TELECOMMUNICATIONS LEGISLATION AMENDMENT (FIBRE DEPLOYMENT) BILL 2010

EXPLANATORY MEMORANDUM

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

The Telecommunications Legislation Amendment (Fibre Deployment) Bill 2010 (the Bill) amends the Telecommunications Act 1997 (the Act) to help implement the Government’s policy that fibre-to-the-premises infrastructure should be installed in new developments that receive planning approval from 1 July 2010.

The policy of having fibre installed in new developments complements the Australian Government’s historic announcement on 7 April 2009 that it will establish a company that will invest up to $43 billion over eight years to build and operate a National Broadband Network delivering super fast broadband to Australian homes and workplaces. The Government considers it does not make sense to roll-out a fibre network to up to 90 per cent of premises, leaving new developments to be serviced by old technology.

The Bill will add a new Part 20A to the Act, the effect of which will be to require that:

- where fixed telecommunications lines are installed within a specified new development or an identified class of new developments, the lines must be optical fibre lines, and any other specified conditions must be met (‘the fibre connection requirement’); and

- where fixed-line facilities (such as pits and ducts) are installed within a specified new development or an identified class of new developments, the facilities must be “fibre-ready facilities”, and any other specified conditions must be met (‘the fibre-ready infrastructure requirement’).

Proposed Part 20A of the Act is intended to apply to all types of new developments, including greenfield (broadacre) estates, urban infill and urban renewal projects. Developments or classes of developments in which these rules apply would be set out in a legislative instrument made by the Minister for Broadband, Communications and the Digital Economy (the Minister). The Bill provides for the Minister to determine what is a “fibre-ready facility” for the purposes of the fibre-ready infrastructure requirement. For example, the Minister could determine that for a duct to be a “fibre-ready facility”, it must have a minimum internal diameter (with a view to enabling the quick and efficient installation of fibre at a later date).

The provisions will apply whether the real estate development project is intended to establish building lots, or building units, or both, for either sale or lease. The fibre connection requirement will not apply to lines that are not intended to provide a carriage service to the public (e.g. it will not apply to private networks) or that are not wholly or primarily for use by an end-user at the end user’s premises (e.g. it will not apply to a line connecting to a mobile phone tower).

By enabling the Minister to specify in a legislative instrument those developments or classes of developments in which the fibre connection requirement or the fibre-ready infrastructure requirement apply, the legislation enables the Minister to implement the Government’s policy on a targeted basis that can take account of market conditions.
circumstances on a regional or local basis and changes in them over time. For example, the Minister could:

- nominate developments where the fibre connection requirement is to apply by setting the characteristics of such developments with reference to matters such as the anticipated cost per dwelling of installation of optical fibre lines; or
- identify the developments in which the fibre-ready infrastructure requirement is to apply with reference to the location of developments or a threshold for the size of such developments (e.g. developments containing at least a certain number of dwellings).

While not addressed in the Bill, it is envisaged, although not strictly necessary, that this legislation will be complemented by changes to state, territory and local planning arrangements, which would further support the roll-out of fibre-to-the-premises, and where necessary, the installation of fibre-ready facilities, which might include appropriate ducting in the case of an underground deployment. However, the Bill can operate even in the absence of complementary state and territory laws.

The Bill also enables the Minister to specify in a legislative instrument exemptions from the fibre connection requirement and from the fibre-ready infrastructure requirement, where these rules would otherwise apply. For example, the Bill would permit the Minister to allow non-fibre fixed infrastructure (e.g. copper) to be installed in certain circumstances (e.g. where customers have equipment that requires the use of a non-fibre line).

To ensure that carriers are able to gain access to the fibre-ready facilities installed in accordance with the fibre-ready infrastructure requirement, the Bill provides for the establishment in later regulations of an access regime that would require third party access to those facilities to be given. It is intended that regulations will be developed requiring the installer (or a subsequent owner) of such facilities to give access to the facilities for the purpose of carriers installing optical fibre.

Installation in developments that are specified by the Minister of lines that are not optical fibre or of facilities that are not fibre-ready would be subject to civil penalty provisions under the Act. The enforcement regime will apply to both carriers and non-carriers, consistent with application of the Act.

The Bill also amends Part 6 of the Act, which deals with industry codes and standards, to more readily enable the development of industry codes and standards relating to fibre optic lines and related facilities, and to give further examples of the types of topics which industry codes or standards might cover. In addition to providing necessary guidance on relevant technical matters, these measures respond to calls from stakeholders for such guidance to promote nationally consistent network and service outcomes.

