

Explanatory Statement

Issued by the Authority of the Minister for Communications,
Urban Infrastructure, Cities and the Arts.

Telecommunications Act 1997

Telecommunications (Fibre-Ready Facilities in Real Estate Development Projects and Other Matters) Instrument 2022

Authority

The *Telecommunications (Fibre-Ready Facilities in Real Estate Development Projects and Other Matters) Instrument 2022* (the Instrument) is made under paragraphs 372K(1)(e) and (f), subsection 372K(3) and subparagraph 372W(b)(ii) of the *Telecommunications Act 1997* (the Act) and subsection 33(3) of the *Acts Interpretation Act 1901*.

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 of the Act. Section 372G provides that a person must not sell or lease a building lot or a building unit, developed in a real estate development project that involves the subdivision of land, unless a functional fibre-ready facility is installed in proximity to the lot or unit.

Paragraph 372K(1)(f) of the Act allows the Minister to exempt, by legislative instrument, projects from section 372H. Section 372H applies to a building unit developed in a real estate development project that involves the construction of one or more units on one or more areas of land, and the making available of any or all of those building units for sale or lease. A person must not sell or lease such a building unit unless a functional fibre-ready facility is installed in proximity to the unit.

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) of the Act. Subsections 372E(2) and 372F(2) provide that a person must not install a fixed-line facility in the project area of a real estate development project (involving the subdivision of land or the construction of units on land) unless that facility is a fibre-ready facility.

Subparagraph 372W(b)(ii) of the Act allows the Minister to specify, by legislative instrument, above ground fixed-line facilities as fibre-ready facilities.

Purpose

The Instrument has four separate objectives.

First, given that Part 20A focuses on the provision of underground fibre-ready facilities, but above ground facilities also need to be used, the Instrument specifies that certain above ground fixed-line facilities like poles are fibre-ready facilities for the purposes of the Act.

Second, the Instrument also allows the installation of non-fibre-ready facilities in new developments in two limited circumstances:

- where fibre-ready facilities have already been installed, or are being installed in parallel, or the installer has a reasonable belief that fibre-ready facilities will be installed in the following 12 months, and no more than 10 building lots or building units, will be serviced by the non-fibre-ready facilities; and

- where it is necessary to supplement non-fibre-ready facilities installed prior to 27 September 2011 and the supplementation is minor in nature (e.g. no extension is greater than 30 metres).

Third, the Instrument provides that in the circumstances above real estate development projects are also exempt from the restrictions on selling or leasing building lots or units unless fibre-ready facilities have been installed in proximity under sections 372G and 372H of the Act.

Fourth, the Instrument exempts real estate development projects from the restrictions, on selling or leasing building lots or units unless fibre-ready facilities are installed, where pre-existing non-fibre-ready facilities can be reused with minimal change.

Background

Part 20A of the Act sets out general requirements for persons who develop real estate development projects. Generally, a person must not install a fixed-line facility in the project area for a real estate development project unless it is a functional fibre-ready facility. Furthermore, a person must not sell or lease a building lot or a building unit unless a functional fibre-ready facility have been installed in proximity to the building lot or unit.

The provisions apply generally across Australia. It was recognised at the time the legislation was made that exemptions would need to be available to account for specific circumstances, and so Part 20A includes powers for the Minister to exempt persons or projects from the requirements. In 2011 the then Minister made the *Telecommunications (Fibre-Ready Facilities in Real Estate Development Projects and Other Matters) Instrument 2011* (the 2011 Instrument), which is now being re-made with minor changes. The 2011 Instrument dealt with the four specific matters set out above; this Instrument does the same.

A further exemption instrument was made in 2016, and re-made in 2021, that exempts real estate development projects in rural and remote areas where it is unlikely that fixed-line networks will be installed for the foreseeable future.

Since the 2011 Instrument was made, there have been a number of changes in the regulatory and commercial environment relevant to the new Instrument. In early 2021 Part 20A was amended by *Telecommunications Amendment (Infrastructure in New Developments) Act 2021* to extend its application from constitutional corporations to all persons and ensure fibre-ready facilities installed are ‘functional’. On the commercial front, a number of telecommunications providers servicing new developments have entered or left the market. This includes Telstra, which was previously the major supplier. NBN Co, like some other providers, also adopted a multi-technology approach to network provisioning. As such, while some of the measures put in place in the Original Instrument in 2011 were intended to support a significant transition in the sector, other changes in the sector mean the exemptions have ongoing relevance.

