



AUSTRALIAN  
SENATE

**Senate Standing Committee for the  
Scrutiny of Delegated Legislation**

Parliament House, Canberra ACT 2600  
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14 April 2021

The Hon Paul Fletcher MP  
Minister for Communications, Urban Infrastructure, Cities and the Arts  
Parliament House  
CANBERRA ACT 2600

Via email: [dlo@communications.gov.au](mailto:dlo@communications.gov.au)

  
Dear Minister,

**Telecommunications (Fibre-ready Facilities — Exempt Real Estate Development Projects)  
Instrument 2021 [F2021L00105]**

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) assesses all disallowable legislative instruments against scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instrument, and the committee seeks your advice in relation to these matters.

***Exemption from the operation of primary legislation  
Parliamentary oversight***

Senate standing order 23(3)(j) requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment. This may include instruments which provide continuing exemptions to primary legislation. In addition, Senate standing order 23(3)(k) requires the committee to scrutinise each legislative instrument as to whether it complies with any other ground relating to the technical scrutiny of delegated legislation. This includes whether an instrument limits parliamentary oversight.

The instrument exempts certain real estate development projects from the requirements in Part 20A of the *Telecommunications Act 1997* (the Act) to install fibre-ready pit and pipe. The exemption applies to real estate developments which satisfy certain conditions and are located outside a National Broadband Network (NBN) fixed line rollout region. The instrument will sunset in 2031.

The committee generally prefers that exemptions from primary legislation by delegated legislation do not continue in force for such time as to operate as a de facto amendment to the principal Act. In this regard, the committee notes that the standard ten-year sunset provision applies to the instrument. However, the previous iteration of this instrument, the *Telecommunications (Fibre-ready Facilities— Exempt Real Estate Development Projects) Instrument 2016 [F2016L01871]*, had a four-year repeal provision. As the measures in this instrument replicate the previous instrument, it is unclear to the committee why this instrument does not also repeal in four years, given the substantive measures are the same.

The committee notes that the explanatory statement explains the exemption from the requirement to lay pit and pipe is needed for these developments as it can be very costly and pit and pipe facilities are unlikely to be required for the foreseeable future, or perhaps may never be required for these types of developments. In light of this, the committee considers that these measures appear to be intended to remain in force for a significant amount of time and would therefore be more appropriate for primary legislation.

The committee's longstanding view is that provisions which exempt persons or entities from the operation of primary legislation should cease to operate no more than three years after they commence. This is to ensure a minimum degree of regular parliamentary oversight.

In addition, as per the committee's guidelines, the committee considers that the explanatory statement should indicate whether there is any intention to conduct a review of the relevant provisions to determine if they remain necessary and appropriate, including whether it is appropriate to include the provisions in delegated legislation. The committee notes that no such information is provided in the explanatory statement.

In light of this, from a scrutiny perspective, the committee considers that the instrument should be amended to specify that it ceases to operate three years after commencement. If it becomes necessary to extend the operation of these provisions, the committee considers that this should be done by amending the primary legislation or via a subsequent legislative instrument that is subject to disallowance and parliamentary scrutiny.

**The committee therefore requests your advice as to:**

- **why it is considered necessary and appropriate to use delegated legislation, rather than primary legislation, to exempt certain real estate developments from the requirements in Part 20A of the *Telecommunications Act 1997*;**
- **whether the instrument can be amended to provide that the measures cease within three years after commencement; and**
- **whether there is any intention to conduct a review of the relevant provisions to determine if they remain necessary and appropriate, including whether it is appropriate to include the provisions in delegated legislation.**

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **28 April 2021**.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to [sdlc.sen@aph.gov.au](mailto:sdlc.sen@aph.gov.au).

Thank you for your assistance with this matter.

Yours sincerely,

**Senator the Hon Concetta Fierravanti-Wells**

**Chair**

**Senate Standing Committee for the Scrutiny of Delegated Legislation**





# PAUL FLETCHER MP

Federal Member for Bradfield  
Minister for Communications,  
Urban Infrastructure,  
Cities & the Arts

MC21-003299

Senator the Hon Concetta Fierravanti-Wells  
Chair  
Senate Standing Committee for the Scrutiny of Delegated Legislation  
Parliament House  
Canberra ACT 2600

Dear Senator

Thank you for your letter of 14 April 2021 concerning the *Telecommunications (Fibre-ready Facilities - Exempt Real Estate Development Projects) Instrument 2021* (the Instrument) made under Part 20A of the *Telecommunications Act 1997* (the Act).

