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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

TELECOMMUNICATIONS LEGISLATION AMENDMENT (FIBRE DEPLOYMENT) BILL 2011

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Broadband, Communications and the Digital Economy, Senator the Honourable Stephen Conroy)

There are four key measures in proposed Part 20A.

First, the Bill enables the Minister to specify by legislative instrument new developments or classes of new developments in which fixed lines that are installed must be optical fibre lines and must comply with any other conditions specified (Division 2). For convenience, this rule is known as the 'optical fibre line requirement'. While NBN Co's role as the fibre infrastructure provider of last resort means fibre will ultimately be provided in new developments, this provides a mechanism to ensure fibre is provided in the long term, if required.

Second, the Bill provides that when fixed-line facilities are being installed in a development, these facilities must be fibre-ready (Subdivision A of Division 3). For convenience, this rule is known as the 'fibre-ready facility requirement'. This rule will apply to the person installing the facilities, and if that person is a developer, whether or not the developer is a constitutional corporation.

A fixed-line facility is an item of passive infrastructure such as underground ducting or 'pit and pipe' or poles used in the deployment of fixed telecommunications lines to a premises. A 'fibre-ready facility' is a fixed-line facility that is designed and installed so that it allows the ready deployment of optical fibre cabling, noting such cabling has special deployment requirements. These concepts are defined further in the Bill.

Third, the Bill prohibits constitutional corporations from selling or leasing land or buildings situated in new developments unless fibre-ready facilities have been installed (Subdivision B of Division 3). For convenience, this rule is known as the 'fibre-ready installation requirement'. The limitation of the 'fibre-ready installation requirement' to constitutional corporations reflects the application of the Australian Government's constitutional powers over corporations.

If the fibre-ready installation requirement applies to a particular new development, civil penalties will apply if a constitutional corporation (such as a developer that is a constitutional corporation) sells or leases land or buildings and fibre-ready facilities have not been installed. However, the sale or lease transaction will still be valid.

The Bill provides that in new developments where urban utilities are not being installed, the fibre-ready facility requirement and the fibre-ready installation requirement will not apply. The Bill also provides for NBN Co to provide a written statement advising that neither it nor another NBN Corporation (e.g. NBN Tasmania) will be deploying fibre in an area: that is, the area is outside the long term fibre footprint of the NBN. The effect of such a statement is that it will relieve a person (such as a developer) of the obligation to install fibre-ready infrastructure in a development in that area (Subdivision C of Division 3).

The Bill also provides for the Minister to exempt by legislative instrument projects, individual lots or units, or conduct that would otherwise be subject to the Bill (Subdivision D of Division 3). For example, the Minister could exempt very small infill redevelopments (e.g. knock-down, rebuilds) where it would not be reasonable to require the replacement of the infrastructure in the street.

Fourth, the Bill provides for a regime for carriers to secure access to fixed-line facilities (e.g. pit and pipe) that are owned by non-carriers, to ensure fibre can be rolled out using these facilities (Division 4).

Access to such fixed-line facilities would be on terms that are commercially negotiated or, failing agreement, determined by an agreed arbitrator. Failing agreement on an arbitrator, the Australian Competition and Consumer Commission (ACCC) will be the default arbitrator. The regime is based on that applying to carrier facilities in Part 5, Schedule 1 of the Act. The Bill also sets out provisions for the ACCC to determine whether third party access is technically feasible and to make a code setting out conditions for third party access. There is also provision for the Minister to exempt fixed-line facilities from this access regime.

The Bill exempts developments from the rules regarding the installation of fibre-ready facilities or fibre lines where, before the Bill comes into effect, contracts have been signed or work has commenced on the installation of fixed-line facilities or lines, or where civil works generally have been contracted or commenced (Division 5).

The Bill provides for a number of new definitions to support the operation of Part 20A (Division 6). In relation to 'real estate development projects', the Bill enables subordinate legislation to refine the definition of this term, should it be necessary, as well as to make definitions and technical amendments that support the new measures and to address consequential matters.

The Bill also makes it clear that the proposed legislation does not intend to exclude or limit the operation of state and territory laws that are capable of operating concurrently with the proposed new Part 20A (proposed section 372ZB). As such, the legislation can be complemented by changes to state, territory and local planning arrangements under state or territory law, which would further support the deployment of fibre-ready facilities or fibre.

The Bill also contains provisions to apply the civil penalties in the Act to breaches of obligations under the new Part 20A.

In addition to inserting the new Part 20A, the Bill amends provisions in Part 21 of the Act to enable the Australian Communications and Media Authority (ACMA) to make technical standards for customer premises equipment and cabling for use with the national broadband network and other superfast telecommunications networks (items 11-13). The ACMA will be able to exercise these powers on its own initiative or if directed by the Minister. The amendments also make it clear that the Minister can give the ACMA directions in relation to cabling provider rules.

Part 1 of Schedule 1 to the Bill will commence at the start of the day after the day the Bill receives Royal Assent, or 1 July 2011, whichever occurs later in time. While the introduction of arrangements to facilitate the deployment of optical fibre infrastructure in new developments was flagged as early as April 2009 and the current arrangements being implemented were announced in June 2010, this approach will ensure affected parties have further advance notice of the requirements and remove concerns about potential retrospective application. It has been the Government's expectation, however, since the 20 June 2010 announcement that developers will have recognised the need to install fibre-ready passive infrastructure to facilitate the rollout of fibre in their developments and that it is a commercial matter for fibre providers as to how to service these developments where this has not been done.

FINANCIAL IMPACT STATEMENT

The financial impact on the Commonwealth is expected to be small and met from NBN implementation funding.

REGULATION IMPACT STATEMENT

Measures to support the installation of fibre to the premises (FTTP) in new developments and the Telecommunications Legislation Amendment (Fibre Deployment) Bill 2011

1. Background

In April 2009 the government announced the establishment of NBN Co to roll out the National Broadband Network. To complement this initiative, it foreshadowed legislation to ensure that fibre to the premises was installed in all new developments. At that time it was envisaged that developers would be required to install and pay for fibre infrastructure.

After extensive consultation the government announced in June 2010 that NBN Co would be the infrastructure provider of last resort in new developments. It would provide fibre in new developments within its long term fibre footprint where developers did not choose to use another provider and provided fibre-ready passive infrastructure, generally trenching, conduits and access pits, or 'pit and pipe'.

In December 2010 the government announced the detailed arrangements for the implementation of this policy, including some transitional arrangements under which Telstra would service infill developments of less than 100 premises pending NBN Co rolling out a fibre presence. In the long run NBN Co will be provider of last resort in all new developments within the fibre footprint. Separately, NBN Co has indicated that it will negotiate with developers to transfer ownership of the infrastructure to NBN Co under the contractual arrangements they enter into. It will not charge developers for the installation of fibre.

The issue, then, is how to ensure, within this policy framework, that fibre is installed most efficiently in new developments. Extensive consultations with the telecommunications industry, state and territory and local governments, developers and builders, and consumers of telecommunications services indicate that this requires the provision of fibre-ready passive infrastructure at the development stage.

Developers may request other telecommunications providers to provide infrastructure in their estate. In these cases, it is assumed that fibre will be installed at development stage and the passive infrastructure will be designed for fibre, installed and used immediately. Fibre-ready infrastructure is necessary when fibre is not installed immediately. It is possible that NBN Co, as provider of last resort, may not be able to service developments immediately.

In the past, telecommunications infrastructure was provided by Telstra. It installed the copper network and provided the retail service, spreading the cost of the new infrastructure over the whole network. Thus, from the point of view of developers, the infrastructure was provided at little or no cost to the developer apart from the cost of the shared trench. More recently, a number of providers including Telstra have installed fibre networks on commercial terms, generally charging developers an amount per premises passed which recovers a large proportion of the capital cost, and

having ownership of the infrastructure transferred to them. They then maintain the network and receive further revenue from retail providers on their network, or from their own retail services on the network.

2. Identifying the problem

The problem to be addressed is how to ensure that fibre-ready passive infrastructure is available to facilitate the rollout of fibre in new developments within the fibre footprint, whether by a developer chosen provider or NBN Co as infrastructure provider of last resort.

The provision of fibre-ready infrastructure entails a cost to developers. This cost is far less than the later cost of retrofitting the infrastructure. It is efficient for it to be installed at the development stage, when a utilities trench is already open.

Notwithstanding that it is efficient, the cost to developers, the fact that they will have moved on before the cost of retrofitting becomes apparent, and the fact that consumers do not know what is needed mean there is a possibility that government intervention is required in order to ensure that fibre-ready infrastructure is available in new developments.

There are around 150,000 new dwellings[1] constructed each year. In addition, it is estimated that there are around 60,000[2] other premises such as commercial, industrial and government premises constructed per annum. According to NBN Co[3], 94 per cent of these new premises (about 197,000) will be within the fibre footprint.

The cost of installing fibre-ready infrastructure has been estimated at about $800 per lot or building unit, using information from a variety of industry sources. The cost of retrofitting fibre where no passive infrastructure has been supplied has been estimated at about $1300 a lot or unit more than installing it in fibre-ready infrastructure.

Most developers will install fibre-ready infrastructure as a matter of course. However, there is a risk that some may not. If five per cent were to neglect to do so, the net cash cost – to be borne by consumers or NBN Co – would be $12.8 million each year[4].

3. Objectives of government action

The Government's ultimate objective is to have optic fibre installed throughout the fibre footprint. Its immediate objective is to maximise the installation of fibre-ready passive infrastructure in new developments:

- to facilitate the rollout of fibre in new developments
- to minimise risk, cost and inconvenience to the community, including to NBN Co as infrastructure provider of last resort

[1] National Housing Supply Council 2008 *State of Supply Report,* p.35
[2] This figure is based on projections in the growth of serviceable addresses in future years.
[3] NBN Co's Corporate Plan (p 45), available at www.nbnco.com.au
[4] 197,000 * 0.05 * $1300 = $12,805,000

- to compensate for an information asymmetry between developers and later occupants.

4. Options that might achieve these objectives

Option 1: Rely on market mechanisms

It might be thought that the benefit of having fibre telecommunications available would be sufficient to ensure that all parties would be prepared to incur costs of various kinds in order to facilitate the rollout of such infrastructure.

In particular, it might be expected that fibre-ready infrastructure will always be installed because the payoff in the medium term to a relatively minor investment is large. That is, the benefit of the installation of fibre – potentially by NBN Co as fibre provider of last resort – at no further cost far outweighs the cost of installing the pit and pipe.

With full information, consumers could discount the value of the land in the development for the cost and inconvenience of retrofitting fibre. Even with full information, a consumer or group of consumers might choose not to have fibre-ready infrastructure installed. In this case the saving to them would have to be offset against later costs to others. This is discussed briefly in the 'Impacts' section below.

Option 2: Use state and territory regulatory arrangements

It might be possible to rely on state and territory regulatory arrangements to ensure that fibre-ready infrastructure is installed in new developments.

In particular, there may be scope for using state and territory planning arrangements to require that fibre-ready infrastructure be installed in new developments. State and territory inclusion of a requirement for fibre-ready infrastructure in planning arrangements would be valuable because developers will have the main responsibility for installation, and they are accustomed to dealing with planning bodies. This would assist in communication with developers.

Option 3: Legislation

A third option is to legislate to in effect require developers to install fibre-ready infrastructure. This would require amendments to the *Telecommunications Act 1997.* Constitutional limitations mean that the requirement would be imposed under the corporations power. Under the telecommunications power, it would be possible further to require that any fixed-line infrastructure being installed was fibre-ready, and this would bind developers who are not corporations where they install such infrastructure. The risk would remain, however, that a developer might choose not to install any such infrastructure. A variant of the legislative option requiring some developers to install fibre to the premises, not just fibre-ready infrastructure, was explored. After consultation with stakeholders, this option was rejected on the basis of cost and practicality.

5. Impact analysis

This impact analysis assesses the three options against these criteria:

- their contribution to the efficient provision of fibre in new developments, in particular by ensuring that fibre-ready infrastructure is installed
- the cost to developers
- the degree to which they compensate for the information asymmetry between developers and later occupants
- the degree to which they reduce risk, cost and inconvenience to telecommunications providers, especially NBN Co as the infrastructure provider of last resort
- the degree to which they reduce risk, cost and inconvenience to the community.

The main groups affected are:

- developers and builders
- network builders, especially NBN Co as provider of last resort
- eventual occupants of premises – households and businesses
- state, territory and local government planning authorities.

A table summarising impacts on stakeholders is attached.

Costs and benefits

The cost of installing fibre-ready telecommunications infrastructure at the development stage is estimated at approximately $800 on average per lot. This figure is based on information supplied by industry. It includes trenching, materials – conduit and pits – and installation.

Installation at the development stage is much cheaper than installation for existing premises, because there is already an open trench for water, sewerage, and electricity in the new development. By contrast, retrofitting involves new excavation and making good. The difference has been estimated at $1300 per block passed.

As well as the cash difference in cost, retrofitting entails potentially large additional costs in inconvenience and damage in the form of gardens and driveways dug up, the possibility of damage to existing utilities when the telecommunications infrastructure is installed, and the presence of machinery and noise in an occupied area. There is a risk of extra delays as fibre is installed in areas which already have other utilities infrastructure.

