

EXPLANATORY STATEMENT

Issued by the Authority of the Minister for Broadband, Communications
and the Digital Economy

Telecommunications Act 1997

*Telecommunications (Fibre-Ready Facilities in Real Estate Development Projects
and Other Matters) Instrument 2011*

Legislative authority

Subparagraph 372W(b)(ii) of the *Telecommunications Act 1997* (the Act) allows the Minister for Broadband, Communications and the Digital Economy (the Minister) to specify by legislative instrument above ground fixed-line facilities as fibre-ready facilities.

Subsection 372K(3) of the Act allows the Minister to exempt by legislative instrument conduct from the scope of subsections 372E(2) and/or 372F(2). Subsection 372K(4) of the Act provides that an exemption made under subsection 372K(3) may be unconditional, or subject to specified conditions.

Paragraph 372K(1)(e) of the Act allows the Minister to exempt by legislative instrument real estate development projects from the scope of section 372G. Similarly, paragraph 372K(1)(f) of the Act allows the Minister to exempt by legislative instrument, projects from section 372H.

Purpose

The first purpose of the *Telecommunications (Fibre-Ready Facilities in Real Estate Development Projects and Other Matters) Instrument 2011* (the Instrument) is to specify certain above ground fixed-line facilities as fibre-ready facilities for the purposes of the Act. In order for an above ground fixed-line facility to meet the requirements of a fibre-ready facility, it must also:

- be used, or for use, in connection with an optical fibre line (see subparagraph 372W(b)(i) of the Act); and
- satisfy any conditions specified by the Minister in a legislative instrument (see subparagraph 372W(b)(iii) of the Act). No conditions are currently specified.

The effect of this specification is that a person may install an above ground fixed-line facility (which meets the requirements mentioned above) in the project area of a building lot or building unit, and satisfy the fibre-ready installation requirements under the following provisions:

- section 372E and/or 372F;
- in the case of a constitutional corporation – section 372G and/or 372H.

As is the case with underground fibre-ready facilities, a person may install an above-ground fibre-ready facility for use in connection with an optical fibre-based telecommunications network and another technological platform, such as a copper-based telecommunications network (i.e. shared use facilities, for example, a shelter).

The second purpose of the Instrument is to exempt two kinds of conduct from subsections 372E(2) and 372F(2) of the Act. The exemptions allow the installation of non-fibre-ready fixed-line facilities, provided certain conditions are met.

The first exemption allows installation of non-fibre-ready facilities where the facilities are for use in connection with a copper-based telecommunications network, a hybrid fibre-coaxial network, or both. Such facilities may be installed where fibre-ready facilities have already been installed, are simultaneously installed, or where the person reasonably believes that fibre-ready facilities are to be installed in sufficient proximity within 12 months of the installation of the non-fibre-ready facilities in the project area, where all of the non-fibre-ready facilities are installed in sufficient proximity to connect no more than 10 building lots or building units. Generally speaking those fibre-ready facilities must be underground pit and pipe. In cases where it is not reasonably practical to install underground pit and pipe, a person may rely on the exemption where above ground fibre-ready facilities are, or are to be installed.

The condition for facilities to be used in connection with copper-based and hybrid fibre-coaxial networks recognises that such facilities may not be used later in connection with optical fibre lines.

The condition for facilities installed, where fibre-ready facilities have already been installed, or are installed simultaneously, or the person reasonably believes will be installed within 12 months of the non-fibre-ready facility, recognises that the fibre-ready installation requirements would already have been, or be in the process of being met. In such circumstances any civil penalty for not installing fibre-ready facilities need not arise. The building lot or building unit as the case may be, would have fibre-ready passive infrastructure to readily and cheaply enable optical fibre lines to be deployed.

The second exemption allows non-fibre-ready fixed-line facilities to be installed as minor supplementation, ancillary extension of no more than 30 metres, minor replacement, minor modification or relocation to a new location, in respect of other non-fibre-ready facilities in a real estate development project. Such facilities may be installed where prior to 27 September 2011 (the day the relevant provisions of the Act commenced), non-fibre-ready facilities were installed and for use in connection with a copper or hybrid fibre-coaxial line in the project area; and on or before completion of civil works the facilities are effectively re-used with the new specified facilities installed, in connection with a non-optical fibre line. A further condition is that it must not be reasonably practical or technically feasible to supplement, extend, replace, modify or relocate the original facilities with fibre-ready facilities.

