Under the Act, or subordinate legislation, there are also exemptions from the requirements to install fibre-ready facilities in certain specific circumstances. For example, developments in rural or remote areas that are not scheduled to be serviced by fixed-line by NBN Co, and that meet certain criteria, do not need to be provided with pit and pipe infrastructure. These exemptions continue to be appropriate.

The statutory requirement is backed up by the Commonwealth Telecommunications in New Developments (TIND) policy, which states that *all* developers (whether incorporated or unincorporated) should provide pit and pipe infrastructure to developments, and also arrange with a telecommunications carrier to connect a development to a network. This policy has been in place since 2011, with the current version taking effect in March 2015.² Most developers follow the policy, as otherwise they would have trouble selling or leasing their properties and consumers would be inconvenienced.

Some states and territories have adopted planning requirements that reflect those in Part 20A, and sometimes those in the TIND policy, in which case unincorporated developers in those jurisdictions are also required to install pit and pipe infrastructure. The requirements are in place (to varying degrees) in the Australian Capital Territory, New South Wales, Queensland and Victoria. Western Australia is considering requiring developers to install pit and pipe infrastructure. South Australia and Tasmania currently do not have requirements of this sort.

2. Government's objectives

The Government's objective is to increase the provision of pit and pipe infrastructure by small unincorporated developers to reduce the disadvantage to consumers, and to provide a more effective model that states and territories can reflect in their planning laws if they wish.

3. Structure of the RIS

The RIS:

² The Government announced a review of the TIND policy in November 2019. While it has proposed some changes, no changes are being considered to this fundamental aspect of the policy.

- sets out seven options (below) to address the Government’s objective, and assesses the strengths and weaknesses of those options;
- assesses the impacts of those options on stakeholders; and
- assesses the costs of the options.

The criteria used to evaluate the options are effectiveness in addressing the problems, and the regulatory costs of compliance.

This RIS has been prepared for consultation, along with accompanying legislation. The accompanying draft legislation contains three main elements, which this RIS assesses as potential options:

- requirements for unincorporated developers to install fibre-ready facilities in developments before sale or lease (see clauses 3-11 in the attached draft);
- requirements for all developers, incorporated or unincorporated, to provide disclosure at the time of sale or lease of premises on whether fibre-ready facilities have been installed, or whether an exemption applied which means it was not required to be installed (see proposed new sections 372J and 372JA in clause 12, and proposed new section 372YA in clause 19 of the draft); and
- a compensation mechanism for consumers if fibre-ready facilities have not been installed, contrary to the law, or the facilities were installed but were not able to be used to install fixed-line networks (see proposed new section 372JB in clause 12 of the draft).

These options could operate in conjunction (for example, compensation requirements (option 6) could be adopted as well as requirements on unincorporated developers to install pit and pipe (option 4)).

The accompanying legislation needs to be read in conjunction with the existing requirements in the Act. For the aid of the reader, if the legislation were adopted, then existing obligations in sections 372G and 372H of the Act would apply not just to constitutional corporations, but also to unincorporated developers (referred to in the legislation as a developer in a state or territory who is not a constitutional corporation). Similarly, proposed new disclosure and compensation obligations would fall on constitutional corporations and on developers in a state or territory who are not constitutional corporations.

As noted above, the Government is seeking comments on these elements and may proceed with some, none or all of them.

4. Overview of options

We have identified seven different options. If submitters wish to propose other options, then the Government will consider those as well.

1. *Do nothing.* No change to current arrangements, meaning a small number of consumers each year would face additional costs and delays in obtaining telecommunications in their homes or places of business.
2. *Raise awareness within the developer and buyer community.* The Department would increase efforts to raise awareness amongst small and unincorporated developers and property buyers about the problems not installing pit and pipe can cause.