Installation of passive infrastructure will entail some administrative costs. Generally it will involve a developer making contact with NBN Co[5] and getting some assistance in finding designers and construction firms to design and install the infrastructure, with NBN Co checking that the result is satisfactory. Retrofitting, too, will entail these

[5] It is assumed here that developers wishing to use other providers will install fibre at development stage and so will be unaffected by the fibre-ready provisions.

costs. In addition, transaction costs will be higher for retrofitting as households and businesses will need to be dealt with individually, and there will need to be co-ordination with other utilities.

Under all options, the cost of installing passive infrastructure at development stage is likely to be the same per lot, whatever the motivation for installing it. The main cost difference will be the extent to which it is installed relative to the total number of premises.

Impact of Option 1: reliance on contractual and market mechanisms

Under all three options, most developers will install passive infrastructure, probably under a contract with NBN Co, who will then install fibre.

However, developers do not directly benefit from the provision of fibre-ready infrastructure. The occupants of premises later built in the development will benefit – though the lots may be more saleable and attract a higher price to the extent that builders or buyers are well enough informed to take it into account. Conversely, developers do not pay the cost of later retrofitting. By the time it happens, they have finished with the development and moved on. After the premises are built and occupied, the occupants may be left with the expense and trouble of retrofitting. Developers do not necessarily have a direct incentive to install fibre-ready passive infrastructure.

Thus there is a mismatch between who pays and who benefits. There is, therefore, a possibility that fibre-ready infrastructure will not be installed in the absence of intervention. Contact the Department of Broadband, Communications and the Digital Economy has had with developers in recent years suggests that this possibility is not merely theoretical. It is not possible to know how many would not, but if it were assumed that 5 per cent of lots were not made fibre-ready, the cost has been estimated at $12.8 million a year (see p 2).

Many consumers (including builders who might purchase several lots from a developer) may be well enough informed to avoid blocks without infrastructure. But such information is not readily available, and efforts to devise a mechanism for collecting and disseminating it suggest that it is likely to be costly and not likely to be effective. In any case, even a modest scheme would have to rely on legislation to work.

Further, in the early stages of implementation of the policy there will be a transition period where fibre may not be installed immediately in new developments, perhaps because the fibre network is scheduled to be rolled out in the area in a relatively short time. Then there might not be an immediate contract between a fibre provider and the developer, and developers may not realise the consequences of not putting in fibre-ready infrastructure.

Obviously, developers who do not install passive infrastructure do not incur the cost. In that sense, there would be a saving from not acting.

However, there would be later costs to consumers and/or the future provider, probably ultimately NBN Co, when passive infrastructure has to be retrofitted, as described above.

There would not be commensurate savings in administrative costs in general from the premises not served with infrastructure, because of the fragmentation of the mechanisms. There may even be further administrative costs for developers who do not install infrastructure because they will have to co-ordinate work in a more complex environment.

In the absence of any compulsion to install fibre-ready infrastructure, there is a transaction cost for consumers, who (if they are well enough informed to do so) will have to find out whether a block has infrastructure or not. There is likely to be an inequitable outcome in the sense that land and housing prices tend to equalise in a particular area and, because of incomplete information, consumers may pay as much for a block without infrastructure as they would have paid if it had infrastructure. That is, developers will pass on the cost of fibre-ready infrastructure, but those who do not install it will be able to pocket the savings.

To the extent that this information failure occurs, it could give developers who do not install infrastructure a spurious competitive advantage

Impact of Option 2: Using state and territory regulatory arrangements

In some state, territory and local planning arrangements telecommunications is treated like any other urban utility, routinely installed along with water, sewerage and electricity. Sign-off of telecommunications is required for planning approval. However, these arrangements vary and it does not appear possible to use planning arrangements to ensure complete coverage of a requirement for fibre-ready infrastructure. This is because some planning systems do not actually have a requirement in the planning approval processes for other utilities and because some planning systems do not require planning approval for a significant proportion of developments.

So there would still be a risk of some developers not installing fibre-ready infrastructure, with costs as detailed above.

Further, after extended discussions it has not been possible to reach agreement with the states and territories on legislation. This is partly because planning arrangements vary from state to state and so it is difficult to devise a consistent scheme or one that would bring about consistent outcomes. Besides, while local planning arrangements routinely provide for other utilities, this is partly because states and territories have traditionally regulated them. Telecommunications, on the other hand, has always been a responsibility of the Commonwealth, and many local governments are unable or unwilling to supervise their installation. Finally, relying on state and territory legislation entails a risk of inconsistent standards and specifications. This is less a concern for, say, water or sewerage than it is for telecommunications which is generally provided on a national basis and standardised installation is desirable.

There might possibly be some costs to local planning authorities in checking the installation of infrastructure if it were required under their planning arrangements, although it appears that these could be minimised under the kinds of sign-off processes fibre providers would use.

State and territory inclusion of a requirement for fibre-ready infrastructure in planning arrangements could reduce transaction costs for developers because they are accustomed to dealing with planning departments, and routinely look there for information. Dealing with telecommunications along with other utilities would be administratively simple and so reduce administration costs.

Impact of Option 3: Legislation

It is likely that most developers will install fibre-ready infrastructure because there are incentives to do so. The payoff, in terms of a fibre connection, is much greater than the cost.

So the immediate cost of the legislation would be to those developers who would not have installed fibre-ready infrastructure, who will now be faced with an outlay of $800 a lot.

This would be more than balanced by the later savings to occupants and/or infrastructure providers, who would otherwise have had to pay for retrofitting – both the cash cost and the inconvenience.

The certainty given by legislation would reduce administrative and transaction costs, possibly for developers, and certainly for planning authorities, infrastructure providers and consumers.

Because it would address the information asymmetry – consumers would now know that all new developments had fibre-ready infrastructure installed – this option would create a level playing field among developers.

It is not possible to say with any certainty how large the benefits of the legislation would be. If 5 per cent of developments which would not otherwise have installed fibre-ready infrastructure now did so, the cash saving in retrofitting costs, at $1300 a lot, is estimated at $12.8 million a year (see p 2). In addition, there would be savings in terms of inconvenience and disruption caused by retrofitting, as well as the other benefits mentioned above.

6. Consultation

There has been an extensive consultation process in relation to the implementation of the Government's fibre in new developments policy. As it is the stated policy goal to maximise the installation of fibre in new developments, this consultation has focussed on the most appropriate mechanism to make this happen, balancing all of the relevant considerations.

A detailed consultation paper was released on 29 May 2009 for public comment. This was followed up by face-to-face presentations to, and meetings with, stakeholders in all mainland States. Stakeholders elsewhere were contacted by phone. Over 80 submissions were received in response to the consultation paper[6].

In light of these consultations, a Fibre in New Developments Stakeholder Reference Group, comprising representatives of the affected groups, was established to provide views on implementation issues and to help disseminate information.

The Government's announcement in June 2010 that NBN Co would be the infrastructure provider of last resort in new developments, and that developers would be responsible for the cost of pit and pipe, was generally welcomed by stakeholders. So, too was the announcement in December of the detailed arrangements for implementing the policy, including the foreshadowing of legislation to require developers to install fibre-ready passive infrastructure.

In terms of the form a legislative approach should take, although there were some differences about the details, the Stakeholder Reference Group generally endorsed an approach along the lines of Option 3, legislation to require installation of fibre-ready passive infrastructure. Developers have some reservations about paying for the installation of fibre-ready infrastructure but appreciate that it is worthwhile in order to get fibre installed. State and territory and local governments support the idea of legislation provided they are not put in a position of enforcing a Commonwealth requirement. Infrastructure providers and telecommunications consumer groups strongly support such legislation.

7. Conclusion

Legislation to require developers to install fibre-ready passive infrastructure would impose little additional cost while providing considerable benefits for most developers, because they would install the infrastructure anyway. It would create a large benefit for some households and businesses and/or for future providers, especially NBN Co as provider of last resort, though it is impossible to say how large because it is not known how many developers, in the absence of the legislation, would fail to install the infrastructure.

The certainty and uniformity presented by legislation are likely to create savings in transaction and administrative costs for developers, consumers, future providers including NBN Co and state and territory planning authorities.

Legislation to require developers to install fibre-ready passive infrastructure (Option 3) is therefore the preferred option.

If possible, it would be useful to supplement Commonwealth legislation with changes to state and territory planning arrangements. These would capture non-corporations, who are outside the Commonwealth power. Further, as discussed above, telecommunications infrastructure is logically and conveniently dealt with in the

[6] The submissions are available at *http://www.dbcde.gov.au/broadband/national_broadband_network/fibre_in_greenfield_estates/*.

context of planning for all urban utilities. There would be advantages in terms of income dissemination and convenience, especially to developers but also to local planning authorities.

Thus the policy conclusion is a combination of Options 2 and 3.

Option 1 is not preferred because of the risk, albeit small, that it may result in fibre-ready passive infrastructure not being installed, leading to a significant cost impact.

8. Implementation and review

The proposed bill in effect requires developers who are constitutional corporations to install fibre-ready infrastructure in new developments. It works by placing penalties on the sale or lease of land unless the infrastructure is installed.

The bill applies only to projects where at least one other urban utility is installed. Within that, the requirement affects only projects that are in the long term fibre footprint. The bill provides for NBN Co to issue a statement saying that a real estate development project is not in the long term fibre footprint. NBN Co will publish such statements on its website.

The bill also requires that fixed line telecommunications infrastructure that is installed within the long term fibre footprint must be fibre-ready. This requirement applies to corporations and non-corporations.

The Commonwealth will continue to work with states and territories on complementary measures to facilitate the installation of fibre-ready infrastructure in new developments.

Once the legislation is passed the main action that will be required is a public awareness campaign to inform developers of their responsibilities and to inform buyers of land or premises of what to look for.

Where enforcement action is required, it would be initiated by an aggrieved party – probably a buyer or an infrastructure provider such as NBN Co, but possibly another body such as a local government – lodging a complaint with the Australian Communications and Media Authority. The Authority would then take action (if warranted) against the developer. Civil penalties under the Telecommunications Act would apply.

The legislation will be reviewed in five years' time. The review will be undertaken in consultation with carriers including NBN Co, developers, consumer groups, and state and territory planning bodies. It will assess whether a continuation of the legislation is required.

Summary of Impacts on Stakeholders

Who is affected	Option 1: Rely on market	Option 2: State and territory regulation	Option 3: Legislation
Infrastructure providers	• Incomplete coverage means later retrofitting costs • Uncertainty	• Coverage better than Option 1, but still incomplete so some retrofitting • May be inconsistent standards and specifications	• High level of coverage minimises retrofitting • Certainty of coverage • Consistency of arrangements
Developers and builders	• Most will install fibre-ready infrastructure • Those who do not install infrastructure save the cost, to the extent that consumers do not realise the lack	• A smaller number who do not install fibre save the cost, to the extent that consumers do not realise the lack • Administrative and transaction costs reduced by incorporation in planning system	• All developers who are corporations will install fibre-ready infrastructure • Cost will be recouped in value of land • Administrative and transaction costs reduced by certainty
Occupants of premises	• Where infrastructure is not installed, costly and inconvenient retrofitting • Transaction costs for all in finding out whether lot has infrastructure	• Coverage better than Option 1, but still incomplete so some retrofitting • Transaction costs for all in finding out whether lot has infrastructure	• Fibre easily installed later • Lower total installation cost • Saving in transaction costs
State and Territory governments	As now, some will include fibre-ready infrastructure in planning requirements	• Need to ensure uniform coverage of legislation or other arrangements • Possible need for additional resources	Little direct effect but provides certainty and a framework for planning arrangements.

ABBREVIATIONS

The following abbreviations are used in this explanatory memorandum:

ACCC:	Australian Competition and Consumer Commission
Access Arrangements Bill:	Telecommunications Legislation Amendment (National Broadband Network Measures—Access Arrangements) Bill 2011
ACMA:	Australian Communications and Media Authority
ACMA Act:	*Australian Communications and Media Authority Act 2005*
Act:	*Telecommunications Act 1997*
AIA:	*Acts Interpretation Act 1901*
Bill:	Telecommunications Legislation Amendment (Fibre Deployment) Bill 2011
CCA:	*Competition and Consumer Act 2010*
Companies Bill:	National Broadband Network Companies Bill 2011
FTTP:	Fibre-to-the-premises
LIA:	*Legislative Instruments Act 2003*
Minister:	Minister for Broadband, Communications and the Digital Economy
NBN:	national broadband network

NOTES ON CLAUSES

Clause 1 – Short title

Clause 1 provides that the Bill, when enacted, may be cited as the *Telecommunications Legislation Amendment (Fibre Deployment) Act 2011*.

Clause 2 – Commencement

Clause 2 of the Bill provides for the commencement of the Bill.

Clauses 1-3 of the Bill and any other provisions not covered in the table provided at subclause 2(1) will commence on the day on which the Bill receives the Royal Assent.

Part 1 of Schedule 1 to the Bill will commence at the start of the day after the Bill receives the Royal Assent, or 1 July 2011, whichever occurs later in time. This commencement timeframe is designed to ensure that industry will have sufficient further notice of the proposed new obligations and removes concerns about potential retrospective application. If the Bill has not yet commenced on 1 July 2011, Part 1 of Schedule 1 to the Bill will apply the day after the Bill receives the Royal Assent.

