



Briefing

Reform of the Residential Tenancies Act 1986 – Ultra-Fast broadband installations in rental properties

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| Date: | 10 December 2019 | Security level: | In Confidence |
| Priority: | High | Report number: | BRF19/20110497 |

Action sought

| | Action sought | Deadline |
|---|--------------------------------------|--|
| Hon Kris Faafoi Associate Minister of Housing (Public Housing) | Agree to the recommendations. | Please provide any feedback by 10am Thursday 12 December to enable HUD to issue drafting instructions to PCO by 12 or 13 December. |

Contact for discussion

| Name | Position | Telephone | s 9(2)(a) | 1 st contact |
|-------------------|---|-------------|-----------|-------------------------|
| Claire Leadbetter | Manager, Tenures and Housing Quality | 04 832 2431 | | ✓ |
| Kate Rickerby | Policy Advisor, Tenures and Housing Quality | 04 832 2434 | | |

Other agencies consulted

The Ministries of Business, Innovation and Employment and Justice. The Commerce Commission, Parliamentary Counsel Office and Kāinga Ora – Homes and Communities.

Minister's office to complete

- Noted
- Seen
- Approved
- Needs change
- Not seen by Minister
- Overtaken by events
- Declined
- Referred to (specify)

Comments

Date returned to MHUD:

12/12/19

Briefing

Reform of the Residential Tenancies Act 1986 – Ultra-Fast broadband installations in rental properties

For: Hon Kris Faafoi, Associate Minister of Housing (Public Housing)

Date: 10 December 2019

Security level: In Confidence

Priority: High

Report number: BRF19/20110497

Purpose

1. To update you on issues that have been identified concerning proposed new rights for tenants to install fibre broadband in rental properties. To solve these, the briefing identifies an option to help meet the policy intent that Cabinet agreed to, and seeks your direction as to how you would like to proceed.

Executive summary

2. In the context of your wider Residential Tenancies Act 1986 (RTA) reform package, Cabinet has approved that tenants will receive a right to install fibre broadband in situations where doing so will have low risks to the property and will pose no cost to the landlord.
3. In the process of further developing the policy to issue drafting instructions to the Parliamentary Counsel Office, we have identified the need to clarify:
 - a. what the mechanism will be to make a landlord's consent to broadband legally enduring,
 - b. that the full installation process is covered by the changes, and
 - c. the liability of network operators for damage.
4. We have presented you with options to proceed to either:
 - a. seek approval from Cabinet to a revised approach to require landlords to install Ultra-fast broadband (UFB) in all rental properties, subject to some specified triggers and exemptions, or
 - b. discontinue with an intervention to facilitate better broadband connections in rental properties specifically, at no risk to the introduction of the RTA Reform Bill.

Recommendations

It is recommended that you:

1. **Note** that Cabinet has approved in the context of your reform of the Residential Tenancies Act 1986 that tenants will have a right to install fibre broadband in situations where doing so will have low risks to the property and will pose no costs to the landlord.
2. **Note** that the processes of further developing the policy in order to prepare drafting instructions for the Parliamentary Counsel Office, we need to clarify the approved policy before this part of the Residential Tenancies (Reform) Bill can be drafted, and we have developed

Noted

Noted

options jointly with the Ministry of Business, Innovation and Employment (MBIE) Communications Policy team to proceed.

3. **Agree to either:**

3.1. Continue with a revised approach that would require landlords to install Ultra-Fast broadband (UFB) subject to some specific triggers and exemptions [**Preferred**], or

Yes / No

3.2. Discontinue the specific intervention to improve the rights tenants have to install fibre broadband and instead rely on this being reached through mutual agreement,

~~Yes / No~~

3.3 Discuss proposals further with the officials from the Ministry of Housing and Urban Development and the Ministry of Business, Innovation and Employment.

~~Yes / No~~

4. **Agree** that both approaches at options (i) or (ii) above could be noted to the Legislation Committee at the approval for introduction stage, given that (i) seeks to achieve the same policy intent that Cabinet has already approved and (ii) seeks to remove the proposal.