**FINANCIAL IMPACT STATEMENT**

The administration costs of the Department of Broadband, Communications and the Digital Economy will be met from Departmental funding.
1. Identifying the problem

Background

Context

The Government is committed to providing high speed broadband access to Australian homes and businesses. On 7 April 2009 it announced that it would establish a majority Commonwealth owned company to invest up to $43 billion in partnership with the private sector to build a new superfast fibre optic based National Broadband Network (NBN). The NBN will connect up to 90 per cent of Australian homes, schools and work places with ‘fibre to the premise’ (FTTP) technology delivering broadband speeds of 100 megabits per second, around 50 to 200 times faster than many broadband services that people use today. Remaining premises will be covered by next generation wireless and satellite technologies delivering speeds of 12 megabits per second or more.

An important adjunct to the decision to roll-out the NBN was that the Government would progress legislative change to ensure that FTTP is installed in new developments that receive planning approval from 1 July 2010. For convenience, this initiative is known as the ‘fibre in greenfields’ policy. With fibre infrastructure being rolled out generally in established ‘brownfield’ areas, it also makes sense to have this technology installed in Australia’s newest premises as they are built to ensure people have access to superfast broadband services from the day they move in.

The benefits of FTTP

FTTP is widely recognised as the optimal communications technology for the future. This is reflected in trends in the United States where it has been estimated that, by 2011, 25 per cent of homes will be passed by fibre\(^1\). FTTP will provide significantly faster broadband speeds, thereby supporting greater simultaneous use of existing applications and a platform for new bandwidth-intensive applications. FTTP will also provide capacity for future growth in the use of broadband applications, is readily upgradeable and will lead to significant direct and indirect economic, environmental and social benefits. For instance, superfast broadband will be an enabler for businesses in new developments; it will ameliorate problems of social isolation by creating opportunities for communication within social groups and families; and it has the potential to reduce energy consumption and greenhouse gas production both directly because fibre networks can be more energy efficient and indirectly because it presents opportunities for reductions in travel through videoconferencing and teleworking. These and other benefits are explored in more detail in the Impact Analysis.

\(^1\)http://www.bhpmag.com/2009issues/april09/BBP_April09_Primer.pdf
Historical approach to providing telecommunications in new developments

Historically, new developments have generally been serviced by copper-based telecommunications networks which have provided voice services, and over the past decade or so, digital subscriber line (DSL) based broadband services. These installations have generally been undertaken by Telstra, largely reflecting its status as the universal service provider.

The capacity of copper-based networks to deliver high speed broadband services is significantly inferior to FTTP networks. This capacity is affected by such factors as the quality of the copper, distance from the exchange, the availability of spare ports and the presence of network electronics such as remote integrated multiplexer (RIM) and pair gain systems. The limitations of copper can lead to poor broadband services or no broadband services at all.

The tendency to install old technology in new estates has been slowly changing. In recent years there has been increasing deployment of FTTP in new estates across Australia. Forward-looking developers and local councils have recognised that FTTP networks provide additional benefits to households, add value to properties and become a selling point as the availability of superfast broadband becomes the expectation for all businesses and consumers. In the United States, it is estimated that having a fibre connection can add approximately $US5,000 to the value of a home².

Australian FTTP providers vary in size, operating model and the areas in which they operate. Known providers of FTTP in new estates in Australia include Arise, BES/E-Wire, Clubcom, OPENetworks, Opticomm, Pivit, Service Elements, Telstra and TransACT. Fibre has been installed in estates in all States and Territories. There are plans for further developments in all States and Territories³.

Increasing demand for FTTP facilities as a result of this initiative is likely to result in the growth of the sector. Currently Australia has over 200 licensed carriers and many would be potential providers of FTTP in new developments. The market may also be of interest to civil engineering firms that provide services to carriers and others.

Key parameters: number of premises and costs per premises

Two parameters are key to discussion of implementation of the fibre in greenfields policy: the number of premises involved and the cost of providing telecommunications to premises. This section provides contextual information on both of these. Cost issues are discussed further in the ‘Impact Analysis’ section.

³ For further information, see, for example, Stephen Davies, FTTH Communities Map, at http://www.ozftth.blogspot.com/2008/02/australian-ftth-communities-map.html (accessed 5 February 2010)
There are around 150,000 new dwellings\(^4\) constructed each year. In addition, it is estimated that there are around 60,000\(^5\) other premises such as commercial, industrial and government premises constructed per annum.

To enable an indicative comparison of options, costs are compared on the basis of capturing 90 per cent of premises with fibre (i.e. 189,000), this being consistent with the Government’s objective of servicing 90 per cent of existing premises with FTTP and that FTTP may not be required in some instances for other reasons.