3. *Liaison with state, territory and local governments.* The Department would continue efforts to encourage state, territory and local governments without requirements for developers to install fibre-ready facilities to amend their planning requirements. It would be a matter for those governments what, if anything, they choose to do.
4. *Legislation to require unincorporated developers to provide pit and pipe.* Part 20A of the Act would be amended so that unincorporated developers must also make arrangements for pit and pipe infrastructure to be installed before selling or leasing a building lot or building unit.
5. *Legislation to require disclosure.* Part 20A of the Act would be amended so that all developers, incorporated or unincorporated, must disclose to prospective buyers or tenants whether they have installed pit and pipe infrastructure (or whether an exemption applies, for example because the development is in a region served by fixed wireless). This option could be adopted in place of option 4 or in addition to it.
6. *Legislation to provide a compensation mechanism.* Part 20A of the Act would be amended to provide a right for consumers to seek compensation from a court (e.g. the Federal Circuit Court of Australia or a State or Territory court that has jurisdiction) if fibre-ready facilities were not installed or were defective. This option could be adopted on its own or in addition to option 4 or option 5.
7. *Legislation to require the installation of networks.* New legislation would be prepared to require all developers to contract with a carrier to have network infrastructure installed. Carriers typically require developers to have pit and pipe installed as a condition of their contract to service the development, and to follow the carrier's specification and certification requirements, reducing the incidence of defects. This approach would increase the installation of enabling pit and pipe and networks. It would also have the benefit of ensuring network infrastructure is installed as well as pit and pipe. The legislation would recognise there is a competitive market to supply networks and developers could contract with the network provider of their choice.

5. Analysis of the options

Option 1 (do nothing) would have no regulatory impacts, but also would not address the problem (i.e., a small number of unincorporated developers each year would continue to sell or lease premises without fibre-ready facilities, or with facilities that are defective). Purchasers of some homes would continue to be disadvantaged, as they would have a reasonable expectation the home has ready access to broadband services, as with other utilities such as water, gas and electricity. As noted, COVID-19 has reinforced the essential nature of broadband services for most households.

Option 2 (awareness raising) is one of the options the Department has been pursuing since the National Broadband Network was announced in 2009. The awareness raising costs would be incurred on a continuing basis. The cost would fall largely on the Department and be relatively modest. The high level of compliance in the developer sector with pit and pipe requirements suggests a high level of success (albeit backed up by legal requirements for incorporated developers) but the ongoing low-level non-compliance suggests a persistent awareness-raising problem in this area. Even if efforts achieved 100% awareness, in the absence of binding requirements some developers could still choose not to install pit and pipe.

Option 3 (liaise with states etc) is also one of the options the Department has been pursuing since 2009. In that time most states and territories have adopted requirements in their planning laws, but a number have not. Option 3 would not have any regulatory impacts as it would be a matter for those jurisdictions which do not currently have requirements whether they would change their laws or not. However, it carries a risk that no changes are made, and therefore may not address the problem.

Option 4 (legislate for pit and pipe) would address the problem but would have regulatory costs for unincorporated developers, although this is a cost most developers already accept and is an inevitable consequence of dealing with the substantive problem of non-compliance with reasonable community expectations. Conversely, the cost to developers could be recovered through property prices and would be lower than retrofitting and other cost impacts on affected consumers. Pit and pipe should enhance the value of properties and therefore option 4 should ultimately benefit developers in aggregate. Where states and territories already have planning requirements for pit and pipe, they do so by reference to the requirements in the Act. Given this, while there may be some need for states and territories to adjust their documents, overall any changes required should be minor.

Option 5 (legislate for disclosure) would not directly require unincorporated developers to install fibre-ready facilities, but would rely on informed disclosure. That is, if a potential buyer or lessee of a property is advised that no fibre-ready facilities have been installed (and no exemption applies) then it is assumed that most rational consumers would refuse to buy or let the property, or would pay less, reflecting the cost of retrofitting the property. In this way, over time developers would amend their behaviour because it would be difficult for them to sell or lease properties without fibre-ready facilities. That said, consumers may value other factors in making their decision, be in a hurry, or not read documents they are given, or not understand them, so this option does carry a risk that some developers continue not to install facilities and therefore some consumers continue to face additional costs and delays.

To the extent this option's intent is to have the developers concerned actually provide pit and pipe, it is little different in effect from option 4, but it would be less direct and certain.

Option 6 (legislate for compensation) could be adopted on its own (in which case it would only provide a compensation mechanism where incorporated developers have not complied with the Act) or in conjunction with option 4, where it would provide additional incentive for developers (incorporated or unincorporated) to comply with the Act. If option 6 were adopted on its own, it would not address the problem of unincorporated developers not installing fibre-ready facilities. It might be adopted with option 5 but it would need to be tailored to provide for compensation where there has been no disclosure or inadequate disclosure (which would likely be rare). Fundamentally, however, it does not directly address the problem of developers not installing facilities in the first place and the additional cost of retrofitting, and adds an extra enforcement cost without addressing the issue more directly.