Part 2 of Schedule 1 to the Bill will commence either immediately after the commencement of Part 1 of Schedule 1 to the Bill or immediately after the commencement of Part 1 of Schedule 1 to the *Telecommunications Legislation Amendment (National Broadband Network Measures—Access Arrangements) Act 2011*, whichever occurs later in time. Item 16, Part 2 of Schedule 1 to the Bill proposes to repeal the definition of 'optical fibre lines' from proposed section 372ZC, and the definition of 'NBN corporation' from proposed section 372ZE respectively. The reason for this is that the Access Arrangements Bill contains an identical definition of 'optical fibre lines' and 'NBN corporation' to this Bill. Therefore if the Access Arrangements Bill is enacted, the definitions of 'optical fibre lines' and 'NBN corporation', as contained in the Bill, are not required.

Clause 3 – Schedule(s)

Clause 3 provides that each Act that is specified in a Schedule to the Bill is amended or repealed as set out in that Schedule and any other item in a Schedule has effect according to its terms. The Bill has one Schedule that will amend the Act.

Schedule 1 — Amendments

Part 1 — General amendments

Part 1 of Schedule 1 of the Bill makes a number of amendments to the Act to support the deployment of optical fibre and optical fibre-ready passive telecommunications infrastructure in specified real estate development projects.

Telecommunications Act 1997

Item 1 – Section 7

Item 1 inserts a definition of 'building lot' in section 7 by reference to the meaning given by proposed section 372Q. The definition of 'building lot' is discussed in the explanatory note for proposed section 372Q.

Item 2 – Section 7

Item 2 inserts a definition of 'building unit' in section 7 by reference to the meaning given by proposed section 372S. The definition of 'building unit' is discussed in the explanatory note for proposed section 372S.

Item 3 – Section 7

Item 3 inserts a definition of 'fibre-ready facility' in section 7 by reference to the meaning given by proposed section 372W. The definition of 'fibre-ready facility' is discussed in the explanatory note for proposed section 372W.

Item 4 – Section 7

Item 4 inserts a definition of 'fixed-line facility' in section 7 by reference to the meaning given by proposed section 372V. The definition of 'fixed-line facility' is discussed in the explanatory note for proposed section 372V.

Item 5 – Section 7

Item 5 inserts a definition of 'project area' in section 7 by reference to the meaning given by proposed section 372Q. The definition of 'project area' is discussed in the explanatory note for proposed section 372Q.

Item 6 – Section 7

Item 6 inserts a definition of 'real estate development project' in section 7 by reference to the meaning given by proposed section 372Q. The definition of 'real estate development project' is discussed in the explanatory note for proposed section 372Q.

Item 7 – Section 7

Item 7 inserts a definition of 'sell' in section 7, when used in relation to a building lot or a building unit, by reference to the meaning given to that term by proposed sections 372T and 372U respectively. The definition of 'sell' is discussed in the explanatory notes for proposed sections 372T and 372U.

Item 8 – Section 7

Item 8 inserts a definition of 'subdivision' in section 7 by reference to proposed section 372R. The definition of 'subdivision' is discussed in the explanatory note for proposed section 372R.

Item 9 – Subsections 22(1) and (4)

Subsection 22(1) provides that for the purposes of sections 20, 21 and 30 of the Act, 'the boundary of a telecommunications network' is to be ascertained in accordance with the regulations.

Subsection 22(4) provides for a default definition of 'the boundary of a telecommunications network' if there are no regulations in place for the purposes of sections 20, 21 and 30 of the Act.

Item 9 makes a consequential amendment to subsections 22(1) and (4), by adding references to proposed subsections 372B, 372C and 372V, which use the definition of the boundary of a telecommunications network.

Item 10 – After Part 20

Item 10 inserts proposed Part 20A into the Act. Proposed Division 2 of Part 20A contains provisions relating to the deployment of optical fibre in the project areas of real estate development projects which are specified in, or ascertained in accordance with, a legislative instrument made by the Minister (referred to henceforth as '**the optical fibre line requirement**').

Proposed Subdivision A of Division 3 of Part 20A also contains provisions relating to the installation of fibre-ready facilities in the project areas of specified real estate development projects (referred to henceforth as '**the fibre-ready facility requirement**').

Proposed Subdivision B of Division 3 of Part 20A imposes a restriction on the sale or lease of specified building lots and building units by constitutional corporations unless fibre-ready facilities are installed (referred to henceforth as '**the fibre-ready installation requirement**').

Proposed Subdivision C of Division 3 of Part 20A provides that NBN Co may issue statements about the non-installation of optical fibre lines.

Proposed Subdivision D of Division 3 of Part 20A provides for exemptions.

A third party access regime for fixed-line facilities is set out in proposed Division 4 of Part 20A.

Proposed Division 5 of Part 20A provides for exemptions for pending projects.

Proposed Division 6 of Part 20A provides for miscellaneous rules, including defining terms used throughout Part 20A.

Proposed Part 20A — Deployment of optical fibre etc.

Proposed Division 1 — Simplified outline

Proposed section 372A – Simplified outline

Proposed section 372A provides a simplified outline of proposed Part 20A to assist the reader.

Proposed Division 2 — Deployment of optical fibre lines

Proposed Division 2 of Part 20A provides for the deployment of optical fibre lines to specified building lots and building units.

Proposed section 372B - Deployment of optical fibre lines to building lots

Proposed section 372B sets out the general rule that where telecommunications lines (i.e. lines for the purpose of providing carriage services) are installed in specified real estate development projects that involve the subdivision of land, those lines must be optical fibre lines.

Proposed subsection 372B(1) limits the operation of proposed section 372B by providing that the section only applies to the installation of a line in the project area, or any of the project areas, for a real estate development project, if certain criteria set out at proposed paragraphs 372B(1)(a)-(g) are met. The purpose of the criteria set out at proposed subsection 372B(1) is to identify when fixed lines in specified new development projects are required to be optical fibre (including any conditions specified in a Ministerial instrument which are to be met). That is, the rule preventing the installation of lines that are not optical fibre only applies to particular lines that meet the specified criteria. Each criterion is described more fully below.

Proposed paragraph 372B(1)(a) limits proposed section 372B to real estate development projects that involve the subdivision of land. This would include, but not necessarily be limited to, developments in areas resulting from the release or rezoning of areas of land to allow for the commencement of new development projects. It would also include urban infill developments where an existing block of land is subdivided, or multiple contiguous existing blocks of land are subdivided, before redevelopment.

Proposed paragraph 372B(1)(b) provides that the rule in proposed subsection 372B(2) only applies to real estate development projects specified in, or ascertained in accordance with, a legislative instrument made by the Minister. The Minister would have the option of specifying real estate development projects individually, or by class (see subsection 13(3) of the LIA), or of nominating characteristics of projects to which the rule is to apply. It is intended that the Minister be conferred with a broad discretion as to how real estate development projects are specified or identified. For example, the Minister may make an instrument specifying real estate development projects by reference to the name, size, location, date of planning approval, proximity to existing infrastructure, number of lots, or estimated cost of providing FTTP infrastructure in a real estate development project.

Proposed paragraph 372B(1)(c) provides that the rule in proposed subsection 372B(2) applies only to lines that have a particular intended use, namely, where the line is wholly or primarily used or for use to supply carriage services to end-users or prospective end-users in building units. This is to make it clear that the rule is directed at the provision of fibre lines to premises occupied by end-users, not to other facilities, for example, mobile base stations or monitoring equipment. In the case of such facilities, it is intended that the party operating the facility can choose the type of line used to connect the facility.

Proposed paragraph 372B(1)(d) clarifies that the building units in question are building units constructed, or proposed to be constructed, on the building lots mentioned in proposed paragraph 372B(1)(a).

The cumulative effect of these criteria is to make it clear that the lines in question are physical fixed lines, wholly or primarily used to deliver services to end-users or prospective end-users in building units that have been or will be constructed on the building lots. For instance, the criteria would cover situations where a line is connected to individual premises (a building unit) in a development, such as a dwelling or a place of business, and an end-user in those premises uses that line, which they would do by means of customer equipment (e.g. telephone, computer, wireless router etc). There may be customer cabling (see section 20 of the Act) between the customer equipment and the line in question. (Note, the rule in proposed subsection 372B(2) does not apply to customer cabling: see section 20 of the Act, and proposed paragraph 372B(1)(e).)

By way of counter-example, the requirement in proposed subsection 372B(2) does not apply to a line that may be installed within a real estate development project leading to a mobile phone tower or monitoring equipment. In that case, the line in question is not wholly or primarily for use to supply carriage services to end-users or prospective end-users in building units, because the line is not connected to the building unit in which the end-users are located.

Proposed paragraph 372B(1)(e) provides that the prohibition on installation of non-fibre lines in a real estate development project in proposed subsection 372B(2) does not apply to a line on the customer side of the boundary of a telecommunications network (section 22 of the Act defines the 'boundary of a telecommunications network'). That is, proposed subsection 372B(2) does not apply in relation to 'customer cabling', as that term is defined in subsection 20(4) of the Act. An example

is a line that connects a telephone or a computer to equipment like an optical network terminal connecting the home to the fibre network.

The prohibition on installation of non-fibre lines in specified developments does not apply to private networks. The optical fibre line requirement does not apply unless a line is actually installed, and such a line is used (or intended for use) to supply a carriage service to the public (proposed paragraph 372B(1)(f)). Proposed section 372ZA provides an explanation of 'supply to the public' for the purposes of proposed Part 20A. Notably, the effect of proposed paragraph 372B(1)(f) is that the rule at proposed subsection 372B(2) will not apply to the installation of a line for the private use of the line owner. This means, for example, that where the users (or intended users) of a line are all within the immediate circle (see section 23 of the Act) of the owner of the line, then the rule in proposed subsection 372B(2) will not apply. Proposed subsection 372B(2) therefore does not prevent the installation of non-fibre lines if those lines are intended only for private use.

The rule in proposed subsection 372B(2) will apply only to lines installed after the commencement of proposed section 372B (proposed paragraph 372B(1)(g)). This is to clarify that the optical fibre line requirement does not apply retrospectively.

Proposed subsection 372B(2) provides that, where the criteria specified in proposed subsection 372B(1) are met, a person must not install a line in the project area, or any of the project areas, for a real estate development project, unless it is an optical fibre line (proposed paragraph 372B(2)(a)); and any conditions specified in a Ministerial instrument under proposed subsection 372B(4) are satisfied (proposed paragraph 372B(2)(b)).

The rule in proposed subsection 372B(2) is intended to apply so that in real estate development projects where telecommunications lines are deployed, optical fibre (rather than copper or other non-fibre fixed line) is used throughout the development: i.e. deployment of optical fibre should occur from the outer boundary of the real estate development project to the property boundary and then from the property boundary to the network boundary point (see section 22 of the Act) for the building unit on the building lot.

The ability for the Minister to specify in a legislative instrument conditions that must be satisfied (proposed paragraph 372B(2)(b) and proposed subsection 372B(4)) is intended to enable the specification of the characteristics, features, performance requirements, methods of installation or other matters relating to the optical fibre infrastructure to be installed in a project area, in both general terms (e.g. necessary outcomes) and, if required, to a high degree of specificity (e.g. appropriate standards). Amongst other things, it is envisaged that specified conditions could, if necessary, cover such matters as data speeds, other service features, quality of service and reliability. Conditions could be specified, if necessary, by reference to external documents such as industry codes and standards or other specifications by virtue of section 589 of the Act.

Section 589 of the Act provides that legislative instruments made under the Act (including potentially a legislative instrument made under proposed subsection 372B(4)), can make provision in relation to a matter or matters by adopting

or incorporating matter contained in any other instrument or writing, as in force at a particular time, or as in force from time to time. In reliance on section 589, the Minister could therefore specify conditions in a legislative instrument by reference to technical standards determined by an industry body, or, if necessary, by a particular carrier (e.g. an NBN corporation), that relate to the deployment of optical fibre networks, as those standards are in force from time to time.

Different types of conditions could be specified in relation to different types of real estate development project, in reliance on subsection 33(3A) of the AIA. For example, the Minister may specify certain conditions that are to apply to all real estate development projects, and particular conditions that are only to apply to non-residential real estate development projects, or certain conditions that are to apply to residential real estate development projects of a particular character. For example, the capacity to provide higher data speeds may be required for optical fibre lines to be provided to schools, community facilities or businesses as opposed to residential properties.

It is envisaged that such conditions as may be specified under proposed paragraph 372B(2)(b) and proposed subsection 372B(4) would be directed at delivering a high level of consistency with end-user experiences available on the national broadband network (referred to henceforth as the NBN). This would provide guidance to infrastructure providers and assurance to developers, property buyers, local councils and others that appropriate FTTP infrastructure was being installed.

Proposed subsection 372B(3) provides that, for the purposes of proposed paragraph 372B(1)(c), it does not matter if the end-users or potential end-users are not identifiable, as may often be the case when a building unit is yet to be constructed on a building lot, or a building unit is not occupied.

Proposed subsection 372B(5) provides that a legislative instrument made by the Minister under proposed paragraph 372B(1)(b) may confer functions or powers on the ACMA. For example, an instrument under proposed paragraph 372B(1)(b) may provide the ACMA with a decision making role in determining whether or not a real estate development project is subject to the rule in proposed subsection 372B(2). As a further example, such an instrument may empower the ACMA to make decisions about individual real estate development projects that are subject to the rule in proposed subsection 372B(2).