That said, the precise cost of implementing the policy will depend on the exact number of premises ultimately affected by it and the mix of approaches (i.e. fibre versus fibre-ready versus doing nothing) that may apply to them.

**Costs per premises**

The following information relates to the cost of different approaches to providing fixed telecommunications in new developments.

There are a number of costs associated with connecting new developments which are common, irrespective of whether copper or FTTP is installed. These include civil engineering costs, such as design, trenching and ducting. They also include the cost of providing backhaul from the new development to an appropriate point of interconnection in the existing network. These costs may be minimal if backhaul infrastructure is readily available in a location. If new backhaul infrastructure is required, the capital cost is variable, depending on the location of the development relative to the existing network and whether existing facilities can be used. By way of guidance, backhaul for some developments has cost $400,000-$700,000. The cost per lot will depend on the number of lots in the development.

There are also costs which are more variable. These include the cost of the line to be installed (e.g. copper versus fibre) and the electronics required. For example, both copper and fibre-based broadband require electronics in the exchange or the node and in the customer’s premises. However, the costs of these differ, as can the incidence of those costs.

For the purposes of this Regulation Impact Statement, key provisioning scenarios and the estimated total cost per premises of each scenario are:

- providing copper connections, with broadband capability, at around $1,000;
- connecting FTTP to new premises, at around $2,500 per lot;
- retrofitting premises that are connected with copper with FTTP where fibre-ready infrastructure is installed, at around $3,000 per lot (i.e. $1,000 for copper and fibre-ready infrastructure plus $2,000 for retrofitting FTTP); and
- retrofitting premises that are connected with copper with FTTP where no fibre-ready infrastructure has been installed, at around $4,000 per lot ($1,000 for initial copper installation plus $3,000 for retrofitting FTTP).

\(^4\) National Housing Supply Council 2008 *State of Supply Report*, p.35
\(^5\) This figure is based on projections in the growth of serviceable addresses in future years.
Another possible scenario that has been raised is that of installing fibre-ready passive infrastructure in new developments but servicing them with wireless technology on an interim basis pending the provision of fibre. This is effectively treated as a variant of the scenario of providing a copper solution and fibre-ready infrastructure with this to be later retrofitted with fibre. It is estimated that the per premises cost of this scenario would be less than that of an interim copper solution but it would not be able to support high demand for high-speed broadband services over an extended period.

These estimates are informed by international benchmarks, consultations and expert input. The estimates are considered to be conservative. In particular, the cost of $2,500 for an FTTP connection is a midpoint figure amongst a number of available estimates ranging from $1,500 to $3,500. They have been developed independently of the NBN Implementation Study and as such they should not be construed as reflecting on the findings of that study. Once the findings of the Implementation Study have been fully considered, they should permit the refinement of these estimates. It may well be that that work will confirm much lower per lot costs than are assumed here, and there may be significant differences in the assumptions made and the cost elements included in estimates. All indications are the estimates used here are cautious and as such should reflect a considerable safety margin.

To put this cost into context, a submission to the Public Works Committee by the Land Management Corporation (South Australia) estimated the per lot costs for one development to be $2,500 for water, $3,200 for stormwater, $4,800 for power and $4,800 for sewerage.

It is the practice at the moment that developers bear these costs initially although to a greater or lesser degree they may be recovered from purchasers.

There may also be some other costs to stakeholders, for example to familiarise themselves with requirements. It is expected these costs would decline over time as stakeholders became accustomed to the arrangements (including by the development of guidance for the industry).

The problem

The problem to be addressed is to maximise the installation of FTTP infrastructure—rather than older copper technology—in new developments that receive planning approval from 1 July 2010 while taking into account relevant external factors and minimising costs, particularly as a result of retrofitting.

Eventually the installation of FTTP in new developments is expected to be a routine part of the major civil works stage, just like the installation of other utilities such as roads, electricity, water, sewerage and gas. At this stage, however, the Government is concerned that, in the absence of this initiative, developers may chose the cheaper, less capable copper option instead of FTTP, contrary to the interests of the first owners — and subsequent purchasers—of new premises. Developers are familiar with
the processes for having copper installed and may have little or no knowledge about the FTTP alternative. More importantly, however, the cost, effort and inconvenience of retrofitting with FTTP may be borne by the purchaser and not by developers, who therefore have an incentive to install the cheaper copper infrastructure initially.

A small, albeit growing, number of new developments are currently being constructed with FTTP. It is estimated that around 11,000 dwellings were connected as at December 2009. The rate of connection is increasing: about a quarter of these connections were made in 2009. In many cases these deployments have been supported by forward-looking local government and state land agencies, including via the use of local planning regulations.