Yes / No

5. **If you wish to proceed with the preferred option (3.1) above, agree** that it would have the following key elements:

5.1. Imposing an obligation on landlords to approve requests to install UFB, subject to some specific triggers and exemptions,

Agree / Disagree

5.2. The obligation would be triggered when-

5.2.1. a tenant requests UFB installation,

5.2.2. a network operator requests access to the property,

5.2.3. there must be a no-cost option for installation available to the landlord, and

5.2.4. UFB must also be available to the property (for example, the property is not outside of network coverage).

Agree / Disagree

5.3. A landlord would be exempt from the obligation to install if the following kinds of circumstances apply -

5.3.1. the property's weather tightness or structural integrity would be compromised by the installation, in a way that is not able to be sufficiently mitigated,

5.3.2. the property's aesthetic character or heritage elements would be severely affected by the installation,

5.3.3. the property is part of a shared access arrangement or installation would otherwise require consent from a third party which has not been received despite reasonable efforts from the landlord,

5.3.4. the landlord plans to develop the property and installation will impede these plans, or

5.3.5. installation will mean that the landlord will be placed in a position where they are in breach of legal obligations they

Agree / Disagree

have. For example, under the Building Act 2004, body corporate rules, bylaws, easements or covenants.

- 5.4. The exact wording of the prescribed exemptions will be subject to development of the Bill with PCO. Agree / Disagree
- 5.5. A landlord would be required to respond to a request from a tenant or network operator within 21 days. Failure to do so without reasonable excuse would be an unlawful act with corresponding exemplary damages of \$1,500. Agree / Disagree
- 5.6. There would be an unlawful act, with \$1,500 exemplary damages, that would apply when a landlord was subject to the obligation to install UFB broadband but failed to meet this obligation within reasonable timeframes. Agree / Disagree
- 5.7. The Tribunal would have a role in adjudication of disputes about whether the obligation is triggered and whether an exemption applies. The Tribunal would also have discretion to rule that a landlord is exempt from the obligation to install UFB in any given situation due to any factors they consider to be relevant. Agree / Disagree
- 5.8. Liability for damage would be established through the landlord-network operator contract. Network operators are incentivised to use the lowest impact method available to them, as these are generally the least cost. Agree / Disagree
- 5.9. An installation will not go ahead if the landlord does not sign the consent form. There will be no "deemed consent" approach, which our further analysis has concluded is not advisable. Agree / Disagree
6. **Note** that there is some risk to project timing if you proceed with the preferred approach but we have planned a process to mitigate this as far as possible by noting the approach to the Legislation Committee and having an option to add a note to the draft Bill for agency consultation if drafting of this section of the Bill is not ready at the date agency consultation is planned to proceed. Noted

C.O. Leadbetter

Claire Leadbetter
Manager, Tenures and Housing Quality

10/12/19


Hon Kris Faafoi
Associate Minister of Housing (Public Housing)

12/10/19

Background

5. Following Cabinet's agreement to a series of policy papers on the reform of the Residential Tenancies Act 1986 (RTA) in September and October 2019 the Residential Tenancies (Reform) Bill is currently being developed in accordance with your aspiration to introduce legislation to Parliament in the first sitting block of 2020.
6. One aspect of the wider reform package Cabinet approved involved introducing a right for tenants to install Ultra-Fast broadband (UFB) broadband at their properties when certain preconditions are met. Specifically:
 - a. where UFB can be installed at no cost to the landlord and the installation will only use methods that are of justified impact to the property (Category One and Category Two installations under the Telecommunications Act 2001) the landlord must only decline consent for specified reasons, and
 - b. unlike the process approved for other minor fittings, UFB equipment would not need to be removed at the end of the tenancy.
7. The Ministry did not include commentary or proposals on broadband issues specifically in the public consultation we ran in the second half of 2018. However, in response to more general questions around whether existing rights to install minor fittings were functioning optionally, several submissions were received requesting that the new rights be considered to address problems installing broadband in rental properties.
8. Subsequent policy through our Regulatory Impact Assessment in partnership with the Ministry of Business, Innovation and Employment (MBIE) Communications Policy team identified that the nearly \$2 billion investment successive governments have made to improve connectivity may not be evenly distributed across both owner-occupied and rented properties. We noted that based on figures provided by the New Zealand Telecommunications Forum, it's possible that 37,180 rented residential premises may forfeit the benefits of improved connectivity upon completion of the UFB programme because landlord consent is difficult to obtain. If this figure was correct, tenants as a group may be prevented from realising \$43 million of value that their Government has already committed and its associated benefits.
9. If the 37,180 rental properties are blocked from having access to a UFB service, Chorus will not be permitted to withdraw copper services and will continue to face costs in the supply and maintenance of copper where UFB exists.¹
10. The policy intent in the RTA Reform context is to bridge this gap and ensure that the growing proportion of New Zealanders renting their property are not disadvantaged relative to owner-occupiers.