Option 7 (legislate for network installation) would rectify the problem and go beyond it to ensure network infrastructure would also be installed, providing developers complied with the new law. There would be the substantive cost for developers of contracting a carrier to install network infrastructure and installing pit and pipe if they require that. However, most developers already do this as a matter of course as access to telecommunications is generally seen as a necessary feature for selling properties. Therefore the additional substantive regulatory cost would largely fall on the developers who are not doing what the community would expect of them. In addition to the

substantive cost, there would be some administrative costs for government in terms of raising awareness of the new requirements and developers in terms of confirming compliance, if a proactive compliance regime was adopted.

6. Analysis of the Costs

Options 4, 5, 6 and 7 would directly impose regulatory costs on developers. Option 4 imposes costs in relation to installing pit and pipe. Option 5 imposes costs in relation to creating and administering disclosure notices. Option 6 may involve costs comparable to those under option 5 but this would be at the discretion of a developer. Option 7 would impose costs in relation to installing pit and pipe and network installation.

Option 4 costs: The cost of installing pit and pipe to a building has been estimated at \$600-\$800. This is significantly lower than the potential cost to consumers of retrofitting the facilities. The average cost of retrofitting pit and pipe has been estimated at \$2,100, depending on the amount of civil works required. Developers can recover the cost of installing pit and pipe through sale or lease prices. Generally property buyers and/or tenants would need to meet these retrofitting costs. As noted above, they could also face significant delays in being able to access fixed-line telecommunications services, and could therefore also face additional costs in sourcing interim services.

Industry data indicate that, during 2019, on average about 1,500 premises each month were delayed because pit and pipe had not been installed or could not be certified because it was defective. The data indicate that most of these premises are developed by small developers and about half of these are unincorporated developers. Given these estimates, the cost of complying for these unincorporated developers in any year would be 3,000 (i.e. $6,000/2$) x \$800, or about \$2,400,000). The costs would be passed through to consumers, but are lower than the likely costs to consumers of retrofitting their premises.

Option 5 costs: In relation to option 5 we estimate developing a disclosure document would require at most about five days' work (including legal and management clearances) for any developer, which means a one-off cost per developer of \$2,922 (derived from the average labour rate, including 75 per cent on costs, of \$73.05 per hour, as set out in the OBPR guide to regulatory burden measurement). Industry information indicates that there are over 1,000 large developers and over 10,000 small developers. We also note many homes are developed by owners (for example by knocking down an old house and building a new one at the same site), but these homes would not be subject to a disclosure requirement as the homes are being built for occupation rather than sale or lease.

Given these data, there would be a cost under option 5 of at least $11,000 \times \$2,922$, or \$32,142,000. Developers would need to incur this cost once (though some ongoing costs would also need to be met, as set out below).

Some ongoing costs are likely to be required as developers would need to confirm fibre-ready facilities had been installed each time they prepare documents for a new development. These costs are unlikely to be as significant as the one-off costs involved with developing new documentation. For example, it could be a few hours' work for a person to prepare and check the standard document. Some developers may develop several different properties each year, whereas others may not develop any (especially where, for example, a business was created simply to develop and manage a single apartment block). If we assume that about 3000 developers may be involved in at

least three different developments each year, then the ongoing cost would be $3000 \times (3 \times \$73.05)$ or \$657,450.

If option 5 was adopted in addition to option 4, then both sets of costs would apply.

Option 6 costs: Option 6 may involve costs comparable to those under option 5 as developers would be likely to put in place administrative processes to disclose whether or not pit and pipe was installed to mitigate the risk of legal action for compensation. If legal action was initiated, there would be the cost of defending that action and the cost of any compensation awarded, which presumably would be reflective of retrofitting costs, which are generally accepted to be much higher than prior installation costs (see above in section 4). Under option 6, however, it would be a matter for the developer whether to provide disclosure, so this is not a direct regulatory cost.

Option 7 costs: Option 7 would involve similar costs to those under option 4 (\$2.4 million), plus additional costs for network installation. Noting that most developers already meet these costs as a normal course of business, using the numbers cited in option 4 for affected premises, we would estimate the additional cost for network installation to be between \$1.2 million and \$1.8 million. This is based on 3,000 affected premises and the standard NBN Co upfront new development charges of \$400 for apartments and \$600 for single dwelling units. These costs would typically be passed through to property buyers, who could also pay them in full or part with some pass through to tenants, setting aside possible deductions for taxation purposes.

7. Consultation

We are first seeking comments on the options in the RIS through public consultation for one month. This may result in the Government proceeding with one or more options, or not proceeding with legislation.

Should the Government decide to proceed with legislation, that legislation would also be subject to further public scrutiny, for example through Senate Committee processes.