However, those estimated 11,000 premises that have been connected with FTTP are only a few compared with the number of new premises constructed each year (an estimated 150,000 dwellings and 60,000 other buildings). In the absence of Government action, these other premises will, at some stage, need to be retrofitted at a higher cost than if fibre or fibre-ready infrastructure were installed in the first place. This cost can be avoided if FTTP is initially deployed and reduced if fibre-ready infrastructure is installed.

2. Objectives of government action

The Government’s objective is to have FTTP installed in new developments to the greatest extent practicable and, where this is not immediately feasible, to have developments made ‘fibre-ready’: that is, to have appropriate ducting and other facilities installed in order to avoid more costly retrofitting later.

The Commonwealth also wants to implement the policy in a manner which maximises the benefits to be derived from superfast fibre-based broadband for:

- users;
- competition; and
- the environment.

Complementary objectives are to have nationally consistent network and service outcomes to the greatest extent possible and that networks in new developments should be fully interoperable and consistent with the NBN.

A further objective in implementing the policy is to minimise the cost to the Commonwealth.

Other policy implementation considerations

In designing implementation options, the following considerations also need to be considered:

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8 Calculated from estimates supplied to DBCDE by Telstra, TransACT, Broadcast Engineering Services Ltd and Stephen Davies of Opticomm

9 ‘Fibre-ready infrastructure’ refers to passive infrastructure such as ducting, pits and poles that are designed, provisioned and installed so as to facilitate the ready installation of FTTP at a later date.
The effectiveness of the measure will be judged in large part by the number of people who have fibre installed sooner than would otherwise be the case.

The policy should take effect as soon as is reasonably practicable: around 410 houses are being completed each day, and if they do not have fibre installed at the building stage they will require costly retrofitting later.

Planning laws are fundamentally a matter for State and Territory Governments. It is this system within which developers and builders generally operate. There may therefore be merit in using these arrangements.

The effects on the industry should be considered: in particular, the measure should not preclude competition among firms for the installation of fibre networks that provide equivalent consumer experiences. For some firms, the provision of FTTP in new developments is their key business activity.

Compliance costs – both direct costs and associated transactional costs – should be kept to a minimum.

The degree of risk and certainty of outcome vary with the different options.

3. Options

Key options

The Government has consulted widely about how to achieve the installation of FTTP in new developments and meet its other objectives. There are three broad options:

1. the provision of fibre in new developments could be left to the market, noting that the rate of installation, while low, is accelerating; or

2. there could be a requirement that fibre-ready infrastructure, such as appropriate ducting, be installed at the time of construction so that FTTP can be retrofitted more efficiently and cost-effectively at an appropriate time in the future; or

3. there could be a requirement that FTTP be installed when a new development is constructed.

These three options are not necessarily discrete; some combination of them may be the most practicable solution. This RIS proceeds on the basis that the Government’s policy may be best effected by requiring some premises to have FTTP installed, while others have fibre-ready infrastructure installed and others (like those outside of the fibre footprint) are not subject to any requirements in relation to FTTP or fibre-ready infrastructure.

Other policy variables

Other policy options are available within the bounds of these three options.

Firstly, there is a question whether, under any of the options, it is necessary or desirable for detailed technical and network design specifications and service outcomes to be
specified or whether these should be left to individual providers. Given the objective that greenfields networks be consistent and interoperable with the rest of the national network, the Government considers that the former approach is appropriate. The RIS proceeds on that basis.

Whether or not to subject fibre-ready infrastructure (option 2) to an access regime is another question. As passive carrier infrastructure is already subject to access arrangements and access arrangements are necessary to derive maximum benefit from such facilities, it is assumed an access regime will be in place.

Another question arises about whether FTTP or fibre-ready infrastructure should be provided by a designated provider — for example NBN Co, as some have suggested — or by multiple providers in an open market, as now. The discussion in this RIS assumes an open market for supply and no special designation of any particular provider. That is, it does not rule out a role for NBN Co, but it allows others to install this infrastructure if they provide required technical and service outcomes.

The fourth question is: who is to pay for meeting the requirements of this policy? The recovery of costs is largely seen as a commercial matter for stakeholders and the RIS proceeds on this basis. A range of cost recovery or sharing scenarios exists, or could exist into the future with the widespread deployment of FTTP. Under the current arrangements for the deployment of FTTP, developers bear much of the initial cost.

Finally, a blanket or targeted approach can be taken. The RIS assumes a targeted approach will be taken as it allows more responsive, tailored and phased solutions to be delivered.