Proposed subsection 372B(6) contains ancillary contravention provisions.

Proposed subsection 372B(7) provides that proposed subsections 372B(2) and (6) are civil penalty provisions. This means if a person contravened subsection 372B(2) or 372B(6)—for instance if a person installed a line that is not optical fibre or does not meet the specified conditions—they would be subject to the pecuniary penalty provisions in Part 31 of the Act. Subsection 570(1) of the Act states that if the Federal Court is satisfied that a person has contravened a civil penalty provision, the Court may order the person to pay to the Commonwealth such pecuniary penalty, in respect of each contravention, as the Court determines to be appropriate.

The pecuniary penalty payable under subsection 570(1) by a body corporate is not to exceed $250,000 for each contravention. The pecuniary penalty payable under subsection 570(1) by a person other than a body corporate is not to exceed $50,000 for each contravention (see subsection 570(3)). Proceedings for the recovery of a pecuniary penalty under section 570 may be commenced by the Minister, the ACCC or the ACMA.

Proposed section 372C - Deployment of optical fibre lines to building units

Proposed section 372C provides the general rule that non-fibre lines must not be installed in specified real estate development projects that involve the construction of buildings. This is in contrast to proposed section 372B which applies where a development involves both the subdivision of land and the subsequent construction of buildings on the land.

Proposed subsection 372C(1) limits the operation of proposed section 372C by providing that the section only applies to the installation of a line in the project area, or any of the project areas, for a real estate development project, if certain criteria set out at proposed paragraphs 372C(1)(a)-(f) are met. The purpose of the criteria set out at proposed subsection 372C(1) is to identify when fixed lines in specified new development projects of this type are required to be optical fibre and to meet any conditions specified in a Ministerial instrument. That is, the rule preventing the installation of lines that are not optical fibre only applies to particular lines that meet the criteria described below.

Proposed paragraph 372C(1)(a) limits proposed section 372C to real estate development projects that involve the construction of one or more building units. As indicated under proposed section 372S, a 'building unit' includes buildings for single occupation or use, units under a strata title (or similar) system and parts of buildings that are for separate lease. It would also cover multi-premises leasehold or freehold buildings such as shopping centres. The construction of a building unit on a vacant lot, or a 'knock-down and rebuild' project could potentially fall under proposed paragraph 372C(1)(a).

Proposed paragraph 372C(1)(b) provides that the rules in proposed section 372C apply only to real estate development projects specified in, or ascertained in accordance with, a legislative instrument made by the Minister. The Minister would have the option of specifying real estate development projects individually or by class (see subsection 13(3) of the LIA), or of nominating characteristics of projects to which the rule is to apply. For instance, and as under proposed section 372B, the Minister could make an instrument specifying real estate development projects by reference to the name, area, location, date of planning approval, proximity to existing infrastructure, number of premises, or estimated cost of providing FTTP infrastructure in a real estate development project, or by exclusion.

The remaining criteria set out in paragraphs 372C(1)(c)-(f) are almost identical to the criteria set out in proposed paragraphs 372B(1)(c)-(g). See the explanatory notes for proposed section 372B for an explanation of those criteria. Proposed paragraph 372B(1)(d) has not been replicated in proposed section 372C, as it is not

required: that paragraph refers to a building being constructed on a 'building lot', which is a term that is not used in proposed section 372C.

Proposed subsection 372C(2) provides that, where a line meets the criteria specified in proposed subsection 372C(1), a person must not install a line in the project area, or any of the project areas, for a real estate development project, unless it is an optical fibre line (proposed paragraph 372C(2)(a)) and any conditions specified in a legislative instrument made by the Minister under proposed subsection 372C(4) are satisfied (proposed paragraph 372C(2)(b)).

As is the case under proposed section 372B, the ability for the Minister to specify in a legislative instrument conditions that must be satisfied (proposed paragraph 372C(2)(b) and proposed subsection 372C(4)) is intended to enable the specification of the characteristics, features, performance requirements, methods of installation or other matters relating to the optical fibre infrastructure to be installed in a project area in both general terms (e.g. necessary outcomes) and, if required, to a high degree of specificity (e.g. appropriate standards).

Proposed subsection 372C(3) provides that for the purposes of proposed paragraph 372C(1)(c) it does not matter if the end-users or potential end-users are not identifiable (as may be the case if the relevant building unit is not sold until after construction has been completed).

Proposed subsections 372C(5) to (7) mirror the provisions in proposed subsections 372B(5) to (7); however, they apply in respect of a real estate development project under proposed subsection 372C(1) (which deals with the construction of one or more building units).

Proposed section 372D - Exemptions—Ministerial instrument

Proposed subsection 372D relates to exemptions from the optical fibre line requirement in sections 372B and 372C respectively.

Subsection 372D(1) allows the Minister to exempt conduct specified in, or ascertained in accordance with, a legislative instrument from the scope of either or both of proposed subsections 372B(2) and 372C(2). Proposed subsection 372D(2) confirms that an exemption under proposed subsection 372B(1) may be unconditional or subject to such conditions (if any) as are specified in the exemption.

For example, subsections 372D(1) and (2) could allow the Minister to exempt from the scope of subsections 372C(2), the installation of copper lines to building units in a project area within a real estate development project, and such an exemption could be conditional or unconditional.

Proposed subsection 372D(3) provides that a legislative instrument made by the Minister under proposed subsections 372D(1) may confer functions or powers on the ACMA. The purpose of this provision is to enable the Minister to provide the ACMA (if necessary) with a decision making role in determining whether or not conduct is exempt from the rule in proposed subsections 372B(2) and/or 372C(2) respectively.

For instance, if such an instrument provides an exemption where particular equipment requires a copper line, the ACMA could be required to certify this.

Proposed Division 3 — Installation of fibre-ready facilities

Proposed Subdivision A – Installation obligations

Proposed Subdivision A of Division 3 of Part 20A relates to the installation of fibre-ready fixed-line facilities in real estate development projects that involve building lots and building units.

The fibre-ready facility requirement is intended to ensure that where passive telecommunications infrastructure is installed at the time of the subdivision and/or construction it is fibre-ready, so that a carrier (e.g. an NBN corporation) will be able to install optical fibre lines at a later date quickly, at lower cost and with minimum inconvenience to the community. As outlined above, proposed section 372W defines what is a fibre-ready facility. The requirement could apply to any type of passive infrastructure, depending on the content of a legislative instrument made under proposed section 372W. This could include appropriate underground pipes, conduit, or poles, in the case of above-ground installation, where this is necessary due to terrain or is otherwise accepted practice.

Where a real estate development project is subject to the fibre-ready facility requirement under proposed Subdivision A of Division 3 and not the optical fibre line requirement under proposed Division 2, there is nothing to prevent a developer from deploying optical fibre lines in that project, so long as those lines comply with all applicable industry codes and/or standards.

Some key concepts used in proposed Division 2 and proposed sections 372E and 372F of Division 3 are the same; however there are also significant differences.

Proposed section 372E - Installation of fibre-ready facilities—building lots

Proposed section 372E sets out the general rule that where fixed-line facilities are installed in a real estate development project that involve the subdivision of land, those facilities must be fibre-ready facilities and satisfy any relevant conditions specified in a ministerial instrument (i.e. 'the fibre-ready facility requirement').

Proposed subsection 372E(1) limits the operation of proposed section 372E by providing that the rule in proposed subsection 372E(2) only applies to the installation of a fixed-line facility in the project area or any of the project areas for a real estate development project if the criteria in paragraphs 372E(1)(a), (b) and (c) are satisfied. Those criteria are:

- the project involves the subdivision of one or more areas of land into building lots (proposed paragraph 372E(1)(a)); and

- the installation occurs after the commencement of proposed section 372E (proposed paragraph 372E(1)(b)); and

- sewerage services, electricity or water, is, are, or will be supplied to those lots (proposed paragraph 372E(1)(c)).

The criteria that are set out in proposed paragraphs 372E(1)(a) and (b) are almost identical to the criteria set out in proposed paragraphs 372B(1)(a) and (g) respectively.

Proposed paragraph 372E(1)(c) limits the application of the rule in proposed subsection 372E(2) to projects where sewerage services, electricity or water is, or are supplied to those building lots. The purpose of this provision is to target the fibre-ready facility requirement to project areas where one or more basic utilities is supplied. It is possible, however, that some project areas in which one or more of the specified utilities are supplied may nevertheless be outside the expected long-term optical fibre line coverage ('the long term fibre footprint') of the NBN. Proposed section 372J therefore gives NBN Co the ability to issue a statement that it does not intend to provide fibre in a particular locality and if it issues such a statement, this would make the rule in proposed subsection 372E(2) inapplicable (see proposed subsection 372E(3)).

The corollary of the criterion in proposed paragraph 372E(1)(c) is that building lots in project areas that are not supplied with any of the specified utilities will not be subject to the fibre-ready facility requirement in proposed section 372E (e.g. in very remote parts of Australia). Rather, it is envisaged that real estate development projects which are not supplied with one or more of the specified utilities will not be required to have fibre-ready infrastructure installed, and that a connection to the NBN will be by either wireless or satellite.

Proposed section 372Z provides for the definition of 'supply' of these basic utilities to projects for the purposes of proposed Part 20A. See the explanatory notes for proposed section 372Z for an explanation of those definitions.

Proposed subsection 372E(2) provides that a person must not install a fixed-line facility in the project area, or any of the project areas, for a real estate development project, unless:

- the facility is a 'fibre-ready facility' (proposed paragraph 372E(2)(a)); and
- any conditions specified in a Ministerial instrument under proposed subsection 372E(4) are satisfied (proposed paragraph 372E(2)(b)).

As is the case under proposed sections 372B and 372C, the Minister will have the ability to specify in a legislative instrument conditions that must be satisfied (proposed paragraph 372E(2)(b) and proposed subsection 372E(4)) in relation to the fibre-ready facility. Like those earlier provisions, this is intended to enable the specification of the characteristics, features, performance requirements, method of installation or other matters relating to the fixed-line infrastructure to be installed in a project area, in both general terms (e.g. necessary outcomes) and, if required, to a high degree of specificity (e.g. appropriate standards).

Examples of possible conditions for fixed-line facilities that could be specified in a legislative instrument by the Minister under proposed paragraph 372E(2)(b) include the design of the passive network (e.g. the location of ducting, plinths and pits and the

angle of ducting), the characteristics of components (e.g. the minimum internal diameter for ducts and conduits, the size of pits, the strength and capacity of poles) and installation and operational requirements (e.g. ensuring ducts are not blocked, the use of sub-ducting). It is envisaged, and considered preferable, for these matters to be addressed in industry codes and/or technical specifications determined by the industry. However, in the absence of codes or standards determined by an industry body, the Minister could use this power to specify relevant requirements, including potentially by reference to the specifications of a particular carrier (e.g. an NBN corporation). The intention would be to ensure that the fibre-ready facilities that are installed in these developments will permit fibre to be installed at a later time in a quick and efficient manner, at lower cost and with minimum inconvenience to the community.

The Minister could also make an instrument under proposed paragraph 372W(b) declaring that certain fixed-line facilities are 'fibre-ready facilities' by reference to relevant codes or standards determined by an industry body, or the specifications of a particular carrier (e.g. an NBN corporation)—see section 589 of the Act, described in detail in the explanatory note for proposed section 372B above.

Proposed subsection 372E(3) provides that the fibre-ready facility requirement expressed in proposed subsection 372E(2) does not apply if NBN Co has issued a statement under proposed section 372J stating that neither it nor any other NBN corporation has installed, is installing, or proposes to install, optical fibre lines in the project area, or any of the project areas, for the project. The purpose of this provision is to provide a mechanism by which to confirm that a person is not subject to the fibre-ready facility requirement because at that point in time the project is not in a locality that is expected to be part of NBN Co's long term fibre footprint. Nothing prevents a person installing fibre-ready facilities if NBN Co has issued a statement under proposed section 372J. See the explanatory notes for proposed section 372J for an explanation of the issuance of statements by NBN Co.

Proposed subsection 372E(5) contains ancillary contravention provisions.

Proposed subsection 372E(6) provides that proposed subsections 372E(2) and (5) are civil penalty provisions. Proposed subsection 372E(6) mirrors proposed subsection 372B(7).

Proposed section 372F - Installation of fibre-ready facilities—building units

Proposed section 372F largely mirrors proposed section 372E, in that it sets out the fibre-ready facility requirement that where fixed-line facilities are installed in specified real estate development projects that involve the construction of one or more building units, rather than subdivision projects expressed in proposed paragraph 372E, those facilities must be fibre-ready.

Proposed paragraph 372F(1)(a) limits the operation of proposed section 372F in part, by providing that the section only applies to the installation of a fixed-line facility in the project area or any of the project areas for a real estate development project that involves the construction of one or more building units on one or more areas of land.

Proposed paragraph 372F(1)(a) is substantially similar to proposed paragraph 372C(1)(a).

Proposed paragraph 372F(1)(b) is substantially similar to proposed paragraph 372C(1)(f), except that it relates to building units.