Consultation

The 2011 Instrument will sunset on 1 April 2022. Between December 2021 and February 2022 the Department of Infrastructure, Transport, Regional Development and Communications (the Department) consulted on both the 2011 and 2021 Instruments. The Department received 15 submissions, from developers, local councils, state agencies,

telecommunications carriers and engineering firms specialising in arranging for fibre-ready facilities. Those submissions were considered in determining to re-make the 2011 Instrument. Non-confidential submissions will be published on the Department's website.

All submissions that discussed the 2011 Instrument commented that the provisions contained in it remain important. Carriers, such as NBN Co, for example, continue to use HFC and copper technologies such as fibre-to-the-node, so they should continue to have the ability to use the facilities they need to use. The extension of Part 20A to persons generally also increases the possibility of the types of edge cases the Instrument covers arising. As such, those matters in the 2011 Instrument should continue to be dealt with in the same way in a similar instrument. This Instrument does this with some minor changes largely reflecting changes in drafting style since the 2011 Instrument was made. However, the Department will consider whether the Instrument can be further refined and simplified to better reflect the more stable operating environment to that which existed in 2011.

Statement of compatibility with human rights

A statement of compatibility with human rights for the purposes of Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* is set out at [Attachment B](#).

Details of the *Telecommunications (Fibre-Ready Facilities in Real Estate Development Projects and Other Matters) Instrument 2022*

Part 1 - Preliminary

Section 1 – Name

This section provides that the name of the Instrument is the *Telecommunications (Fibre-Ready Facilities in Real Estate Development Projects and Other Matters) Instrument 2022*.

Section 2 – Commencement

Section 2 provides that the Instrument commences on the day after it is registered on the Federal Register of Legislation.

Section 3 – Authority

This section provides that the Instrument is made under paragraphs 372K(1)(e) and (f), subsection 372K(3) and subparagraph 372W(1)(b)(ii) of the *Telecommunications Act 1997* (the Act).

Section 4 – Definitions

Section 4 provides that a number of expressions used in the Instrument are defined in the Act. Expressions used and defined in the Act include key terms used in Part 20A to define facilities, obligations and real estate development projects.

Section 5 – Schedules

Section 5 provides that each instrument that is specified in a Schedule to this Instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Instrument has effect according to its terms.

Part 2 – Fibre-ready facility

Section 6 – Specification of above ground fixed-line facilities that are fibre-ready facilities

Section 6 provides that a fixed-line facility is specified for the purposes of subparagraph 372W(1)(b)(ii) of the Act if it satisfies one or more of five requirements. Those requirements relate to above ground facilities. They are that the facility:

- a) is suspended above the surface of land or a body of water; or
- b) is placed or attached, on or above the surface of land or a body of water; or
- c) is placed or attached, on or within a building, structure or other thing located on, or above the surface of land or a body of water; or
- d) is protruding from the surface of land or a body of water; or
- e) is otherwise located above the surface of land or a body of water.

Common examples of facilities which may meet these specifications include optical fibre-splitter cabinets; nodes; optical fibre drop cables; risers; aerial lead-in cabling; poles or masts; shelters; and structures housing exchanges. Such types of facilities are commonly used in the rollout of fibre and hybrid fibre networks.

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. These are that the facility must be used, or is for use, in connection with an optical fibre line, and must satisfy such conditions (if any) as are specified in a legislative instrument made by the Minister.

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

Division 1 – Exempt conduct

Section 7 – Exemptions

Section 7 specifies two types of conduct that would be 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.

Exempt conduct – installation of fixed-line facilities related to copper or hybrid fibre-coaxial

The first exemption provides for deployments of non-fibre-ready facilities in parallel with fibre-ready facilities or on an interim basis pending the deployment of fibre-ready facilities.

Subsection 7(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 HFC network (including joint copper and HFC facilities such as a shelter). This exemption is subject to the conditions specified in subsections 7(2) or 7(3) (as applicable) being satisfied. Subsection 7(2) relates to a situation where fibre-ready facilities are or will be underground. Subsection 7(3) relates to a situation where the fibre-ready facilities are or will be above ground.