4. Impact analysis

Criteria against which each option is to be assessed

This impact analysis assesses the three options against these criteria:

- their effectiveness in achieving the Government’s objectives
- the relative costs of requiring FTTP or fibre-ready infrastructure now compared with the cost of acting later; and
- the impact of stakeholders, the most prominent being:
  - consumers in new developments, including households, businesses, schools and other users in metropolitan and regional areas;
  - developers and builders, including State and Territory land development agencies;
  - NBN Co, since any development that does not have FTTP installed at greenfield may need to be serviced by NBN Co at a later date;
  - the telecommunications industry generally, including Telstra, other carriers who install FTTP, and wholesale and retail service providers;
  - suppliers of network equipment, including cabling and electronics;
  - State and Territory and local governments; and
  - the Commonwealth, in terms of achieving it policy objective within the constraints identified.

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10 HIA has over 40,000 members. This includes developers, builders and suppliers of various types and size. The largest 100 companies won contracts worth $57 billion in 2008/09, work equal to 67 per cent of all non-mining projects started in the year to March 2009.
Insofar as this Regulation Impact Statement is concerned with the impact of these options on Telstra, it does so in relation to Telstra in its current form. The implications for Telstra may be different if Telstra’s form changes as a result of, for example, commercial agreement or passage of the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009.

Assessment against the criteria

Criterion 1: Effectiveness in meeting the Government’s objectives

Access to superfast broadband

As noted above, there is expected to be significant economic value in ensuring people get access to superfast broadband from the day they move into a new property, rather than waiting for the NBN rollout.

There are clear benefits to the direct user of superfast broadband services, but there are also network benefits; that is, the benefit to others from that purchaser being available on the network. These network benefits will be greater to the extent that more users have access to superfast broadband services and are able to make greater use of user-to-user services that depend upon such functionality (e.g. high definition video conferencing). A specific example of a particular network benefit is the value for businesses of being readily accessible in new developments, especially those some distance from commercial centres, via superfast broadband. The use of broadband for advertising and receiving orders is increasing rapidly, and superfast broadband increases the level of user interaction and the sophistication of transactions possible. Consistent with the Government’s decision to roll-out the NBN more generally, these network benefits are expected to be significant.

The social value of early access to superfast broadband may be greater to the extent that people in new estates may otherwise be more physically and/or socially isolated. For example, the ability of superfast broadband to support high-definition video-calling and videoconferencing can help maintain family relationships both by supporting contact with family members and allowing users to work from home.

FTTP may have a range of implications for social housing and affordable housing developments. The short term impact would depend on the extent to which fibre or fibre-ready infrastructure was required in such developments. However, many features of broadband, including easier and faster communications, greater access to information and to business and government services, and assistance with patient self-management of chronic illness, may be of particular benefit to those living in social and affordable housing developments. It is often the case that the ability of those on low incomes to access these services directly is limited by the lack, or cost, of transport. This being the case, residents of affordable housing and social housing developments may gain the greatest benefit from access to broadband.

To the extent that users in new residential or business developments in regional areas may be relatively disadvantaged in terms of access to facilities, services or markets, the amenity of access to superfast broadband could be greater for them.
There is also a benefit in that provision of FTTP at the development and building stages is likely to result in more functional and aesthetically pleasing arrangements, than retrofitting. For example, the housing of electronics can be better integrated into the design of the premises. This is not readily quantifiable.

As Option 1 provides little certainty as to whether it will expedite the delivery of FTTP in new developments, it rates poorly in relation to its likely effectiveness. Option 2 also does not ensure immediate access to FTTP in new developments, however it paves the way for simpler installation at a later date, making it more likely in the future. Option 3 best achieves the objective of having fibre installed because it directly requires it.

**Competition effects**

The provision of FTTP in new developments is also expected to have a positive effect on competition in the supply of telecommunications infrastructure and services. Because of its incumbency and role as the universal service provider, Telstra is generally called upon to install copper infrastructure. By contrast, as noted above, it faces competition in the supply of FTTP infrastructure. Once installed FTTP can support multiple providers of different services at the retail level. A number of competing FTTP providers are also strong proponents of providing open access on their networks. (That said, networks are otherwise subject to access regulation under Part XIC of the *Trade Practices Act 1974*.)

As the largest provider of copper-based infrastructure to individual premises, all options to move to FTTP will impact on this aspect of Telstra’s business. However, Telstra is already well established in the FTTP market and is in a strong position to compete in the provision of fibre. Telstra has generally welcomed the Government’s fibre in greenfields policy.

The installation of fibre-ready infrastructure with appropriate specifications and access arrangements should also facilitate competition in the supply of fibre-based services in that it will be difficult for any owner of such passive infrastructure to take unfair advantage of their control of such bottleneck facilities.