Proposed paragraph 372F(1)(c) mirrors proposed paragraph 372E(1)(c). See the explanatory notes for proposed sections 372C and 372E for an explanation of those rules.

Proposed subsection 372F(2) to (6) largely mirror proposed subsections 372E(2) to (6) respectively. The material difference is that proposed section 372F refers to construction projects, while proposed section 372E refers to subdivision projects.

Proposed Subdivision B – Sale of building lots and building units

Proposed Subdivision B of Part 20A applies to constitutional corporations which propose to sell or lease building lots and building units. Unlike proposed Subdivision A (which provides that where fixed-line facilities are installed, they must be fibre-ready facilities), this Subdivision sets out the fibre-ready installation requirement which is intended to encourage developers to install fibre-ready facilities in their developments. In effect the limitation on sale or lease requirement requires the installation of fibre-ready facilities as a precondition to sale or lease of the specified developments. If a sale or lease proceeds without fibre-ready facilities being installed, the transaction would not be invalid but civil penalties could be sought.

The objective of this Subdivision is to ensure that fibre-ready facilities are installed in new developments so as to enable subsequent fibre rollout to occur quickly, more economically and with less disruption than a full retrofitting.

Constitutional corporations are targeted in reliance on the constitutional corporations power. A corporation for this purpose includes a proprietary company (often indicated by 'Pty Ltd' at the end of the organisation's name), a not-for-profit association incorporated under State or Territory incorporated associations legislation (usually indicated by 'Inc' at the end of the organisation's name) and a statutory authority incorporated under special legislation.

The general rule is that constitutional corporations will not be permitted to sell or lease those lots or units in the particular project area, unless there are fibre-ready facilities installed within or in proximity to the lots or units.

The prohibition does not apply if:

- there is an exemption arising either from:
    - a legislative instrument made by the Minister under proposed section 372K; or
    - a contract for the installation of lines or fixed-line facilities being in place, or the installation of lines or fixed-line facilities having commenced, or civil works otherwise having commenced in a development as provided for under proposed section 372P; or

- a statement has been issued by NBN Co under proposed section 372J (see the commentary below) in respect of the particular project.

The Bill does not prohibit or otherwise restrict the 'off-the-plan' sale or lease of lots and/or units. This is because, generally, when consumers buy undeveloped blocks of lands from developers, the transfer of the property title (generally) is effected only once the basic utilities are installed. The rationale behind this industry practice is twofold: namely, many state laws and council by-laws insist that the civil works for basic utilities must occur before the title of land passes, and secondly, as a consumer safeguard.

Proposed section 372G relates to the sale or lease of building lots or building units involving the subdivision of land. Proposed section 372H relates to the sale or lease of other projects.

Proposed section 372G - Sale of building lots and building units—subdivisions

Proposed section 372G provides the fibre-ready installation requirement with respect to subdivision projects.

Proposed subsection 372G(1) sets out each of the criteria for the application of the rules in proposed section 372G.

Proposed paragraph 372G(1)(a) is substantially similar to proposed paragraph 372B(1)(a) with both relating to subdivisions.

The purpose of proposed paragraph 372G(1)(b) is to make it clear that proposed section 372G applies to projects where there is, is to be, or it would be reasonable to expect that one or more building units would be constructed and made available for sale or lease. For example, if a large area of land was subdivided into lots for the purpose of constructing multiple dwellings for sale, paragraph 372G(1)(b) would be satisfied. Proposed sections 372T and 372U provide an explanation of when a building lot or building unit respectively is made available for 'sale'.

Proposed paragraphs 372G(1)(c) and (d) make it clear with respect to building lots and/or units that the requirement to install fibre-ready facilities is targeted at projects where it is expected that optical fibre lines will eventually be deployed by reference to the availability and supply of other basic utilities as described in proposed section 372Z.

Proposed subsection 372G(2) provides the general rule that a constitutional corporation must not, in the course of carrying out, or carrying out an element of, the project sell or lease the building lot unless a fibre-ready facility is installed in proximity to the building lot. The purpose of this fibre-ready installation requirement is to encourage constitutional corporations who subdivide land to install appropriate passive infrastructure in the subdivided lots, so that optical fibre lines can be installed later easily and cheaply.

Proposed subsection 372G(3) mirrors proposed subsection 372E(3). Proposed subsections 372G(4) and (5) largely mirror proposed subsections 372G(2) and (3), except that the rules apply in circumstances specified in subparagraph 372G(1)(b)(ii).

Proposed subsection 372G(6) provides ancillary contravention provisions. A contravention of subsections 372G(2), (4) or (6) is a civil penalty provision under proposed subsection 372G(7). For a detailed explanation of the civil penalty provisions, see the explanatory notes for proposed section 372B.

Proposed subsection 372G(8) is to provide an abundance of caution and clarify that a contravention of the rules in proposed subsection 372G(2) and/or subsection 372G(4) does not affect the validity of any transaction. In other words, if a person contravenes proposed subsection 372G(2) and/or subsection 372G(4), the related sale or lease transaction is not invalidated. The constitutional corporation which had actually sold or leased the building lot or unit, however, would be subject to the civil penalty provision in proposed subsection 372G(7) .

Proposed section 372H - Sale of building units—other projects

Proposed subsection 372H(1) provides that the fibre-ready installation requirement for other projects applies to a real estate development project only if all the criteria set out at proposed paragraphs 372H(1)(a) and (b) (relating to the construction of building units but not including subdivision) are met.

The purpose of the criteria set out at proposed subsection 372H(1) is to identify the types of real estate development projects whereby constitutional corporations are required to deploy fibre-ready facilities and be subject to penalties if they attempt to sell or lease land without it.

Proposed subparagraph 372H(1)(a)(i) is substantially similar to proposed paragraph 372F(1)(a), except that it relates to other projects. These are essentially construction projects not involving subdivision.

The purpose of proposed subparagraph 372H(1)(a)(ii) is to apply the rule in proposed subsection 372H(2) to construction projects that involve the making available of building units for sale or lease, but do not involve subdivision; that is, they are on land that is already subdivided. For example, if a project simply involved the construction of one building unit or a multi-apartment complex on existing land, proposed subparagraph 372H(1)(a)(ii) would be satisfied providing the individual building units (apartments) would be made available for sale and/or lease.

Proposed paragraph 372H(1)(b) adds the further requirement to proposed paragraph 372H(1)(a) that basic utilities are to be provided to these building units. Proposed paragraph 372H(1)(b) mirrors proposed paragraph 372F(1)(c).

Proposed subsection 372H(2) provides the fibre-ready installation requirement and mirrors proposed subsection 372G(4), except that it applies in respect of construction projects.

Proposed subsection 372H(3) is substantially similar to proposed subsection 372G(5); and proposed subsections 372H(4) to (6) largely mirror proposed subsections 372G(6) to (8) respectively.

Proposed Subdivision C—NBN Co may issue statement about the non-installation of optical fibre lines

Proposed Subdivision C of Division 3 sets out a process by which NBN Co, by issuing a written statement, can provide clarity as to whether a particular real estate development project will be outside its long term fibre footprint. If a project is outside the footprint, it would therefore not be necessary for fibre-ready facilities to be installed in that project area. In issuing such statements, it is envisaged that NBN Co will take a forward-looking perspective, in recognition that its long term fibre footprint will be dynamic, changing over time in response to changes in demographics or other matters.

Proposed section 372J - NBN Co may issue statement about the non-installation of optical fibre lines

Proposed subsection 372J(1) enables NBN Co to issue a written statement to the effect that neither it nor any other NBN corporation has installed, is installing, or proposes to install optical fibre lines in the project area, or any of the project areas, for a specified real estate development project – in effect, that the project area is outside the NBN long term fibre footprint.

The purpose of this provision is to enable a person (such as a developer) to enquire whether or not they will be subject to the fibre-ready facility requirement set out in proposed Subdivision A of Division 3 and, for constitutional corporations, the fibre-ready installation requirement set out in proposed Subdivision B of Division 3 of Part 20A. This provision provides a process by which developers can seek clarity on whether their projects may be subject to these rules.

It is expected that NBN Co will provide advice to developers about its long term fibre footprint, so that fibre-ready facilities are not built in project areas where there is little likelihood of their actually being used by NBN Co or other superfast telecommunications network providers. (If fibre is to be deployed by another provider in an area where NBN Co has stated it does not intend to install fibre, the provision of passive infrastructure would be a contractual matter between the provider and the developer.)

Proposed paragraph 372J(2)(a) makes it clear that persons (in particular developers) can request NBN Co to provide a statement to the effect described in proposed subsection 372J(1). For example, it is envisaged that there may be persons in some remote areas with only one utility, say electricity, who may like certainty as to whether their real estate development project is expected to receive optical fibre lines and they need to install fibre-ready facilities.

As it is expected that NBN Co will provide information to the public about areas where it is certain that no NBN corporation will deploy optical fibre lines as part of the rollout of the NBN, proposed paragraph 372J(2)(b), which provides for NBN Co to provide information on its own initiative, has been included. For instance, NBN Co

has already indicated that it expects seven per cent of premises in Australia will be serviced by wireless or satellite technologies, rather than optical fibre lines.

Proposed subsection 372J(3) clarifies that a statement issued under proposed subsection 372J(1) is not a legislative instrument for the purposes of the LIA as it is not legislative in character. Proposed subsection (3) is merely declaratory. A statement issued by NBN Co in accordance with these requirements is intended to provide guidance to the public namely, developers.

It is intended that persons can rely on a statement issued at a particular time by NBN Co under proposed section 372J about the non-installation of fibre in respect of a project area for the entire duration of the project and on an ongoing basis. This is the case even if the NBN Co's long term fibre footprint subsequently changes. Equally, however, given NBN Co's long term fibre footprint may change, NBN Co may subsequently refuse to issue a statement in relation to a project in the same locality, on the basis it now envisages fibre will be installed in that area.

Proposed section 372JA - Register of Statements about the non-installation of optical fibre lines

Proposed section 372JA provides an obligation on NBN Co to maintain a register of all statements issued in accordance with proposed subsection 372J(1). NBN Co must maintain the register by electronic means; and the register is to be made available for inspection on NBN Co's website.

The purpose of this register is to provide transparent information to the public. Any person can therefore ascertain whether a statement has been issued with respect to a project area, or project areas, within their development. This is designed to enable persons such as developers and their customers to ascertain whether the fibre-ready facility requirement and, for constitutional corporations, the fibre-ready installation requirement, apply in relation to a particular project.

As NBN Co is a carrier, a standard carrier licence condition imposed is that NBN Co must comply with the Act (see clause 1 of Schedule 1 to the Act). Accordingly, NBN Co would be under an obligation to maintain the register under proposed section 372JA.

Proposed Subdivision D—Exemptions

The proposed arrangements to require the installation of fibre-ready facilities and other fibre-related infrastructure carry potentially significant obligations. At the same time they are being put in place in a marketplace which is inherently complex and undergoing significant change. As such, the Bill provides for flexibility in the implementation of the arrangements through the use of exemption powers in Subdivision D of Division 3 in relation to the fibre-ready facility requirement and/or the fibre-ready installation requirement.

Proposed section 372K - Exemptions – Ministerial instrument

Proposed subsection 372K(1) enables the Minister, by legislative instrument, to exempt real estate development projects from:

- the fibre-ready facility requirement expressed in section 372E and/or 372F (proposed paragraphs 372K(1)(c) and (d)); and
- the fibre-ready installation requirement for constitutional corporations under proposed sections 372G and 372H (proposed paragraphs 372K(1)(e) and (f)).

These exemptions could be used, for example, to exempt a project that might still be receiving one or more basic utilities outside the proposed long-term coverage of the rollout of the NBN by an NBN corporation. Section 589 of the Act would enable the Minister to incorporate by reference coverage maps or other guidance prepared by an NBN corporation and the like to specify or ascertain exempt projects.

The proposed subsection 372K(1) would also allow the Minister to permit the installation of fixed-line facilities other than fibre-ready facilities where appropriate. For example, if fibre-ready facilities are already in place other fixed-line facilities could be permitted (e.g. a dual provisioning approach) as the fibre-ready requirements would already have been met and any penalty for not installing fibre-ready facilities need not arise.

The Minister would be able to specify such exemptions either individually, or by class (see subsection 13(3) of the LIA).

Proposed subsection 372K(2) clarifies that an exemption under proposed subsection 372K(1) may be unconditional or subject to such conditions (if any) as are specified in the exemption. For example, an exemption could be applied if a development or class of developments is clearly beyond the NBN Co long term fibre footprint or the development project is of a temporary nature or of a limited size.

Proposed subsection 372K(3) is similar to subsection 372K(1), except that it relates to conduct specified or ascertained in accordance with an instrument for the purposes of proposed subsection 372E(2) and/or proposed subsection 372F(2).

Proposed subsection 372K(4) is similar to proposed subsection 372K(2), except that it relates to conduct referred to in proposed subsection 372K(3), rather than a real estate development project referred to in proposed subsection 372K(1).

Proposed subsection 372K(5) enables the Minister, by legislative instrument, to specify that a building lot is exempt from the fibre-ready installation requirement in specified developments.

Proposed subsection 372K(6) is in substantially similar terms to proposed subsections 372K(2) and (4), except that it applies to building units.