Consistent with the significant structural changes taking place in the Australian telecommunications industry with the structural separation of Telstra and the rollout of the National Broadband Network (both of which are supported by the Definitive Agreements between NBN Co and Telstra), the overall purpose of Part 20A is to maximise the installation of fibre-ready infrastructure. The second purpose of the instrument explained above recognises, however, that there may be some need for non-fibre-ready facilities to be installed in certain instances, particularly during the transition to these new arrangements. The intention is such non-fibre-ready

installations should be as limited as possible. Use of these provisions to install non-fibre-ready facilities will be monitored and the Instrument is open to review and revision if it appears the flexibility the provisions give is being abused.

The third purpose of the Instrument is to exempt real estate development projects from the pre-condition of sale or lease for constitutional corporations, that fibre-ready facilities be installed in sufficient proximity in the project area, under sections 372G and 372H of the Act (where those sections would otherwise apply). The first class of exemption would apply to projects whereby at the time of installation, non-fibre-ready fixed line facilities were installed in reliance on an exemption granted under subsection 372K(3) from the requirements of subsection 372E(2) and/or 372F(2) (where those sections would otherwise apply), as specified or ascertained in this Instrument. These flow-through exemptions will ensure that constitutional corporations are not prevented from selling or leasing building lots or building units in a project that has previously been subject to an exemption from the installation requirements under subsection 372E(2) or 372F(2) of the Act (see above).

A similar exemption is also provided for real estate development projects where facilities that were formerly used in connection with a copper or hybrid fibre-coaxial line (prior to 27 September 2011 – see below), are prior to sale or lease, effectively re-used in connection with a non-optical fibre line. This covers situations where a corporation does not install facilities and does not materially change the original non-fibre-ready facilities.

Background

The substantive provisions of the *Telecommunications Legislation Amendment (Fibre Deployment) Act 2011* (the Fibre Deployment Act) commenced on 27 September 2011, in order to facilitate the rollout of fibre-ready infrastructure and optical fibre, as part of the National Broadband Network (NBN) and more generally. The Fibre Deployment Act relevantly inserted Part 20A into the Act.

Unlike underground fixed-line facilities (see paragraph 372W(a) of the Act), in order for an above ground fixed-line facility to be considered a fibre-ready facility for the purposes of the Act, a pre-requisite is that the Minister must specify such a facility.

Real estate development projects are however, relevantly exempt under subsections 372P(2) and (3) of the Act, from the obligations under sections 372E, 372F, 372G, or 372H where prior to 27 September 2011, a person carrying out an element of the project:

- began to install fixed-line facilities in the project area or any project areas; or
- entered into a contract for installation of fixed-line facilities; or
- commenced civil works associated with the project; or
- entered into a contract for the carrying out of civil works.

Therefore in practice, because of these exemptions for pending projects, it is highly unlikely that any projects would have been subject to the scope of any of sections 372E, 372F, 372G, or 372H prior to the commencement of the Instrument.

While the specification of above ground fibre-ready facilities and associated exemptions will enable the installation of above ground infrastructure for the purposes of Part 20A of the Act, any such installation is still subject to other applicable Commonwealth, State, Territory and local government laws (such as planning laws). In the case of the Commonwealth, Schedule 3 of the Act is an example of relevant law.

The Instrument is a legislative instrument for the purposes of the LIA.

Consultation

The Department of Broadband, Communications and the Digital Economy sought comment on a draft instrument from:

- NBN Co, Telstra and smaller carriers OptiComm, and TransACT;
- the Communications Alliance;
- developer peak organisations - the Housing Industry Association, Master Builders Australia, Planning Institute of Australia, Property Council of Australia, and Urban Development Institute of Australia;
- the Australian Communications and Media Authority, Australian Competition and Consumer Commission and the Department of Sustainability, Environment, Water, Population and Communities;
- selected state and territory government agencies and the Australian Local Government Association;
- other bodies and groups such as the Australian Communications Consumer Action Network, iiNet, CITT, Energy Networks Association and the National Electrical and Communications Association.