Again, as Option 1 provides little certainty as to whether it will expedite the delivery of FTTP or fibre-ready infrastructure in new developments, it rates poorly in relation to its benefits for competition. Option 2 does not deliver the full competition benefits of a FTTP platform, but it improves opportunities for FTTP providers and paves the way for a full FTTP outcome. Option 3 best achieves the competition benefits of fibre installed because it directly requires it.

**Environmental benefits**

FTTP will deliver environmental benefits. There are several pathways to this outcome. First, fibre networks can be more energy efficient to operate than other forms of broadband. As a high-bandwidth technology, superfast broadband can also save on travel and therefore greenhouse emissions by way of teleworking, high-definition videoconferencing and online shopping. (This benefit may be even

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higher for regional developments.) There may be a higher uptake of technologies such as smart metering if FTTP is available immediately when new premises are being established. The environmental benefits will be greatest the larger the number of premises that have fibre installed and the sooner that happens.

There may also be environmental benefits from better integrating FTTP into the overall design of new developments. For example, the installation of FTTP in new large developments can have positive environment impacts in terms of commuting patterns and transport needs.

The installation of fibre-ready infrastructure can also have environmental benefits. For example, the existence of such infrastructure can eliminate the need for further energy-intensive civil construction (i.e. digging up and relaying conduit) and reduce other retrofitting costs, such as hauling new fibres.

Again, as Option 1 provides little certainty as to whether it will expedite the delivery of FTTP or fibre-ready infrastructure in new developments, it rates poorly in relation to its benefits for the environment. Option 2 does not deliver the full environmental benefits of a FTTP platform, but does provide some environmental benefits. Option 3 rates best in this area as it expedites the delivery of FTTP and its environmental benefits.

Practicality, timeliness and risk

Important considerations for the Commonwealth are the practicality, timeliness and risk of the three options. The Commonwealth needs options that can be implemented in practice on a reasonable timeframe and with acceptable risk.

Option 1 is a practical implementation option in that particular actions will rest with stakeholders and they can take account of commercial and other considerations in making decisions and choose the timeframe that best suits them. For these reasons the risks to external stakeholder should be low. Given the growing interest in superfast broadband, there will be increasing pressure on developers to provide FTTP in their developments; however, the time frame over which this will extend is uncertain. Conversely, the option may be seen as impractical for the Commonwealth because it provides no certainty as to the achievement of objectives or the timeframe for doing so. As such it involves considerable risk for the Commonwealth.

Option 2 is a practical implementation option in that the utility of fibre-ready infrastructure is well understood and accepted, it is increasingly being installed, it involves little extra cost (see below), it involves little extra risk for external stakeholders and it paves the way for the later installation of FTTP. Requiring the installation of fibre-ready infrastructure would lock in what is a growing practice. It could be quickly implemented and would be of enduring benefit. For the Commonwealth it would not immediately deliver its ultimate objective of having FTTP, but would help achieve it over time.

Implementation of Option 3 would be more demanding for external stakeholders. It would require changes in business practices on the part of most players and increased costs. Suppliers would need to increase their capacity to meet stronger demand. Given these factors, the approach does involve some risks for both external stakeholders and
the Commonwealth. This may mean a targeted and phased implementation, using Options 2 and 3, would be best, although this could extend the timeframe over which FTTP was actually installed. Unlike Options 1 and 2, however, Option 3 provides for the actual provision of FTTP in the short term.

**Criterion 2: Savings from avoiding later retrofitting with fibre**

This section discusses the relative costs and savings of the three options. As noted above, a key consideration in assessing the options is the extent to which options would provide for saving by avoiding or reducing future retrofitting costs.

The discussion of costs and savings uses the key parameters set out on pages 3-4 above (i.e. number of premises and cost per premises).

None of the costings include backhaul which is required for all options with negligible differences in cost.

It should be noted that these costs are calculations of the maximum possible costs. They are indicative only. Actual expenditure will depend on the precise implementation settings adopted and the exact number of premises serviced by a particular service solution. That is, actual costs will depend on the extent to which fibre and/or fibre-ready requirements are targeted at new developments.

The cost of Option 1 would depend on how external stakeholders chose to react to market pressures on them to install FTTP as opposed to other fixed telecommunications solutions. Option 2 would prescribe a more fixed migration path, with fibre-ready infrastructure paving the way for FTTP. Option 3 would see a direct move to FTTP.

**Conventional passive infrastructure and FTTP retrofitting**

To the extent that stakeholders continued to install copper solutions to all relevant premises using conventional passive infrastructure (under Option 1), the cost would largely remain the same as now in the short term. The estimated cost of a copper solution is around $1,000 per lot, around $800 of which is attributable to passive infrastructure, including trenching. If it is assumed that 90 per cent of the 210,000 premises constructed per annum are connected with copper, the estimated cost would be $189 million per annum. This cost would initially be met by Telstra, and passed through to developers and customers.