Proposed subsection 372K(7) is similar to proposed subsection 372K(5), except that it relates to building units specified in or ascertained in accordance with the instrument

from the rule in proposed subsection 372G(4) and/or proposed subsection 372H(2) relating to the installation of fibre-ready facilities.

Proposed subsection 372K(8) mirrors proposed subsection 372K(6), except that it relates to an exemption under proposed subsection 372K(7) concerning building units, rather than subsection 372K(5) which relates to building lots.

Proposed subsection 372K(9) provides that an instrument under subsection (1), (3), (5) or (7) may confer functions or powers on the ACMA. For example, an exemption instrument could provide for the ACMA to determine whether specified circumstances under which an exemption was to operate (such as remoteness or that a locality was outside NBN Co's long term fibre footprint) were applicable.

Proposed subsection 372K(9) mirrors proposed subsection 372B(5).

Proposed Division 4 — Third party access regime

Proposed Division 4 of Part 20A provides a framework for carriers to seek access to non-carrier fixed-line facilities with a view to supporting the rollout of optical fibre. Such facilities may be owned, for example, by developers or councils. The provision of access could be commercially negotiated or failing agreement, arbitrated by an agreed arbitrator or the ACCC as the default arbitrator. This model mirrors the regime in clauses 35-37 of Part 5 of Schedule 1 of the Act which provides for carrier access to the underground facilities of other carriers.

The Division also allows the Minister to give exemptions using a legislative instrument. Provision is also made for the Minister to confer functions or powers on the ACCC in relation to an exemption.

Proposed section 372L - Third party access regime

Proposed subsection 372L(1) provides that the third party fixed-line access regime applies to fixed-line facilities in Australia if:

- the installation occurs after the commencement of proposed section 372L (proposed paragraph 372L(1)(a)); and
- the facility is owned or operated by a person other than a carrier (proposed paragraph 372L(1)(b)).

'Fixed line facility' is defined in proposed section 372V.

The term 'Australia' is defined in section 7 of the Act and it is intended to refer to the six States of Australia, the Australian Capital Territory, the Northern Territory, the Territory of Norfolk Island, The Territory of Cocos (Keeling) Islands and the Territory of Christmas Island.

The proposed regime does not apply to fixed-line facilities which were installed before the proposed new regime commences.

The proposed regime will allow a carrier to seek access to a fixed-line facility owned or operated by third parties, such as a developer, utility, council or private property owner.

Proposed subsection 372L(2) sets out a general rule which requires the owner or the operator of a fixed-line facility, if requested to do so by a carrier, to give the carrier access to that facility.

Proposed subsection 372L(3) provides that the owner or operator of a fixed-line facility is not required to comply with the request unless:

- the access is provided for the sole purpose of enabling the carrier to provide facilities and carriage services (proposed subparagraph 372L(3)(a)(i)); or
- to establish its own facilities (proposed subparagraph 372L(3)(a)(ii)); and
- the carrier gives the owner or operator of the facility reasonable notice that the carrier requires access (proposed paragraph 372L(3)(b)).

Proposed subsection 372L(4) provides that an owner or operator of the facility is not required to comply with proposed subsection 372L(2) in relation to the facility if there is in force a written certificate issued by the ACCC stating that, in the ACCC's opinion, compliance with proposed subsection 372L(2) in relation to the facility is not technically feasible. This provision sets out the powers of the ACCC to issue a certificate to the owner or operator of a fixed-line facility exempting it from the third party access obligation, if the facility cannot readily offer access to third parties.

Proposed subsection 372L(5) sets out the factors which the ACCC must consider before deciding to issue a certificate under proposed subsection 372L(4). The factors are:

- whether compliance is likely to result in significant difficulties of a technical or engineering nature (proposed paragraph 372L(5)(a)) — for example, for an underground facility, the conduit might be too small to accommodate additional cabling; and
- whether compliance is likely to result in a significant threat to the health or safety of persons who operate, or work on, the facility (proposed paragraph 372L(5)(b)); and
- if compliance is likely to have a result referred to in paragraph (a) or (b)— whether there are practicable means of avoiding such a result, including (but not limited to):
    - changing the configuration or operating parameters of the facility (proposed subparagraph 372L(5)(c)(i)); and
    - making alterations to the facility (proposed subparagraph 372L(5)(c)(ii)); and
- such other matters (if any) as the ACCC considers relevant (proposed paragraph 372L(5)(d)).

Before issuing a certificate under proposed subsection 372L(4), the ACCC may consult with the ACMA if it considers it appropriate to do so (see proposed subsection 372L(6)).

Proposed subsection 372L(7) provides that if the ACCC receives a request to make a decision about the issue of a certificate under proposed subsection 372L(4), the

ACCC must use its best endeavours to make that decision within 10 business days after the request is made.

The rule in proposed subsection 372L(2) does not impose an obligation to the extent (if any) to which the imposition of the obligation would have the effect of depriving any person of a right under a contract that was in force at the time the request was made (proposed subsection 372L(8)). This recognises that giving a carrier access to a fixed-line facility could affect the ability of a person with contractual rights to use the facility. If the owner or occupier of the fixed-line facility had contracted to provide access to another carrier, for example, the person would not be required to comply with the request if the access requested prevented the pre-existing contracted party from use of the facility.

Proposed subsection 372L(9) provides ancillary contravention provisions. Proposed subsection 372L(10) provides that proposed subsections 372L(2) and (9) are civil penalty provisions.

Proposed section 372M - Terms and conditions of access

Proposed section 372M relates to the terms and conditions of access to fibre-ready facilities as described in proposed section 372L.

Proposed subsection 372M(1) provides that the owner or occupier of a fixed-line facility must comply with proposed subsection 372L(2) on such terms and conditions as are agreed between the owner or operator of the facility and the carrier who has requested access under subsection 372L(2) (proposed paragraph 372M(1)(a)). Failing commercial agreement, the terms and conditions will be determined by an arbitrator appointed by the parties (proposed paragraph 372M(1)(b)). If the parties fail to agree on the appointment of an arbitrator, the ACCC is to be the arbitrator.

This model ensures there is a clear methodology for the terms and conditions of access to be determined.

Proposed subsection 372M(2) provides that the regulations may make provision for and in relation to the conduct of an arbitration under section 372M. For instance the regulations may specify rules of procedure in the conduct of an arbitration conducted for the purposes of section 372M. It is envisaged that any regulations made would be similar to those which currently apply in relation to clause 36 of Schedule 1 to the Act.

The regulations may provide that, for the purposes of a particular arbitration conducted by the ACCC under proposed section 372M, the ACCC may be constituted by a single member, or a specified number of members of the ACCC (see proposed subsection 372M(3)). Further, for each such arbitration, that member or those members are to be nominated in writing by the Chairperson of the ACCC. The effect of regulations made pursuant to proposed subsection 372M(3) would be that the Chairperson of the ACCC may delegate to a single member or specified number of members of the ACCC the effective administration of arbitration of the terms and conditions of the third party access regime. This is intended to give the ACCC flexibility about how arbitration proceedings are conducted.

Proposed subsection 372M(4) provides that proposed subsection 372M(3) does not, by implication, limit proposed subsection 372M(2) with respect to the making of regulations.

The effect of proposed subsection 372M(5) is that the carrier and third party will only be permitted to seek an arbitration about terms and conditions only for those matters that have not been agreed commercially.

Proposed section 372N - Exemptions – Ministerial instrument

Proposed subsection 372N(1) would enable the Minister by legislative instrument to exempt a fixed-line facility, specified in an instrument or a fixed-line facility ascertained in accordance with the instrument, from the scope of section 372L.

This power could be used, for example, to exempt an owner or operator of a fixed-line facility from the requirement to provide access, because the facility is not in an area within the NBN Co long term fibre footprint or is otherwise required for the rollout of optical fibre cabling.

The Minister would be able to specify such exemptions either individually, or by class (see subsection 13(3) of the LIA).

Proposed subsection 372N(2) clarifies that an exemption under proposed subsection 372N(1) may be unconditional or subject to such conditions (if any) as are specified in the exemption.

Proposed subsection 372N(3) provides that an instrument made under proposed subsection 372N(1) may confer functions or powers on the ACCC. For instance, an instrument may provide a decision making role for the ACCC as to whether a facility meets a description of a class of exempt facilities.

Proposed subsection 372N(4) enables the ACCC to delegate any or all of its functions to a member of the ACCC, as defined in the CCA.

Proposed section 372NA - Code relating to access

Proposed section 372NA sets out provisions enabling the ACCC to make a code in relation to third party access under Division 4, and the obligation of owners and operators of fixed-line facilities to comply.

Proposed subsection 372NA(1) provides that the ACCC may, by legislative instrument, make a code setting out conditions that are to be complied with in relation to the provision of access under this Division.

Proposed subsection 372NA(2) provides that the owner or operator of a fixed-line facility must comply with such a code which is in force at any time. Breaches may be subject to the civil penalties.
Proposed subsections 372NA(3)-(5) set out instances where the provisions do not limit the matters that can be dealt with.

Proposed subsection 372NA(6) provides for ancillary contraventions of proposed subsection 372NA(2). Proposed subsection 372NA(7) provides that proposed subsections 372L(2) and (6) are civil penalty provisions.
It is envisaged that the ACCC would make a code which is similar to that relating to the carrier facility access regimes under Schedule 1 to the Act or may modify that code to also cover matters relevant to the access arrangements under this division.

Proposed Division 5 — Exemption of certain projects

Proposed Division 5 sets out exemptions for pending projects which meet certain criteria from the optical fibre line requirement under proposed Division 2. A limited exemption is also provided from the fibre-ready facility requirement and the fibre-ready installation requirement under proposed Division 3 for pending projects which meet certain criteria.

Proposed section 372P - Exemption of certain projects

Proposed subsection 372P(1) provides an exemption from the optical fibre line requirement under Division 2 for real estate development projects where a person carrying out an element of the project has, before proposed section 372P commences, either:

- started to install lines in the project area, or any of the project areas, for the project (proposed paragraph 372P(1)(a)); or
- entered into a contract with another person for the installation of lines in the project area, or any of the project areas, for the project (proposed paragraph 372P(1)(b)).

Proposed subsection 372P(2) mirrors proposed subsection 372P(1), except that it relates to exemptions from the fibre-ready facility requirement and/or the fibre-ready installation requirement under proposed Division 3.

Proposed subsection 372P(3) provides an exemption from the fibre-ready facility requirement and/or the fibre-ready installation requirement under Division 3. The exemption applies where a person carrying out an element of the project has, before proposed section 372P commences, either:

- begun civil works associated with the project (proposed paragraph 372P(3)(a)); or
- entered into a contract with another person for the carrying out of civil works associated with the project (proposed paragraph 372P(3)(b)).

Proposed section 372P has been inserted into the Bill because it would be unreasonable to apply the rules in such instances. For example, if a contract has already been let, it would be excessively onerous to then require developers to break commercial contracts which were entered into at a time when no such rules applied. Similarly, it would be inconvenient and costly to developers to have to stop physical works or the installation of fixed lines or facilities in their developments.

Proposed Division 6 — Miscellaneous

Proposed Division 6 sets out a number of new definitions supporting the operation of proposed Part 20A. The definitions will also support any exemptions contained in legislative instruments made by the Minister under proposed Part 20A. Proposed Division 6 also clarifies that State or Territory laws operate concurrently with proposed Part 20A of the Act to the extent that they are not inconsistent with the Bill.

Proposed section 372Q - Real estate development projects etc.

Proposed section 372Q defines a 'real estate development project' for the purposes of the Act in relation to projects involving subdivision and/or construction. Proposed section 372Q additionally provides meanings of the terms 'project area' and 'building lot'.

Proposed subsection 372Q(1) provides a first meaning of 'real estate development project' for projects involving the subdivision of land. For a project to be considered a 'real estate development project', it must satisfy each requirement at proposed paragraphs 372Q(1)(a), (b) and (c).

Proposed paragraph 372Q(1)(a) indicates that the definition of 'real estate development project' in proposed subsection 372Q(1) applies in respect of projects that involve the subdivision of one or more areas of land into lots (whether the resultant blocks of land are called 'lots' or given another name).

Proposed subparagraph 372Q(1)(b)(i) indicates that a project involving the making available of lots will be a 'real estate development project' if it would be reasonable to expect that one or more building units would be subsequently constructed on the lots. This provision would cover instances where building lots are offered for sale to builders, developers or members of the public and there is sufficient authorisation in place, or it is reasonable to expect that sufficient authorisation could be obtained, to permit the construction of one or more building units on one or more of the building lots, potentially by a subsequent developer. That is, this covers instances where a real estate development project involves only the subdivision of land and the installation of utilities, where the subdivided lots are on-sold to a different developer prior to the actual construction of buildings on the land. See the explanatory comments for proposed section 372S below for further commentary about the meaning of 'building unit'.

Proposed subparagraph 372Q(1)(b)(ii) indicates that projects involving the construction of one or more building units on any of the lots and the making available of any of those buildings units for sale or lease will meet this criterion. Proposed subparagraph 372Q(1)(b)(ii) is intended to cover projects that combine subdivision of land into lots, construction of building units on the subdivided lots, and the sale or lease of the building units. In a number of cases this would include 'off the plan' sales or leases of, for example, units and/or land and single dwelling units.