Details of the accompanying Instrument are set out in the [Attachment](#).

ATTACHMENT

Details of the Telecommunications (Fibre-Ready Facilities in Real Estate Development Projects and Other Matters) Instrument 2011

Part 1 – Preliminary

Clause 1 – Name of Instrument

Clause 1 provides that the title of the Instrument is the *Telecommunications (Fibre-Ready Facilities in Real Estate Development Projects and Other Matters) Instrument 2011*.

Clause 2 – Commencement

Clause 2 provides that the Instrument commences on the day after it is registered on the Federal Register of Legislative Instruments.

Clause 3 – Definitions

Clause 3 provides definitions of key terms used in the Instrument.

The term *pipe* is defined by reference to a tube or pipe that physically accommodates cables and offers mechanical protection for cabling. This allows for the pull through or replacement of cabling (such as installation of optical fibre lines).

The term *pit* is defined by reference to a manhole, pit or any other hole or chamber in the ground. It is envisaged pits would generally be formed purpose-built structures rather than simple holes. Pits could be used for other utilities as well as telecommunications facilities.

These definitions accord with their understanding in the telecommunications industry.

To assist the reader, two notes are included at clause 3 indicating that a number of expressions used in the Instrument, such as ‘fibre-ready facility’, ‘proximity’ and ‘real estate development project’, have the same meaning as under the Act (see subsection 13(1) of the *Legislative Instruments Act 2003*) (LIA).

Part 2 – Fibre-ready facility

Clause 4 – Specification of above ground fixed-line facilities that are fibre-ready facilities

Subclause 4(1) provides that fixed-line facilities specified in subclause 4(2) are specified for the purposes of subparagraph 372W(b)(ii) of the Act.

Subclause 4(2) sets out five types of above-ground facilities, such that a facility is installed, placed or attached above the ground or a body of water. An above ground

fixed-line facility will only be regarded as a fibre-ready facility if it also satisfies the requirements of subparagraphs 372W(b)(i) and 372W(b)(iii) of the Act.

Common examples of facilities which meet this specification include: optical fibre-splitter cabinets; optical fibre drop cables; risers; aerial lead-in cabling; and exchanges. Such types of facilities are commonly used in the rollout of fibre networks.

The installation of any above-ground fixed-line facilities (including fibre-ready facilities as specified in this Instrument) will still be subject to applicable Commonwealth, State, Territory and local government laws (such as planning laws).

Part 3 – Exemption from requirement to install fibre-ready facilities

Subdivision A – Exempt conduct

Clause 5 – Exemptions

Clause 5 specifies two types of conduct exempt from the requirements in subsections 372E(2) and 372F(2) of the Act, pursuant to subsection 372K(3). In reliance on subsection 372K(4) of the Act, these exemptions are expressed subject to specified conditions.

Subject to specified conditions, subclause 5(1) provides an exemption where non-fibre-ready fixed-line facilities are installed for use in connection with either or both of a copper-based or hybrid fibre-coaxial network (including joint copper and HFC facilities such as a shelter). This exemption is intended to apply where such facilities are installed with the purpose of connection to that particular type of technology. This would cover situations where it was not expected that the particular facilities would be later used in connection with optical fibre lines to an optical fibre-based network. By way of contrast, if a facility could be used for both optical fibre and copper and/or HFC, the facility could be installed without reliance on these provisions because it would already be fibre-ready, even though it could be used with the other technologies.

Subclause 5(2) specifies the conditions for the purposes of subclause 5(1). Paragraph 5(2)(a) provides the general condition that underground fibre-ready facilities, predominantly comprising pit and pipe are already installed, are simultaneously installed, or the person installing the non-fibre-ready facilities reasonably believes that underground fibre-ready facilities will be installed within 12 months of the installation of the non-fibre-ready facility in the project area. The intention of this is to maximise the installation of underground fibre-ready facilities, particularly pit and pipe, consistent with the overall intention of Part 20A.

In each of the three alternative conditions in paragraph (5)(2)(a) about when fibre-ready facilities are installed, the underground fibre-ready facilities must be in proximity (as defined in section 372Y of the Act) to each building lot or building unit in the project area. This is to make clear that the fibre-ready facilities are installed close enough to a building lot or unit to enable ready connection. A fibre-ready facility installed, for example, at a property boundary or under a concrete slab, would

not be installed in proximity to a building unit, for example, because it would not allow ready access.