I note the Committee's concerns that the exemption in the Instrument may be more appropriately incorporated in the primary legislation and the long period of operation of the Instrument. The Committee has sought my advice on why it is considered necessary to use delegated legislation, whether the Instrument can be amended to sunset within three years after commencement, and whether there is any intention to conduct a review of the relevant provisions.

In response to the Committee's first question, the Explanatory Memorandum to the originating Bill, the Telecommunications Legislation Amendment (Fibre Deployment) Bill 2011, noted that the statute provided a default framework for the whole of Australia that carried potentially significant obligations but applied to a marketplace that is inherently complex and undergoing significant change. As such, the statute included flexibility in the form of exemption powers (page 32). These exemption powers are intended to enable the default framework to be tailored to accommodate different circumstances in particular areas of Australia, circumstances which can change over time. This flexibility continues to be vital.

For example, the fixed-line facilities generally required under Part 20 of the Act are not usually required in NBN Co's fixed wireless and satellite footprints, but this may alter, for example, due to the changes in the way telecommunications carriers operate or changes in demographic trends in areas adjacent to NBN Co's fixed line footprint.

Moreover, apart from the need for flexibility, such exemptions are generally complex, as the Committee will be able to gauge from the Instrument itself. This level of detail was anticipated when the Bill was developed and it was not clear such detail would be appropriate for primary legislation, particularly given the need for flexibility.

The original version of the Instrument made in 2016 reflected this complexity and the need for detail. When I remade the Instrument, I was conscious that there may be a need for further changes to the exemption given changes in the marketplace, including concurrent moves to bring unincorporated developers into Part 20A. There is therefore an ongoing need for the flexibility conferred by the use of a legislative instrument. I envisage, for example, that the exemption may need to be modified given emerging issues, thus my intention to initiate a review in the near term, as discussed below.

In response to the Committee's second question, I remade the Instrument for the period I have because of the certainty it provides for developers and stakeholders, and the importance of them having ongoing confidence that such an exemption will be available on a long term basis, noting the default requirements under the Act. I note that the exemption has been regularly used. While the exemption could be remade for three years, I envisage an exemption under subordinate legislation will need to be an ongoing feature of the regime given the design of the regime and the factors affecting the provision of telecommunications in new developments across Australia.

In response to the Committee's third question, as noted above, I envisage the Instrument will need to be reviewed in the near term given past experience and the telecommunications market. The Explanatory Statement to the Instrument indicates on page 2 that the intention is to further review the Instrument and a related instrument. I would expect this review to commence during the next twelve months. While the intention of the review would be to explore the need to update the exemptions in place in light of experience and current circumstances, the review could also consider whether the matters dealt with by the Instrument could be incorporated into Part 20A of the Act, noting the statutory design considerations above.

I trust the information in this letter is of assistance to the Committee. Should the Committee require further information, the contact officer in the Department of Infrastructure, Transport, Regional Development and Communications is Philip Mason (phone: (02) 6271 1579; email: [philip.mason@infrastructure.gov.au](mailto:philip.mason@infrastructure.gov.au)).

Yours sincerely

Paul Fletcher

1/5/2021





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13 May 2021

The Hon Paul Fletcher MP  
Minister for Communications, Urban Infrastructure, Cities and the Arts  
Parliament House  
Canberra 2600 ACT

Via email: [dlo@communications.gov.au](mailto:dlo@communications.gov.au)

  
Dear Minister,

**Telecommunications (Fibre-ready Facilities — Exempt Real Estate Development Projects) Instrument 2021 [F2021L00105]**

Thank you for your response of 1 May 2021 to the Senate Standing Committee for the Scrutiny of Delegated Legislation in relation to the above instrument. The committee considered your response at its private meeting on 12 May 2021 and has resolved to seek your further advice about the issues outlined below.

***Exemption from the operation of primary legislation  
Parliamentary oversight***

Thank you for your advice that the measures in the instrument are in delegated legislation due to a need for flexibility and because of the complexity of the measures. The committee notes your advice that this is as was envisaged in the explanatory memorandum for the originating bill (the Telecommunications Legislation Amendment (Fibre Deployment) Bill 2011).

You further advised that the 10-year duration of the instrument is necessary for business certainty and that the exemptions in the instrument will be an ongoing feature of the regime. In addition, you noted that a review of the instrument is likely in the next 12 months and that the review could consider whether the measures could be incorporated into Part 20A of the *Telecommunications Act 1997*.