In the process of further developing the policy to issue drafting instructions to the Parliamentary Counsel Office, we have identified a need for clarification

11. While the Ministry continues to support the high-level policy intent of enabling UFB installations in rental properties, the process of HUD further developing the policy in order to prepare drafting instructions for the Parliamentary Counsel Office has surfaced four issues which we have undertaken further policy analysis work to resolve. The need to clarify some areas arose having considered how the multi-party relationship of tenant,

¹ Schedule 2A 1(3)(a)(i) of the Telecommunications Act 2001.

landlord and network operator will interrelate with the new rights agreed in the Cabinet paper *Reform of the Residential Tenancies Act 1986 – Minor Fittings, Rent Setting and Access to Justice* in more detail and in further joint development with the MBIE Communications Policy team.

It's unclear what mechanism will make a landlord's consent to broadband legally enduring...

12. As the installation of broadband from the street into the home has a cost to network operators² these companies will not agree to undertake this work without a corresponding assurance that their equipment may legally occupy the property and will not be tampered with. To achieve this, network operators enter into contractual agreements with the property owners that sign up for UFB that include standard terms and conditions which:
 - a. allow the company onto the property to install and operate the network,
 - b. oblige the landowner not to interfere with the network once installed,
 - c. make the property owner liable if they, or someone they are responsible for damage or steal the network, and
 - d. make the network operator liable for remediation of damage caused by the installation.
13. Previous policy advice did not set out how these terms and conditions the network operator requires will be met in instances where a landlord is resistant to the installation proceeding by right (through a process of deemed consent). In these circumstances:
 - a. the tenant is unable to enter into a contract, on the landlord's behalf, directly with a network operator and it is not tenable to change the law to allow this as doing so would impose legally enforceable obligations on landlords through a contract that they were not party to, and may impact a landlord's property rights, and
 - b. the landlord cannot be compelled through the law to sign a contract with the network operator for a service that the tenant has negotiated and we do not advise changing to law to do so. As well as being an unusual legislative feature, this approach could risk a situation where the presence of this compulsion could result in landlords being presented with less favourable contractual terms by a network operator than an owner occupier might.
14. These issues could potentially be overcome if the need for a contract between the landlord and network operator was circumvented by establishing the obligations, protections and liabilities required in statute. However, this would require significant further investigation and would likely include a material amendment to the Telecommunications Act 2001 (Administered by MBIE) that is considered out of scope for the current project.

The approach set out in the previous Cabinet paper does not cover the full installation process...

15. The installation of UFB involves two stages occurring on private property once the network has been built along the street. The first of these requires the equipment to be built to the house. The second requires it to enter the house and be installed within it.

² Just over 1,000 per premises based on figures in Chorus' 2018 annual report.

16. Further analysis has uncovered that previous advice did not afford any specific rights for tenants to install broadband through a property's external walls and within it. This problem arose by connecting Cabinet's agreement to existing definitions for Category One and Category Two installation methods under the Telecommunications Act 2001 for the purpose of establishing what a reasonable level of impact for these installations should be.
17. This does not cover the complete installation process because Category One and Category Two installation methods were developed to overcome problems of third-party landowner holdout on shared property but with individual property owners still providing their consent for the broadband to occupy their sole property should they wish to connect to it.
18. The unintentional effect of limiting the new rights to Category One and Category Two installation methods is that Cabinet has approved that landlords should not decline the build of UFB between the street and the exterior walls of their rental property. However, as neither Category One nor Category Two methods of installation cover how equipment should enter buildings there is no guarantee that a reluctant landlord would be required to consent to the network entering the house.
19. The approach also means that there could be some impacts to landlords, for example to the character of properties, that would not have been sufficiently mitigated.
20. A further issue identified with linking this to the wider Telecommunications Property Access framework that establishes Category One and Category Two installations is that this is subject to a sunset clause and will cease to exist on 1 January 2025 unless that legislation is amended.

Options

Option One – set a legal obligation that landlords must connect to UFB in rented properties, subject to some conditions and circumstances

21. If you wished to continue with an intervention to improve connectivity for people in rental properties, an alternative approach has been jointly developed by HUD and the MBIE Communications Policy team that seeks to overcome the problems outlined above.

Summary of Option One

- Imposing an obligation on landlords to install UFB, subject to some specific triggers and exemptions.
- The obligation would be triggered - following a tenant requesting UFB installation and a network operator requesting access to the property. There must be a no-cost option for installation available to the landlord. UFB must also be available to the property (for example, the property is not outside of network coverage).
- A landlord would be exempt - if one of the circumstances at paragraph 35 applied.
- The Tribunal would also have discretion to rule that a landlord is exempt from the obligation to install UFB in any given situation due to any factors they consider to be relevant.