Clause 6 as discussed below sets out circumstances where a person is taken to “reasonably believe” particular types of fibre-ready facilities may be installed in a project area within 12 months. There is a maximum number of building lots or building units which the condition applies to. The limit is 10 building lots or building units, and is intended to enable the connection of construction site offices, real estate sales offices, display homes, or a small number of premises, if necessary, on a strictly limited basis pending the installation of fibre-ready facilities. The provision is not intended to allow larger scale connection of premises with non-fibre-ready facilities pending the rollout of fibre-ready facilities as a way of circumventing the overall intention of Part 20A to maximise the installation of fibre-ready facilities.

Paragraph 5(2)(b) provides the operative condition in a case where it is not reasonably practical to install underground facilities – namely, that above ground fibre-ready facilities are already installed, are simultaneously installed, or the person installing the non-fibre-ready facilities reasonably believes the above-ground fibre-ready facilities will be installed within 12 months of the installation of the non-fibre-ready facility in the project area. This paragraph largely mirrors paragraph 5(2)(a) above. In considering whether it is not reasonable to install underground facilities, regard is to be had to the nature and composition of the land in the project area and the direct cost associated with such an installation. For example, if the land in the project area is situated on a bed of exceptionally hard rock which would render underground installation cost prohibitive, this may constitute a case where it is ‘not reasonably practical’ to install underground facilities.

The exemptions in subclauses 5(1) and (2) are considered appropriate as the building lot or building unit (as the case may be), would have fibre-ready passive infrastructure (generally underground pit and pipe) installed to enable the deployment of optical fibre lines on a cost-effective basis. This exemption provides flexibility for carriers, infrastructure installers, developers and the community to install additional infrastructure (i.e. non-fibre-ready facilities) for use with other technological platforms. For example, under the Australian Government’s Fibre in New Developments Policy of 22 June 2011, certain real estate development projects may be serviced with a copper-based telecommunications network by Telstra, as infrastructure provider of last resort, on an interim basis pending the later rollout of optical fibre by another carrier (such as NBN Co, as infrastructure provider of last resort). Such an interim installation could require facilities only suitable for use with a copper network (e.g. pillars of the kind commonly seen throughout older Australian suburbs).

The general exemption condition relates to the installation of underground pit and pipe because it is expected in the majority of cases that this infrastructure will be installed underground. This is especially the case where planning authorities require utilities to be installed underground (e.g. under planning laws) or where utilities such as grid electricity are deployed underground.

Subject to all of the specified conditions under subclause 5(4) being met, subclause 5(3) provides an exemption where minor supplementary and other specified non-fibre-ready fixed-line facilities are installed for a real estate development project.

The conditions under subclause 5(4) are that:

- prior to 27 September 2011 (the day the relevant provisions commenced), non-fibre-ready fixed-line facilities were installed and for use, in connection with a non-optical fibre line (i.e. a copper or hybrid fibre-coaxial line) in the project area; and
- the non-fibre-ready fixed-line facilities that are installed constitute a minor supplementation, an ancillary extension up to 30 metres in total, a minor replacement, a minor modification, or a relocation of the facilities that were installed prior to 27 September 2011; and
- it is not reasonably practical or technically feasible to supplement, extend, replace, modify or relocate the facilities that were installed prior to 27 September 2011 with fibre-ready facilities.

This exemption is intended to cover developments where facilities that were installed for use with copper or hybrid fibre-coaxial networks are generally re-used during, or following completion of civil works with the specified new non-fibre-ready facilities that are installed for use in connection with the copper or hybrid fibre-coaxial network. This is intended to cover possible but likely limited scenarios where the pre-existence of non-fibre-ready facilities and the provision of non-fibre connections means it is not practical or technically feasible to use a fibre-ready facility. For example, a piece of conduit may need replacing and because it needs to match the size of the pre-existing conduit it may not be possible for it to be fibre-ready. In reality, however, it is envisaged there would be few scenarios where fibre-ready facilities could not be employed and the criteria in subclause 5(4)(c) put the onus on the person installing the facility to demonstrate this is the case.