Subsection 7(2) specifies that underground fibre-ready facilities must have already been installed or are simultaneously installed (paragraphs 7(2)(a) and (b)). Alternatively, if neither of those paragraphs apply, the person installing the non-fibre-ready facilities must have a reasonable belief that underground fibre-ready facilities will be installed within 12 months of the installation of the non-fibre-ready facility in the project area, and all of the fixed-line facilities are to be installed in proximity to no more than 10 building lots or building units. The intention of this is to maximise the installation of underground fibre-ready facilities, consistent with the overall intention of Part 20A, while providing limited exemptions for flexibility.

‘Proximity’ is defined in section 372Y of the Act and captures a facility that is installed in, on or under the building lot, or in sufficient proximity to the lot, so as to enable a line to be readily connected to a building unit. The intention is that connection can take place quickly and without significant additional civil works. 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, because it would not allow ready connection.

The limit of 10 building lots or building units 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.

Subsection 7(3) specifies conditions where it is not reasonably practical to install underground facilities, and consequently above ground fibre-ready facilities are installed. The conditions in subsection (3) largely mirror those in subsection (2) - namely, fibre-ready facilities have been 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 and the facilities are to be installed in proximity to no more than 10 building lots or building units.

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 exemption in subsection 7(1) is appropriate as the building lot or building unit (as the case may be) would have fibre-ready passive infrastructure installed (even if there was some delay) 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.

Exempt conduct – installation of minor supplementary fixed-line facilities etc.

Subsection 7(4) provides a second exemption where minor supplementary and other specified non-fibre-ready fixed-line facilities are installed for a real estate development project. This exemption is subject to the conditions specified in subsection 7(5).

The conditions under subsection 7(5) 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 HFC line) in the project area; and
- the non-fibre-ready fixed-line facilities that are installed constitute a minor supplementation, an ancillary extension of no more than 30 metres, a minor replacement, a minor modification, or a relocation of the facilities; 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 situations where minor supplementations are required for existing copper-based or HFC facilities. Effectively, a person may choose to supplement those existing facilities with non-fibre-ready facilities where it is not reasonably practical or technically feasible to install fibre-ready facilities. This is intended to cover possible but likely limited scenarios where the pre-existence of non-fibre-ready fixed line facilities 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. Alternatively, supplementary conduit may not be able to be installed with obtuse angle bends used for optical fibres. In reality, however, it is envisaged there would be few scenarios where fibre-ready facilities could not be employed

and the criteria in subclause 7(5) 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 subsection 7(5), the concept of 'supplementation' is expressly tied to non-fibre-ready facilities installed prior to (and at) 27 September 2011 (paragraph 7(5)(a)). Subparagraph 7(5)(b)(i) provides for minor supplementation that does not constitute an extension as the Instrument is not intended to enable unlimited extension of non-fibre-ready fixed line facilities. Only extension of an ancillary nature (i.e. up to 30 metres) is permitted, as provided for in subparagraph 7(5)(b)(ii). Accordingly, in determining whether the installation of a new non-fibre-ready fixed-line facility may constitute a permissible ancillary extension, it is necessary to consider whether the new facility would constitute an ancillary extension of no more than 30 metres in total relative to the facilities that were installed prior to (and at) 27 September 2011. The intention is to provide some limited flexibility to install non-fibre-ready facilities but not allow a more broad exemption or the creeping extension of non-fibre-ready facilities (e.g. by adding 30 metres to 30 metres to 30 metres). 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 to install fibre-ready facilities (for example, because 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.

Section 8 – Reasonable belief in relation to the installation of fibre-ready facilities

For the purposes of subparagraphs 7(2)(c)(i) and 7(3)(c)(i) of the Instrument, section 8 sets out examples of how a person will be able to form a reasonable belief that a particular type of fibre-ready facility will be installed in the project area within the following 12 months. The examples are not exhaustive.

Paragraph 8(1)(a) covers the instance where a person relies on information published by any carrier, carriage service provider, or other telecommunications infrastructure provider, to believe that fibre-ready facilities will be installed in the project area of a real estate development project within the following 12 months.

Historically, carriers have often published information that they will be servicing particular areas, including installing fibre-ready facilities. People with obligations to otherwise install fibre-ready facilities have been able to rely on such material. While it is uncertain how common this practice will be in future, the provision is retained for continuity, should it be useful in future. More likely is the scenario in paragraph 8(1)(b).