Enforcement

- There would be two unlawful acts with corresponding \$1,500 exemplary damages;
 - 1) A landlord fails to respond to a request from a tenant or network operator within 21 days, without reasonable excuse.
 - 2) A landlord is subject to the obligation to install UFB broadband but fails to meet this obligation within reasonable timeframes.

Disputes

- The Tribunal would have a role in adjudication of disputes about whether the obligation is triggered and whether an exemption applies.
- Liability for damage would be established through the landlord-network operator contract.
- An installation will not go ahead if the landlord does not sign the consent form. There will be no "deemed consent" approach, which our analysis has concluded is not advisable.

22. The approach involves a shift from the approved policy of granting tenants' rights to install broadband where pre-conditions are met, to a policy that instead imposes an obligation on landlords to install UFB, subject to some specific triggers and exemptions.
23. This obligation on the landlord for a UFB installation would arise from the request to access the property from the network operator and can only occur after a request by the tenant for a UFB installation has been made to the network operator.
24. This approach is considered to circumvent the problems outlined above as the landlord would be entering into a contract with a network operator on their own volition as a way of discharging their legal obligation. As rights are not being exercised by the tenant issues around contractual privity and network operator liability for damage are avoided.
25. By shifting the bar for intervention from one that is based on a justified level of impact to the property to one that is instead based on the fulfilment of a utility requirement, there would be no need to connect with existing Category One and Category Two installation methods which are incomplete for the current context.
26. Liability for damage would be established through standard end-user terms between the landlord and the network operator as is the case for all UFB installations with recourse to the Disputes Tribunal and normal commercial and contract law.
27. The Tenancy Tribunal's (the Tribunal's) role would be limited to adjudication on disputes about whether an exemption applies. We note that network operators are incentivised to use the lowest impact method available to them as these have the least cost and installations generally take the same form as the copper network already installed in the property. Other bodies for customers to resolve broadband disputes include Utility Disputes for installations on shared properties and the Telecommunications Disputes Resolution for matters covered by fair trading or telecommunications industry codes.

Impact of the copper withdrawal code

28. It is important to note the impact of the copper withdrawal code and the protections it has for consumers, as Chorus could circumvent this for rental properties. Under amendments

to the Telecommunications Act 2001, the Commerce Commission is required to develop a copper withdrawal code that sets the minimum consumer protection requirements that will need to be met before Chorus can stop providing copper services.

29. Chorus currently view that the copper withdrawal code (the code) process starts when it sends the first notice to the end-user (which may be the tenant or the landlord depending on the circumstances). If Chorus contacts the landlord directly the code is not triggered, meaning that the tenant could potentially miss out on the protections offered under the code. These protections include:
 - a. the need to make alternative arrangements, such as battery backup, to maintain the UFB service in the event of a power failure; (which links to 111 code);
 - b. information about the UFB services available to the end-user (the tenant who will be buying the service, not the landlord); and
 - c. any other prescribed matters must be complied with – including disputes resolution for the tenant.
30. Chorus may also not have an obligation to provide reasonable notice of the proposed withdrawal of the copper service to access seekers (the retail service providers who will be selling the service to the tenant).
31. To ensure that tenants are offered the same protection under the code, it is important that the obligation on the landlord be clear. It is also important that the obligation can only occur after a request for UFB by the tenant has been made to the network operator.

How would Option One work in practice?

32. In order for the obligation to apply, the tenant must first request, from their landlord, a UFB installation. There also must be a no-cost option for installation available to the landlord. UFB must also be available to the property (for example, the property is not outside of network coverage).
33. A landlord would be required to respond to any request from tenants or network operators about UFB within 21 days.
34. If a response is not forthcoming by the due time, and without a reasonable excuse, then the landlord would be committing an unlawful act and be subject to exemplary damages of \$1,500.
35. A landlord would be exempt from the obligation to install UFB where they are able to show that the following kinds of circumstances apply:
 - a. the property's weather tightness or structural integrity would be compromised by the installation, in a way that is not able to be sufficiently mitigated;
 - b. the property's aesthetic character or heritage elements would be severely affected by the installation;