The committee appreciates this advice, yet remains of the view that these measures remain more appropriate for primary legislation. The committee notes, in particular, your position that the exemption provided for "will need to be an ongoing feature of the regime" and considers that this supports the committee's views that the measures appear to be intended to remain in force for some time and would therefore be more appropriate for primary legislation.

If the measures are to remain in delegated legislation, the committee reiterates its view that the instrument should be amended to provide that it cease no later than three years from commencement. In your response you advised the committee that emerging issues in the industry may require the exemption measures to be modified. In light of this, the committee considers that a three-year duration would provide you with the opportunity to review the efficacy of the exemption in context with emerging industry changes, and seek stakeholder and user consultation as to what changes may be required or retained.

The committee would therefore appreciate your further advice as to:

- whether the instrument can be amended to provide that it ceases within three years from commencement; and
- whether the upcoming review of the instrument will include consideration as to whether, in light of the committee's scrutiny views outlined above, it would be more appropriate to insert these measures into Part 20A of the *Telecommunications Act 1997*.

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. Noting that the 15th sitting day after the instrument was tabled in the Senate will be 15 June 2021, the committee intends to give notice of a motion to disallow the instrument on that day as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **27 May 2021**.

Finally, please note that, in the interests of transparency this correspondence and your response will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to [sdlc.sen@aph.gov.au](mailto:sdlc.sen@aph.gov.au).

Thank you for your assistance with this matter.

Yours sincerely,

**Senator the Hon Concetta Fierravanti-Wells**  
Chair  
Senate Standing Committee for the Scrutiny of Delegated Legislation



# PAUL FLETCHER MP

Federal Member for Bradfield  
Minister for Communications,  
Urban Infrastructure,  
Cities & the Arts

MC21-004046

Senator the Hon Concetta Fierravanti-Wells  
Chair  
Senate Standing Committee for the Scrutiny of Delegated Legislation  
Parliament House  
Canberra ACT 2600

Dear Senator

Thank you for your letter of 13 May 2021 concerning the *Telecommunications (Fibre-ready Facilities – Exempt Real Estate Development Projects) Instrument 2021* (the Instrument). The Committee has asked whether the Instrument can be amended so that it ceases within three years from commencement, and whether the upcoming review of the Instrument can consider whether the exemptions can be included in Part 20A of the *Telecommunications Act 1997* (the Act).

As indicated in my letter to you of 1 May 2021, the exemption powers in the Act provide important flexibility. They are currently used to save developers the cost of installing underground pit and pipe in rural and remote areas where telecommunications will be provided by wireless or satellite. Developers are likely to be concerned by the winding back of the exemption, prior to any future change in legislation. However, given the Committee's concerns, I have prepared an amendment to the Instrument that would see it sunset three years after the date of commencement. This is a better option than having the instrument disallowed, providing developers with no relief.

As this amendment would be a legislative instrument, there is a need to consult stakeholders on it. The Department of Infrastructure, Transport, Regional Development and Communications will undertake this consultation and I envisage making a final decision on the amendment early in June 2021.

In relation to the Committee's second question, as I advised in my letter of 1 May 2021, the future review could and would consider whether the matters dealt with by the Instrument could be incorporated into the Act.

Yours sincerely

Paul Fletcher

25/5 / 2021





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17 June 2021

The Hon Paul Fletcher MP  
Minister for Communications, Urban Infrastructure, Cities and the Arts  
Parliament House  
CANBERRA ACT 2600

Via email: [dlo@communications.gov.au](mailto:dlo@communications.gov.au)

  
Dear Minister,

**Telecommunications (Fibre-ready Facilities — Exempt Real Estate Development Projects)  
Instrument 2021 [F2021L00105]**

Thank you for your response of 25 May 2021 to the Senate Standing Committee for the Scrutiny of Delegated Legislation in relation to the above instrument.

The committee considered your response at its private meeting on 16 June 2021. On the basis of your undertaking to amend the instrument to provide that it will cease three years after commencement, the committee has concluded its examination of the instrument. The committee has also resolved to withdraw the notice of motion to disallow the instrument.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

Thank you for your assistance with this matter.

Yours sincerely,

**Senator the Hon Concetta Fierravanti-Wells**  
**Chair**  
**Senate Standing Committee for the Scrutiny of Delegated Legislation**