In order for a project to be a 'real estate development project' under proposed subsection 372Q(1), the project must also satisfy the conditions (if any) that are specified by the Minister in a legislative instrument under proposed

paragraph 372Q(1)(c) and proposed subsection 372Q(4). This provides flexibility for the Minister, if required, to further specify what is meant by 'real estate development project' under proposed subsection 372Q(1).

Proposed subsection 372Q(2) provides the meaning of 'project area' for real estate development projects falling under proposed subsection 372Q(1). That is, by reference to an area of land mentioned in proposed subsection 372Q(1). A real estate development project can comprise one or more project areas (see proposed paragraph 372Q(8)(d)).

Proposed subsection 372Q(3) provides a definition of 'building lot' for the purposes of the Act, by reference to a lot mentioned in proposed subsection 372Q(1). Pursuant to this definition, a lot (however described) that has been subdivided from one or more areas of land (as referred to in proposed subsection 372Q(1)) is a 'building lot'.

Proposed subsection 372Q(4) allows the Minister to specify conditions for the purposes of proposed paragraph 372Q(1)(c) by means of a legislative instrument.

Proposed subsection 372Q(5) provides a second meaning of a 'real estate development project' for projects involving construction of building units. The definition of 'real estate development project' in proposed subsection 372Q(5) differs from the definition provided in proposed subsection 372Q(1) in that the project does not have to involve the subdivision of land into building lots to come within the definition. For example, it would cover a construction project where land is already subdivided or no subdivision is required.

Proposed subsection 372Q(5) applies so that a project that involves both the construction of one or more building units on one or more areas of land and the making available of any or all of those building units for sale or lease will be considered to be a 'real estate development project' for the purposes of the Act. This would include projects where, for example:

- one or more old buildings are torn down and one or more new building units are constructed on the relevant area of land and sold or offered for lease; and/or
- one or more building units are constructed on one or more building lots (where one or more buildings or building units are already located on the relevant building lot or lots) and offered for sale or lease; and/or
- one or more building units are constructed on one or more vacant building lots and offered for sale or lease.

In order for a project to be a 'real estate development project' under proposed subsection 372Q(5), the project must also satisfy the conditions (if any) that are specified by the Minister in a legislative instrument under proposed paragraph 372Q(5)(b) and proposed subsection 372Q(7).

Proposed subsection 372Q(6) provides the meaning of 'project area' for real estate development projects falling under proposed subsection 372Q(5).

Proposed subsection 372Q(7) allows the Minister to specify conditions for the purposes of proposed paragraph 372Q(5)(b) by means of a legislative instrument.

Proposed subsection 372Q(8) contains rules to assist in the application of proposed subsections 372Q(1) and 372Q(5). This subsection seeks to take account of the complexity that may be involved in development projects.

Proposed paragraph 372Q(8)(a) states that it is immaterial whether the project has been, is being, or will be implemented in stages. This means that if a project is divided into multiple stages of land release, construction, sale/lease or otherwise, this does not matter when considering whether the project is a 'real estate development project' for the purposes of proposed subsections 372Q(1) and 372Q(5).

Proposed paragraph 372Q(8)(b) states that it is immaterial whether different elements of the project have been, are being, or will be, carried out by different persons. This means that the way in which work or other aspects of the project are divided between different persons is irrelevant when considering whether the project is a 'real estate development project' for the purposes of proposed subsections 372Q(1) and 372Q(5).

Proposed paragraph 372Q(8)(c) states that it is immaterial whether one or more approvals are given, or required, or will be required, under a law of the Commonwealth, a State or Territory, for the project or any element of the project. This means that the definition of a 'real estate development project' for the purposes of proposed subsections 372Q(1) and 372Q(5) is applicable regardless of the number of planning approvals, building approvals or other approvals for the project, however described.

Proposed paragraph 372Q(8)(d) states that it is immaterial whether, in a case where the project relates to two or more areas of land, those areas of land are under common ownership. This recognises the scenario where different owners of land collaborate and "pool" their land holdings for collective subdivision, construction, and/or sale or lease. In those circumstances the definition of 'real estate development project' would apply in respect of the entirety of the areas of land collectively owned by them.

Proposed section 372R - Subdivision of an area of land

Proposed section 372R confirms, for the purposes of the Act, that if an area of land has been subdivided into lots (however described), all provisions in the Act that are relevant to that area of land or to those lots are to apply to their full extent regardless of whether a part of the area of land (e.g. a road, verges or footpaths) is not included in any of those building lots. There will be parts of a subdivision that will not ultimately be subdivided into lots for sale or lease, such as roads, nature strips and other common areas within the subdivision.

Proposed section 372S - Building units

Proposed section 372S provides the definition of 'building unit'.

Proposed subsection 372S(1) indicates that proposed section 372S applies to a building that has been constructed, is currently being constructed, or is to be constructed. It is necessary for proposed section 372S to apply to past, present and future building constructions given that the provisions proposed under the Bill use definitions and concepts that may rely upon the past, present and future construction

of buildings in order to describe a number of the obligations set out under the Bill. Nevertheless, the requirements under the Bill do not in any way apply to building units constructed prior to the commencement of the Bill. Furthermore, the requirements under Division 3 of the Bill will not apply if the building unit is constructed after the commencement of the Bill in the case where:

- the civil works for the real estate project in which the building unit is situated had commenced prior to the commencement of the Bill; or
- contracts for the civil works were let.

Proposed subsection 372S(2) provides, for the purposes of the Act, that if the whole of the building is, or is to be, for single occupation or use (for example a detached house), the building is a building unit.

Proposed subsection 372S(3) provides, for the purposes of the Act, that if the whole or a part of the building is, or is to be, held as a unit under a strata title system (or similar system) established under a law of a State or Territory, that whole or part of the building is a building unit. This is to ensure that the rules in proposed Part 20A apply appropriately to strata title developments.

Proposed subsection 372S(4) provides, for the purposes of the Act, that if part of the building is, or is to be, for separate lease, that part of the building is a building unit. An example of this is a shopping centre where each individual store is separately leased: those individual stores would be 'building units' for the purposes of the Act. It is also intended to apply to such developments as housing units in retirement villages which may be held on long-term leases, university halls of residence and the like.

Proposed section 372T - Sale of building lots

Proposed section 372T provides that for the purposes of the Act, a person 'sells' a building lot if:

- in a case where the person holds a freehold interest in the land concerned – the person transfers the whole or part of their freehold interest in the land concerned (paragraph 372T(a)); or
- in a case where the person holds a leasehold interest in the land concerned – the person transfers the whole or part of their leasehold interest in the land concerned (paragraph 372T(b)).

The words 'transfer', 'freehold interest' and 'leasehold interest' have not been defined in the Act as their ordinary meaning is intended to apply. The purpose of specifying that a person transferring part of their freehold or leasehold interest is taken to sell a building lot is to clarify that a person does not need to transfer all of their interest in land to satisfy this definition. For example, if a person held the whole freehold interest in the land concerned and then transferred half of their freehold interest, the person will be taken to have sold the building lot.

Proposed section 372U - Sale of building units

Proposed section 372U provides that for the purposes of the Act, a person 'sells' a building unit in three circumstances:

- where a person holds the freehold interest, a person will be taken to 'sell' a building unit if the whole of the building is for single occupation or use and the person transfers the whole or part of the freehold interest in the land (paragraph 372U(a)); or
- where a person holds a leasehold interest in the land, a person will be taken to 'sell' the building unit if the person transfers the whole or part of the leasehold interest (paragraph 372U(b)); or
- where a person holds the whole or part of a building unit under a strata title scheme (however described) and the person transfers the whole or part of that interest, a person 'sells' a building unit for the purposes of the Act (paragraph 372U(c)).

See the explanatory notes for proposed section 372T above for an explanation of transferring a part of a freehold interest in land.

Proposed section 372V - Fixed-line facilities

Proposed section 372V provides the definition of 'fixed-line facility' for the purposes of the Act.

Proposed section 372V provides that a fixed-line facility is a facility (other than a line) used, or for use, in connection with a line, where the line is not on the customer's side of the boundary of a telecommunications network; and is used, or for use, to supply a carriage service to the public.

Pits, ducts, conduit and plinths are examples of fixed-line facilities that are used in the underground deployment of lines. Poles are an example of a fixed-line facility used in the above-ground deployment of lines, where this is necessary due to terrain or is otherwise accepted practice. This definition explicitly excludes, for example, coverage of facilities that are located within a customer's premises, such as internal ducting that could be used for customer cabling linking customer equipment to the telecommunications network at the network boundary point.

Proposed section 372W - Fibre-ready facility

Proposed section 372W sets out the definition of a 'fibre-ready facility' for the purposes of the Act. The definition covers two categories:

- an underground fixed-line facility that is used, or for use, in connection with an optical fibre line and which satisfies such conditions (if any) as are specified in a legislative instrument made by the Minister (paragraph 372W(a)); and
- any other fixed-line facility that is used, or for use, in connection with an optical fibre line; is specified in a legislative instrument made by the Minister; and satisfies such conditions (if any) as are specified in a legislative instrument made by the Minister (paragraph 372W(b)).

The purpose of the second category is to enable the Minister to specify other types of fixed-line facilities, including above ground facilities, as fibre-ready facilities individually or by class (see subsection 13(3) of the LIA). If necessary, it is envisaged that the Minister would exercise this power to make a legislative instrument specifying other fixed-line facilities to be fibre-ready facilities, and at the same time would make a legislative instrument specifying conditions that must be met by the fibre-ready facilities.

Because fibre-ready facilities are for use in connection with optical fibre cabling they will necessarily need to be designed and installed with that purpose in mind. In the case of underground fibre-ready facilities, for example, this would include ducting with gentle enough angles to allow the ready deployment of fibre. More detailed specifications could be set out in industry codes or standards, carrier specifications or in a Ministerial instrument as discussed below.

If the Minister were to specify additional attributes of fibre-ready facilities under proposed subparagraph 372W(a)(ii) and proposed subparagraph 372W(b)(iii), examples of possible attributes are:

- the design of the passive network (e.g. the location of ducting, plinths and pits and the angle of ducting);
- the characteristics of components (e.g. the minimum internal diameter for ducts and conduits, the size of pits, the strength and capacity of poles); and
- installation and operational requirements (e.g. ensuring ducts are not blocked, the use of sub-ducting).

The intention of these provisions is to ensure that the fibre-ready fixed-line facilities that are installed in these developments will permit fibre to be installed into the future in a quick and efficient manner, at low cost and with minimum inconvenience to the community.

Proposed section 372X - Installation of a facility

For the purposes of new Part 20A, proposed section 372X provides that the meaning of 'install' in relation to a facility includes, but is not limited to, construction of the facility on, over or under any land, and attachment of the facility to any building or other structure.

Proposed section 372Y - Installation of a fibre-ready facility in proximity to a building lot or building unit

Proposed section 372Y provides the meaning of installation of a facility in 'proximity' to a building lot or a building unit for the purposes of Part 20A of the Act. The concept of proximity is used in proposed Division 3.

The purpose of proposed 372Y(1) is to ensure that fibre-ready facilities are installed either in, on, under the lot (proposed subparagraph 372Y(1)(a)) or close enough to the building lot (proposed subparagraph 372Y(1)(b)) to enable ready connection of optical fibre lines to any building unit that may be or is constructed on the lot.

The purpose of proposed subsection 372Y(2) is to ensure that fibre-ready facilities are installed close enough to the building unit to enable ready connection to that building unit. A fibre-ready facility that has been built under a concrete slab where it cannot be readily accessed by persons deploying optical fibre line would not be installed in *proximity* to a building lot or building unit.

Proposed section 372Z - Sewerage services, electricity or water supplied to a building lot or building unit

Proposed section 372Z provides explanations in relation to the supply of the following utilities to building lots and building units:

- sewerage services;
- electricity; and
- water.

The supply of these basic utilities to building lots and building units is important to the application of the requirements of Part 20A in that the supply of utilities is used as a *prima facie* indicator that a building lot or a building unit is in a location that may be in NBN Co's long term fibre footprint. However, it is recognised that this may not always be the case, therefore the Bill includes legislative mechanisms to enable the Minister to exempt on a case-by-case basis or by class building lots and/or building units. For example, many localities may be supplied with mains electricity, but not be within NBN Co's long term fibre footprint. In addition, proposed section 372J provides a mechanism by which NBN Co can provide guidance on whether or not it will be installing fibre in a particular locality.

Proposed subsection 372Z(1) sets out when sewerage services are taken to be supplied to a building lot for the purposes of proposed Part 20A. It describes where the sewerage pipeline is installed (proposed paragraph 372Z(1)(a), and requires that such a pipeline forms part of a public sewerage system (proposed paragraph 372Z(1)(b)): that is, there must be a sewerage pipeline as part of a public sewerage system either actually installed under the building lot; or the pipeline must be installed close enough to the building lot to enable ready connection of sewerage services to a building unit constructed on the building lot. For example, if a septic tank was installed on, or close to the building unit to provide for sewerage, the septic tank would not be taken to be sewerage services 'supplied' to a building lot for the purposes of proposed Part 20A.

Proposed subsection 372Z(2) sets out when sewerage services are taken to be supplied to a building unit for the purposes of proposed Part 20A. The purpose of proposed subsection 372Z(2) is similar to proposed subsection 372Z(1); however, it relates to the supply of sewerage services to building units.