- c. the property is part of a shared access arrangement or installation would otherwise require consent from a third party which has not been received despite reasonable efforts from the landlord³;
 - d. the landlord plans to develop the property and installation will impede these plans; or
 - e. installation will mean that the landlord will be placed in a position where they are in breach of legal obligations they have. For example, under the Building Act 2004, body corporate rules, bylaws, easements or covenants.
36. The exact wording of the prescribed exemptions will be subject to development of the Bill with PCO.
37. The Tribunal would also have discretion to rule that a landlord is exempt from the obligation to install UFB in any given situation due to any factors they consider to be relevant.
38. There would be an unlawful act, with \$1,500 exemplary damages, that would apply when a landlord was subject to the obligation to install UFB broadband but failed to meet this obligation within reasonable timeframes. The Tribunal could decide that the obligation does not apply where it has not been triggered by the factors at paragraph 31. Alternatively, the Tribunal may rule that it does apply but an exemption ground at paragraph 34 is met.
39. An installation will not go ahead if the landlord does not sign the consent form. There will be no "deemed consent" approach, which would not be recommended given the issues we have identified that are outlined at paragraph 8. The approach is instead to disincentivise non-response and non-fulfilment of obligations through the proposed penalties.
40. This obligation on landlords could be set out in primary legislation through the Residential Tenancies Bill.

Process for Option One

41. Parliamentary Counsel have indicated that they could draft for Option One based on a briefing approved by you. They have provided this advice on the basis that the policy of Option One appears to be reasonably developed, not overly complex, and (in broad terms) consistent with the approved policy.
42. We are seeking your direction by 10am Thursday 12 December to enable HUD to issue drafting instructions to PCO by 12 or 13 December. There is a risk that UFB may not be included in the agency consultation draft of the Bill, but we could include a cover note outlining the policy to ensure timeframes do not slip and agencies are still consulted.
43. Given that this policy follows the intent of the Cabinet paper agreements, but makes some changes, the changes could be noted to Legislation Committee when introducing the Bill in 2020. This approach mitigates timing risks.

Option Two - Rescind the existing agreement and take no specific action regarding UFB installations in rental properties

³ A landlord seeking a consent of this nature could constitute a "reasonable excuse" for not responding within the 21-day timeframe, as outlined at paragraphs 33.

44. This approach would continue with the policy Cabinet has approved regarding minor fittings more generally but would not extend any specific rights in relation to UFB connections in rental properties.
45. Tenants would still receive some connectivity benefits relative to the status quo as it will likely become easier for them to install fixed wireless broadband equipment, such as antennas, where the preconditions for a minor fitting have been met. Where a UFB connection is desired, this will continue to be negotiated between the tenant and the landlord as it is currently with the landlord and network operator then contracting for this service.
46. As this option would be removing some drafting complexity it would lessen delivery risks around the Residential Tenancies (Reform) Bill being introduced to Parliament in the first sitting block of 2020 to some extent.
47. It would be necessary to seek Cabinet's agreement to not continue with the policy direction approved, but you could choose to do this when seeking agreement from the Legislation Committee to introduce the Bill in early 2020.

Risks

48. There may be perceived or real increased risks of damage to landlord property from Option One. Cumulative overall market impacts from the RTA reform are possible, as acknowledged in other RTA reform advice.
49. Option One may create some risk to your ability to introduce the RTA Reform Bill to Parliament in the first sitting block of 2020. We will keep you updated if this risk eventuates. We have designed an approach to mitigate risk as far as possible by;
 - a. having an option for this policy to be outlined in a cover note if it cannot be included in the agency consultation draft of the Bill, and
 - b. noting changes to the Legislation Committee when introducing the Bill, rather than taking them back to a Policy Committee, given that they are of a minor nature and are in keeping with the policy intent of previous Cabinet agreements.

Operational implications

50. Information, education, compliance, monitoring and evaluation for the changes in this paper would be part of the broader RTA reform approach.
51. As advised in RTA reform briefings and Cabinet papers, there may be some implications for the Tenancy Tribunal from the RTA reform package. This also applies for the Option One changes in this paper. The proposal may result in an increase in dispute volumes, however it can be argued that these are as a result of tenants.

Minimum connection standard – considered but withdrawn

52. HUD considered an option to design a minimum connection standard. We have not recommended this following further analysis and further consultation with the MBIE Communications Policy team.

53. A minimum standard solution is considered to be too complex to implement. This would also require substantial upskilling of the Tenancy Tribunal in a very technical area. This solution would set an unhelpful arbitrary benchmark that could be sought as a minimum for all residential owner occupiers.

Consultation

54. The Ministries of Business, Innovation and Employment and Justice. The Commerce Commission, Parliamentary Counsel Office and Kāinga Ora – Homes and Communities.

Next steps

55. We recommend that you indicate whether you would like to proceed with Option One or Two by 10am Thursday 12 December to enable HUD to issue drafting instructions to PCO by 12 or 13 December. This will enable officials to proceed with the processes outlined above.