When it comes time to retrofit these premises that have conventional passive infrastructure with FTTP, the estimated additional retrofit cost would be $3,000 per premises, giving an estimated total additional retrofit cost of $567 million per annum. This high cost reflects the additional FTTP equipment that is required but also the need to undertake new civil works (trenching, ducting, pits) which is

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12 ‘Conventional passive infrastructure’ means passive infrastructure suitable for copper lines but not optimised for later fibre roll-outs. This means it may not be appropriately designed or dimensioned - for example, conduits may be too narrow, ducts bends may be too sharp or pits may be too small or poorly placed.  
13 90% x 210,000 = 189,000. 189,000 x $1,000 = $189m.  
14 189,000 premises x $3,000 (being $1,500 for the additional cost of FTTP, plus $1,500 for retrofitting)
expensive, and to pull through new fibre cables. All up, the estimated total cost of providing copper then retrofitting with FTTP, without fibre-ready passive infrastructure, would be $756 million per annum.¹⁵

**Fibre-ready infrastructure and FTTP retrofitting**

To the extent that stakeholders continue to install copper solutions to all relevant premises but use fibre-ready passive infrastructure (under either Option 1 or 2), the cost would largely remain the same in the short term. (While long term benefits of fibre-ready passive infrastructure are considerable, the additional cost of providing it over and above conventional infrastructure of this kind is considered marginal.)

If it is assumed that 90 per cent of the 210,000 premises constructed per annum are connected with copper and fibre-ready infrastructure, the estimated cost would be around $189 million. This cost would generally be met by Telstra with some contributions from developers and customers. However, when it comes time to retrofit these premises that have fibre-ready infrastructure with FTTP, the estimated additional retrofit cost would be $2,000 per premises, giving an estimated total additional retrofit cost of $378 million per annum.¹⁶ All up, the estimated total cost per annum of providing copper and fibre-ready passive infrastructure and then retrofitting with FTTP would be $567 million per annum.¹⁷ This would represent a saving of $189 million per annum over simply retrofitting copper and conventional passive infrastructure.

**Immediate installation of fibre-ready infrastructure and fibre**

To the extent that stakeholders moved directly to the installation of fibre-ready passive infrastructure and FTTP (under either Option 1 or 3), the cost would increase in the short term but provide savings in the long term. If it is assumed that 90 per cent of the 210,000 premises constructed per annum were connected with FTTP, the estimated cost would be around $472.5 million.¹⁸ While there are a range of cost-recovery models that may emerge with the widespread deployment of FTTP, under the current arrangements this cost is likely to be met by developers, but it would depend on the cost recovery arrangements put in pace by providers. For example, cost sharing arrangements are often offered to win business.

**Cost comparisons**

Installing FTTP up front would involve an additional cost over installing copper of around $283.5 million per annum.¹⁹ However, as FTTP will have been installed from the outset, consistent with published specifications, no further retrofitting will be required. Compared with the total cost of retrofitting FTTP when there is conventional non-fibre-ready infrastructure ($756m), installing FTTP up front ($472.5m) saves $283.5m. Compared with the total cost of retrofitting FTTP when there is fibre-ready infrastructure ($567m), installing FTTP up front saves $94.5m.

¹⁵ $189m (for copper initially) + $567m (for FTTP retrofit) = $756m
¹⁶ 189,000 premises x $2,000 (being $1,500 for the additional cost of FTTP, plus $500 for retrofitting)
¹⁷ $189m (for copper with fibre ready infrastructure) + $378m (for FTTP retrofit) = $567m
¹⁸ 189,000 premises x $2,500 = $472.5m
¹⁹ $472.5m (cost of FTTP) - $189m (cost of copper) = $283.5m
Criterion 3: Stakeholder impact

This section looks at the likely impact of the three options on key stakeholder groups identified above above.

Consumers

No intervention: Consumers in new developments who do not have FTTP installed will pay the lower cost of connection to a copper or wireless network, possibly, as now, recovered over some years through connection and rental payments. At some later time, however, they may have to also pay for a fibre connection—depending on the commercial and operational arrangements which are in place—and put up with the inconvenience of a retrofit. In the interim, they will have to rely on slower speed networks which are not capable of delivering the same level of service or they may choose to pay separately for cable, wireless or satellite connection. If their properties are not connected with fibre but fibre is increasingly the norm, this may reduce the long term value of their properties.