Proposed subsection 372Z(3) sets out when electricity is taken to be supplied to a building lot for the purposes of proposed Part 20A. It describes where the electricity cable is installed (proposed paragraph 372Z(3)(a)), and requires that the cable is to form part of an electricity supply grid (proposed paragraph 372Z(3)(b)).

The purpose of proposed subsection 372Z(3) is to make clear that to be regarded as electricity supplied to a building lot for the purposes of proposed Part 20A there must be an electricity cable that is part of an electricity supply grid installed either over or

under the building lot, or close enough to enable the electricity cable to be readily connected to a building unit constructed on the building lot. The provision would not apply if the premises are supplied with electricity, for example, using a generator or through solar panels at the premises and the premises are not connected with a cable to the electricity supply grid.

The purpose of proposed subsection 372Z(4) is similar to proposed subsection 372Z(3), in that to be regarded as electricity supplied to a building unit, there must be an electricity cable as part of an electricity supply grid installed close enough to the building unit to enable ready connection of electricity to the building unit.

Proposed subsection 372Z(5) sets out when water is taken to be supplied to a building lot for the purposes of proposed Part 20A. It describes where the water pipeline is installed (proposed paragraph 372Z(5)(a)), and requires the pipeline to form part of a reticulated water supply system (proposed paragraph 372Z(5)(b)).

The purpose of proposed subsection 372Z(5) is to make clear that in order for water to be regarded as supplied to a building lot for the purposes of proposed Part 20A, there must be a water pipeline that is part of a network of water supply, installed either under the building lot, or close enough to enable water to be readily connected to a building unit constructed on the building lot. For instance, where a building lot relied on a private water tank or a non-piped source of water (such as a bore, spring or watercourse) for water supply, the water would not be taken to be supplied to a building lot for the purposes of proposed Part 20A.

The purpose of proposed subsection 372Z(6) is similar to proposed subsection 372Z(5) in that in order for water to be regarded as supplied to a building unit, there must be a water pipeline that is part of a network of water supply installed close enough to the building unit to enable ready connection of water to the building unit.

Proposed section 372ZA - Supply to the public

Proposed subsection 372ZA(1) sets out when a line is taken to be used, or for use, to supply a carriage service to the public, for the purposes of proposed Part 20A (specifically, proposed sections 372B and 372C). That is, if:

- a line consists of, or forms part of, a network unit (proposed paragraph 372ZA(1)(a)); and
- under section 44 of the Act, the network unit is taken, for the purposes of section 42 of the Act, to be used to supply a carriage service to the public (proposed paragraph 372ZA(1)(b)).

Proposed subsection 372ZA(2) is similar to proposed subsection 372ZA(1), although it applies where the line neither consists of nor forms part a network, such a line will be taken to be a network unit for the purposes of new Part 20A.

Section 44 of the Act sets out the circumstances in which a 'network unit' is taken, for the purposes of section 42, to be used to supply a carriage service to the public. The set of circumstances outlined in section 44 for a 'network unit' is therefore adopted

for the purpose of outlining the circumstances in which a line is taken to 'be used, or for use, to supply a carriage service to the public'. The material difference is that under proposed section 372ZA, it is immaterial whether the line consists of, or forms part of a network unit.

Proposed subsection 372ZA(2) has been included in the Bill as a technical amendment, to make clear that the provisions will apply, regardless of existing provisions in the Act that might set minimum lengths for lines linking network units (for example, a single line link network unit ordinarily would need to be 500m or greater in length).

Proposed section 372ZB - Concurrent operation of State and Territory laws

Proposed section 372ZB provides that proposed Part 20A is not intended to exclude or limit the operation of a law of a State or Territory that is capable of operating concurrently with Part 20A. It is the Australian Government's view that complementary State and Territory legislation may be implemented to further ensure appropriate fibre lines and fibre-ready facilities are installed in new developments. An example of a complementary law could possibly be one which ensured that developers who are not constitutional corporations would be required to install fibre-ready facilities in new developments.

Proposed section 372ZC - Optical fibre line

Proposed section 372ZC inserts a definition of 'optical fibre line', for the purposes of proposed Part 20A. An optical fibre line is a line that consists of, or encloses, optical fibre. The reference to 'encloses' optical fibre in the definition is intended to refer to the immediate casing surrounding the fibre, not the underground duct in which a cable may be installed (which is a separate facility). The definition recognises that fibre lines are generally sheathed in plastic tubes, which in turn are bundled together and further sheathed to form a cable.

As discussed in Part 2 of Schedule 1, proposed section 372ZC will be repealed if and when the Access Arrangements Bill takes effect—see the explanatory notes for item 16, Part 2 of Schedule 1 for further explanation.

Proposed section 372ZD - NBN Co

Proposed section 372ZD provides that, in proposed Part 20A, 'NBN Co' means NBN Co Limited (ACN 136 533 741), as the company exists from time to time, irrespective of whether the company changes its name.

Proposed section 372ZE - NBN corporation

Proposed section 372ZE provides that 'NBN corporation' has the same meaning as in section 577BA.

As discussed in Part 2 of Schedule 1, proposed section 372ZE will be repealed if and when the Access Arrangements Bill takes effect—see the explanatory notes for item 16, Part 2 of Schedule 1 for further explanation.

Amendments to provisions in Part 21 — Technical regulation

The Bill also proposes amendments to some provisions in Division 3 (Technical standards about customer equipment and customer cabling) and Division 9 (Cabling providers) of Part 21 of the Act.

The amendments relate to the ability of the ACMA to make standards in relation to the interoperability of customer equipment with the NBN or other superfast telecommunications networks, and to set standards for customer equipment and customer cabling to be connected to the NBN or other superfast telecommunications networks. The Bill will also enable the Minister to direct the ACMA to make technical standards under Division 3 and update directions powers in Division 9.

These amendments are intended to ensure that the ACMA has sufficient powers to make technical standards should these be required to assist with the operation of the NBN or other superfast telecommunications networks.

Item 11 – After paragraph 376(2)(d) - ACMA's power to make technical standards

Under existing section 376 (Division 3 of Part 21 of the Act), power is conferred on the ACMA to make technical standards in relation to specified matters in relation to customer equipment or specified customer cabling. ACMA can only make technical standards that are consistent with the aims of section 376 of the Act (for example, protecting the integrity of a telecommunications network or facility). Given the importance of deriving optimal benefit from the NBN and other superfast telecommunications networks, scope is being added to make standards in relation to customer equipment and cabling to be used in connection with such networks.

Item 11 amends subsection 376(2) by inserting proposed subparagraphs 376(2)(da), (db) and (dc) which make it clear that the ACMA can also make technical standards relating to customer equipment and customer cabling for the purposes of ensuring:

- the interoperability of such equipment with the NBN or any other superfast telecommunications network providing superfast carriage services (paragraph 376(2)(da)) – this approach is similar in some respects to the concept of interoperability as set out in existing paragraph 376(2)(d), which relates to interoperability for the standard telephone service; or

- such equipment and cabling operates in a manner so as to meet particular performance requirements when they are connected to the NBN or any other superfast telecommunications network providing superfast carriage services (paragraph 376(2)(db)); or
- such equipment and cabling has particular design features that will apply when they connected to the NBN or any other superfast telecommunications network providing superfast carriage services (paragraph 376(2)(dc)).

The specification of these matters at section 376 means that they are not subject to the rule in paragraph 376(2)(e) that technical standards must not specify an objective if the achievement of the objective is likely to have the effect (whether direct or

indirect) of requiring a telecommunications network or a facility to have particular design features or performance standards.

The terms 'national broadband network', 'superfast carriage service' and 'superfast telecommunications network' are defined in proposed subsection 376(7). See the explanatory notes below for an explanation of those definitions.

Item 12 – At the end of section 376

Item 12 amends section 376 of the Act by inserting proposed subsection 376(7). Proposed subsection 376(7) provides definitions for three key terms used in proposed paragraphs 376(2)(da), (db) and (dc), as described in item 11 above.

The term 'national broadband network' (NBN) is given the same meaning as in section 577BA of the Act.

The term 'superfast carriage service' is defined to capture carriage services which:

- allow end-users to download communications at a data transmission speed of more than 25 megabits per second (under normal conditions) (paragraphs 376(7)(a) and (b)); and
- are fixed-line services supplied to premises occupied or used by an end-user (i.e. retail services) (paragraph 376(c).

The 25 megabits per second download speed has been selected because it is the minimum speed higher than the peak speeds available on ADSL2+ platforms.

The term 'superfast telecommunications network' is defined to cover any telecommunications network that is used, or is capable of being used to supply a superfast carriage service to customers.

The concepts and terms are consistent with those used in the Access Arrangements Bill in respect of the matters dealt with by that Bill – see the explanatory notes for proposed subsection 141(10) of the Act in item 86 of the Access Arrangements Bill.

Item 13 – After section 376

Proposed section 376A - ACMA must make technical standards if directed by the Minister

Proposed item 13 inserts proposed section 376A into the Act.

Proposed subsection 376A(1) has the effect of enabling the Minister to require the ACMA to make technical standards that deal with one or more specified matters under subsection 376(2) within the specified time. Such a direction could, for example, require the ACMA to make technical standards concerning the interoperability of customer equipment; particular performance requirements; and/or particular design features for the purposes of proposed paragraphs 376(2)(da), (db) and/or (dc), in relation to the NBN and other superfast telecommunications networks.

Section 14 of the ACMA Act provides the Minister with a broad power of direction in relation to the performance of the ACMA's functions and the exercise of the ACMA's powers.

Proposed subsection 376A(2) provides that the Minister must not give the ACMA a direction under section 14 of the ACMA Act to require the ACMA to make a technical standard under section 376 that deals with one or more specified matters in subsection 376(2). Subsection 376A(2) clarifies that if the Minister wished to direct the ACMA to make a technical standard for the purposes of section 376 of the Act, the Minister would need to do so using his or her discretionary power under subsection 376A(1) of the Act, rather than the general power of direction under section 14 of the ACMA Act.

Item 14 – Subsection 440(1)

Under subsection 440(1) of the Act, the Minister may give the ACMA written directions about how the ACMA is to perform its functions or exercise of powers under Division 9 of Part 21 of the Act (cabling providers).

Item 14 amends subsection 440(1) to provide that the Minister may 'by legislative instrument' give the ACMA such written directions for the purposes of Division 9 of Part 21 of the Act. This amendment brings the language of subsection 440(1) up to

date, to reflect the language used in the LIA, by clarifying that the written direction is by legislative instrument.

While this is a minor technical amendment, it is a timely one in the context of the current rollout of the NBN. For example, should it be necessary, the Minister is able to direct the ACMA to make appropriate rules for customer cabling work to ensure optimal performance where that cabling is to be connected to the NBN or other superfast telecommunications networks.

Specifically, paragraph 6(d)(i) of the LIA provides that an instrument made in the exercise of a power delegated by the Parliament before the LIA came into operation, and in accordance with a provision of the enabling legislation declared to be a disallowable instrument for the purposes of section 46A of the AIA as in force, to be a legislative instrument.

The reference in subsection 440(2) to the direction being a disallowable instrument is repealed by proposed item 15 below - see the explanatory notes below.

Item 15 – Subsection 440(2)

Subsection 440(2) provides that a direction under subsection 440(1) is a disallowable instrument for the purposes of section 46A of the AIA. Section 440 was originally drafted prior to the introduction of the LIA and the repeal of subsection 440(2) is made to modernise the drafting language of this provision and to bring it up to date with the LIA. As noted above in item 14, the proposed amendment to subsection 440(1) clarifies that such a direction is made by legislative instrument.

Item 15 repeals existing subsection 440(2) and substitutes in its place two proposed subsections 440(2) and (2A).

Proposed subsection 440(2) clarifies that a direction under subsection 440(1) may require the ACMA to make cabling provider rules that deal with one or more specified matters. For example, the Minister could direct the ACMA to develop cabling rules to ensure customer cabling is installed in a manner which maximises the performance of the cabling when it is connected to the NBN and other superfast telecommunications networks.

Proposed subsection 440(2A) clarifies that the proposed subsection 440(2) does not limit subsection 440(1). In other words, the Minister may give the ACMA written directions, by legislative instrument, concerning other functions or powers of the ACMA under Division 9 of Part 21 of the Act.

Part 2 — Other amendments

Telecommunications Act 1997

Item 16 – Proposed sections 372ZC and 372ZE

As noted in relation to item 10, proposed section 372ZC inserts a definition of 'optical fibre lines' into the Act. Item 16 operates to repeal proposed section 372ZC.

As noted in relation to item 10, proposed section 372ZE inserts a definition of 'NBN corporation' into proposed Part 20A. This definition has the same meaning as in section 577BA(12) of the Act. Item 16 also operates to repeal proposed section 372ZE.

The reason for this is that the Access Arrangements Bill proposes identical definitions of 'optical fibre lines' and 'NBN corporation' to be inserted into section 7 of the Act. Therefore, if the Access Arrangements Bill is enacted before this Bill, the definitions 'optical fibre lines' and 'NBN corporation' under the Access Bill would apply to proposed Part 20A and the identical definitions proposed under this Bill sections 372ZE and 372ZE would not required. See the commentary above for clause 2 (commencement), for further details.