Paragraph 8(1)(b) provides another example where a person is taken to be able 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, under the Commonwealth's *Telecommunications in New Developments* (TIND) policy of September 2020¹ developers are required to arrange for their developments to be connected to telecommunications networks. It follows that developers would be aware of contracts that they have entered into for such networks and, where those contracts require facilities to be installed in the next 12 months, the developer will have a reasonable belief that this will occur. Under the TIND policy developers are required to approach a carrier at least six months before infrastructure is required, and to do so as early as possible to optimise planning. Where such arrangements are in place, they may be published for commercial, promotional or regulatory reasons, thereby providing further grounds for the reasonable belief as provided for under paragraph 8(1)(a).

Division 2 – Exemption for real estate development projects from sale and lease limitation

Section 9 – Exemption from requirements of section 372G – Subdivisions

Section 9 specifies two class exemptions pursuant to paragraph 372K(1)(e) of the Act (see also subsection 13(3) of the *Legislation Act 2003*) for certain real estate development projects from the requirements in section 372G of the Act.

Item 1 in the table at section 9 provides an exemption from the limitation on sale or lease of a building lot or building unit where fibre-ready facilities are not installed in proximity in the project area, as specified in section 372G of the Act. Any real estate development project will be exempt where fixed-line facilities (other than fibre-ready facilities) have been installed in accordance with an exemption granted under subsection 372K(3) of the Act from the requirements of subsections 372E(2) and/or 372F(2). This is a flow-through exemption for projects subject to an exemption under section 7 of this Instrument. Accordingly, see the explanatory notes to section 7 above for details on the applicable exemptions from subsections 372E(2) and 372F(2).

Item 2 in the table at section 9 provides another exemption, for the re-use of fixed-line facilities installed prior to 27 September 2011 (the day the relevant provisions of the Act commenced), and these are not fibre-ready facilities. The exemption only applies if such facilities are re-used, or for re-use, in connection with a line other than an optical fibre line (such as a copper or HFC line). Item 2 in the table provides that the re-use must be 'without any material change'.

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 HFC 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 person to positively arrange for fibre-ready facilities to be installed prior to the 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.

¹ See www.infrastructure.gov.au/tind

In the case where some minor supplementation of pre-existing 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 circumstances where it is more practical for pre-existing non-fibre-ready facilities to be re-used and developers should not be impeded in trading in their land or building units where this is the case. The exemptions are intended to provide practical flexibility.

In a case where it is necessary or desirable for a person 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.

Section 10 – Exemption from requirements of section 372H – Other projects

Section 10 specifies two class exemptions pursuant to paragraph 372K(1)(f) of the Act, for certain real estate development projects from the requirements of section 372H of the Act. See also subsection 13(3) of the *Legislation Act 2003*, which provides that the power to make an instrument specifying, declaring or prescribing a matter may be exercised by referring to a class or classes of matters.

Item 1 of the table in section 10 largely mirrors item 1 of section 9, except that the exemption relates 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. The reason why subsection 372E(2) of the Act is not specified (as it was in item 1 of the table in section 9), is because that provision 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 the table in section 10 largely mirrors item 2 of the table in section 9, except that the exemption is limited to projects that involve construction of building units.

Schedule 1 – Repeals

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

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Telecommunications (Fibre-Ready Facilities in Real Estate Development Projects and Other Matters) Instrument 2022

Overview

The purpose of the *Telecommunications (Fibre-Ready Facilities in Real Estate Development Projects and Other Matters) Instrument 2022* (the Instrument) is to re-make with minimal changes and repeal an existing instrument, the *Telecommunications (Fibre-Ready Facilities in Real Estate Development Projects and Other Matters) Instrument 2011* (the 2011 Instrument) which would otherwise sunset on 1 April 2022.

The Instrument specifies above ground facilities are ‘fibre-ready facilities’ for the purposes of Part 20A of the *Telecommunications Act 1997*, and also sets out exemptions from requirements to install fibre-ready facilities in real estate development projects, and flow-through exemptions for developers from requirements not to sell or lease building lots or building units unless fibre-ready facilities have been installed in proximity.

The exemptions are generally limited to interim or small-scale deployments but recognise that telecommunications providers still use above ground facilities and technology platforms like copper or hybrid fibre-coaxial and should therefore be able to continue to use those platforms to service new developments in limited circumstances.

Human rights implications

The Instrument is compatible with the rights and freedoms recognised or declared by the international instruments listed in subsection 3(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* as they apply to Australia.

The Instrument does not engage any of the applicable rights or freedoms.

Conclusion

The Instrument is compatible with human rights as it does not raise any human rights issues.