It is envisaged these provisions are most likely to be relevant where a real estate development project (which has a broad meaning) takes place in an existing built-up 'brownfields' area and involves for example the refurbishment and strata-titling of an existing building or the demolition and rebuilding ('knock-down rebuild') of one or more new buildings. In these instances, there may be situations where it is more practical or technically feasible to re-use and supplement existing non-fibre-ready facilities. Where fibre-ready facilities can be used, however, that is the preference and would be required.

For clarity, for the purposes of subclause 5(4), the term 'supplementation' is expressly limited to not include any form of extension of the non-fibre-ready facility installed prior to 27 September 2011 (subparagraph 5(4)(b)(i)). Accordingly, if the installation of a new fixed-line facility may constitute an extension, it is necessary to consider whether the new facility would constitute an ancillary extension of no more than 30 metres in total of the facilities that were installed prior to 27 September 2011. The intent is to provide some flexibility to install non fibre-ready facilities in limited circumstances (e.g. adding a facility) but not allow a more broad exemption. The length of 30 metres is considered reasonable in the context of the dimensions of a typical block of residential land in suburban Australia.

Of course, even if a project is not subject to the requirements of Part 20A of the Act (for the installation of fibre-ready facilities, or an exemption applies), a person (such as a developer) may choose to install such infrastructure for use in connection with an optical fibre based network as a commercial decision.

Clause 6 – Reasonable belief in relation to installation of fibre-ready facilities

For the purposes of clause 5, clause 6 sets out two instances in which a person will be able to form a reasonable belief that a particular type of fibre-ready facilities will be installed in the project area within the following 12 months.

Paragraph 6(1)(a) covers the instance where a person relies on information published by any carrier, carriage service provider, or other telecommunications infrastructure provider, as an area in which that particular type of fibre-ready facilities will be installed within the following 12 months.

Under the Australian Government's Fibre in New Developments policy of 22 June 2011, it is expected that NBN Co will publish information on rollout regions of the NBN 12 months prior to the ready-for-service date. On the basis of such information, a carrier, carriage service provider, or other telecommunications infrastructure provider may decide to publish information that they will deploy particular types of fibre-ready facilities (such as underground pit and pipe and associated facilities) to project areas within that rollout region in anticipation of the NBN rollout within the next 12 months. For the purposes of clause 5, any person could rely on that published information to reasonably believe the particular type of fibre-ready facilities will be installed to the project area within 12 months.

The paragraph intentionally refers to published information by 'any' carrier, carriage service provider, or other telecommunications infrastructure provider. It is open to any such infrastructure provider to publish information, such as on their website, that they will commence the rollout of such facilities in a particular area within the next 12 months as a commercial decision.

Paragraph 6(1)(b) provides another instance whereby a person is taken to form a reasonable belief - that any carrier, carriage service provider, person responsible for the project (typically a developer) or other telecommunications provider has entered into a legally enforceable agreement for the particular type of fibre-ready facilities to be installed within the following 12 months. For example, if carrier A has entered into a contract for the installation of underground fibre-ready facilities (predominantly comprising pit and pipe) to occur within the next 12 months, it logically follows that carrier A will reasonably believe that such infrastructure will be installed in the project area within the next 12 months. Similarly, as developers are expected under the Fibre in New Developments policy to have pit and pipe installed in their developments (and, indeed, potentially face penalties under Part 20A if they are constitutional corporations and do not), it is expected that developers will typically have contracts for the installation of such infrastructure if it is not already installed.

Subclause 6(2) clarifies for the avoidance of any doubt, that the two examples mentioned in subclause 6(1) are not exhaustive (i.e. they are not the only ways a reasonable belief could be formed). There may be other ways in which a person could

form a reasonable belief that the installation of fibre-ready facilities will be installed within the following 12 months. For example, it is possible that local government or a person responsible for the project (such as a developer) could provide suitably dependable information to support a reasonable belief. This provision is intended to provide flexibility to cover other acceptable scenarios that may arise. It would be necessary, however, for a person to have robust justification for a reasonable belief in any other circumstance.

Subdivision B – Exemption for real estate development projects from sale and lease limitation

Clause 7 – Exemption from requirements of section 372G – Subdivisions

Clause 7 specifies two class exemptions for paragraph 372K(1)(e) of the Act (see subsection 13(3) of the LIA), for certain real estate development projects from the requirements in section 372G of the Act.

By operation of item 1, projects are exempt from the limitation from sale or lease of a building lot or building unit for a constitutional corporation where fibre-ready facilities are not installed in sufficient proximity in the project area, where at the time of installation, non-fibre-ready fixed-line facilities were installed in accordance with an exemption granted under subsection 372K(3), from the requirements of subsections 372E(2) and/or 372F(2), that are specified or ascertained in accordance with clause 5. This is a flow-through exemption for projects subject to an exemption under clause 5. Accordingly, see the explanatory notes to clause 5 above for details on the applicable exemptions from subsections 372E(2) and 372F(2).

Item 2 provides another exemption, whereby prior to 27 September 2011 (the day the relevant provisions of the Act commenced), non-fibre-ready fixed-line facilities were installed and for use in connection with a non-optical fibre line (such as a copper or hybrid fibre-coaxial line); and effectively such facilities are re-used, or for re-use in connection with a copper or hybrid fibre-coaxial line. Such a scenario might be where existing conduit is in place beneath concrete and it can be used and it would be costly and wasteful to dig up the conduit to replace it with fibre-ready facilities. This might occur, for example in a refurbishment or knock-down rebuild situation.

This exemption is similar to the exemption specified in subclauses 5(3) and (4) under subsection 372K(3), except that the fixed-line facilities are to be re-used without additional facilities installed or material change to the original non-fibre ready facilities installed prior to 27 September 2011.

An example of facilities that were installed prior to 27 September 2011, being re-used ‘without material change’ could include patching, resealing or painting conduit that is used for a copper or hybrid fibre-coaxial network.

In such circumstances, as the facilities are for re-use and are not for use in connection with an optical fibre line, it is not necessary for a constitutional corporation to positively install fixed-line facilities (that are fibre-ready facilities) prior to sale or lease of a building lot or building unit. The facilities referred to may be underground or above ground for the purposes of the exemption.

In the case where some minor supplementation of pre-existing non-fibre-ready facilities with non-fibre-ready facilities is required, this would be covered by the flow-through exemption under item 1 of clause 7 (see above).

These exemptions are intended to recognise that there may be some, albeit limited circumstances, where it is more practical for pre-existing non-fibre-ready facilities to be re-used and constitutional corporations (such as developers) should not be impeded in trading in their land or building units where this is the case. Again, the exemptions are intended to provide practical flexibility and not undermine the overall efficacy of Part 20A. As such their operation will be monitored and the provisions will be reviewed and revised if it appears they are being abused.

In a case where it is necessary or desirable for a corporation to install facilities to materially change the facilities installed prior to 27 September 2011 (such as a material modification), it is expected that fibre-ready facilities should be installed, prior to sale or lease. For example, if new pits and pipes are required to be put in, the exemption will not apply to any such real estate development project, and by virtue of the operation of Part 20A, those facilities would need to be fibre-ready.

Clause 8 – Exemption from requirements of section 372H – Other projects

Clause 8 specifies two class exemptions for paragraph 372K(1)(f) of the Act, for certain real estate development projects from the requirements in section 372H (the limitation on sale or lease for constitutional corporations where fibre-ready facilities are not installed in sufficient proximity in the project area).

Item 1 of clause 8 largely mirrors item 1 of clause 7, except that the exemption is limited to projects where non-fibre-ready fixed-line facilities were installed in accordance with an exemption granted under subsection 372K(3), from the requirements of subsection 372F(2) only, specified or ascertained in accordance with clause 5. The reason that subsection 372E(2) of the Act is not specified (for the purposes of clause 5), is because that provision relevantly relates to projects that involve subdivision of land into building lots. Sections 372F and 372H of the Act potentially apply only where a project involves construction of building units on land (i.e. there is no subdivision into building lots). This may include, for example, refurbishment or knock-down rebuild scenarios in existing built-up brownfield areas.

Similarly, item 2 of clause 8 largely mirrors item 2 of clause 7, except that the exemption is limited to projects that involve construction of building units.