Businesses whose customers do not have the fast broadband access that fibre provides may have their effective markets reduced. Equally, businesses without access to fast broadband themselves will be disadvantaged.

Fibre-ready: Consumers in developments which have fibre-ready infrastructure installed will face retrofitting costs and delays in their access to superfast broadband. However, the costs, and perhaps more importantly the disruption, of the retrofitting will be very much reduced. It is possible that fibre-ready estates will be more attractive to providers in the future, so that they will be fibred sooner than comparable estates without fibre-ready passive infrastructure.

FTTP: Consumers (including householders and businesses) in new developments who have FTTP will enjoy the benefits of superfast broadband from the day they move into a new development. Consumers would be saved the cost of installing copper infrastructure. The costs associated with retrofitting these estates with FTTP at a later date would be avoided.

Consumers in new developments in which FTTP was installed would pay for their broadband connection, probably up front in the total cost of their house and land package. As indicated above, this would involve a cost of approximately $2,500 to the cost of a property, assuming that all costs are recovered up front by the infrastructure provider and passed on by the developer\(^\text{20}\). This represents an additional cost of 0.7 per cent of the total cost of a $350,000 house and land package. Compared to the cost of a copper connection, this involves an additional cost of $1,500.

However, while the cost of a house and land package may increase by this relatively small amount, research shows that the value of homes equipped with FTTH is materially greater than the cost. On the basis of US data, for instance, the US FTTH

\(^{20}\) This ignores the reality that consumers would also pay most if not all of the cost of a copper connection through property, building, connection and service charges. If it is assumed that consumers pay the estimated $1,000 cost of a copper connection, the additional cost of FTTP would be an estimated $1,500, which would be 0.4% of the cost of a $350,000 house and land package.
Council has estimated that having fibre connected adds $5,000 to the value of a home\footnote{Fibre to the Home Council, 2009 Fibre Primer, p.18, available at www.ftthcouncil.org (accessed 25 February 2010)}.

**Developers and builders**

*No intervention:* Even without Government action, developers and builders could come under increasing pressure to install FTTP or fibre-ready infrastructure but how they responded to such pressure would largely be a matter for them. From consultations, this is understood to be their general preference. To the extent that *ad hoc* planning arrangements and technical specifications emerge, this could add to compliance costs for these stakeholders. These costs may be higher for smaller developers, and for those in regional areas – larger developers often have specialists who are aware of the issues involved in installing fibre, and have employees or regular contractors whose skills they know.

There may be less pressure on developers in low-growth regional areas to install fibre, because the scale of development is less, there are fewer local examples and possibly fewer competitors to make it the norm. As noted above, because developers are unlikely to face future retrofit costs, they may have little incentive to consider these costs.

*Fibre-ready:* Fibre-ready infrastructure is increasingly being installed in new developments as awareness of its advantages increases. In consultations, many developers and builders expressed support for the installation of fibre-ready infrastructure. It would help future proof their developments and reduce future retrofitting costs. Developers will also need to decide what type of interim telecommunications solution they will acquire for their estates, noting it will soon be superseded by FTTP.

*FTTP:* If fibre were required, developers would have to market their product at a higher price, but the difference is likely to be modest, particularly when balanced against the fact that the value — and attractiveness — of their development would be increased. The proposed approach would build on existing industry trends. Developers would need to arrange the installation of FTTP. However, they already organise the provision of copper-based services and increasingly FTTP. Generally they contract a carrier who takes on the responsibility for installing such infrastructure. The process would be made easier through the development of standards and guidelines and administrative mechanisms to apply them such as the accreditation of FTTP providers and the certification of networks. These processes are likely to be of greater benefit to small developers than to the larger companies, who often have skilled specialists in fibre installation on their staff or available as contractors.

**Telstra and other providers**

*No intervention:* In the absence of Government intervention, Telstra would, under the current legislative framework, continue to have flexibility to offer copper, wireless or fibre solutions. Its status as the universal service provider could advantage it in
servicing new developments. It may, however, consider the roll-out of copper is wasteful if it is to be soon rendered obsolete by FTTP and look at other options such as the use of wireless or FTTP.

Other carriers and service providers would have opportunities to service new developments but market opportunities would be uncertain. The competitive market in installation might grow relatively slowly, and Telstra would retain some of the dominance that it holds by reason of its copper network.

Fibre-ready: Many of these stakeholders already install fibre-ready infrastructure so such a requirement should have little impact on their current operations. To the extent fibre-ready infrastructure requires slightly more planning or materials, there may be slightly more costs. These would typically be recovered from customers. There may also be slightly more business opportunities. Fibre-ready infrastructure will reduce opportunities to use passive infrastructure to constrain market entry (e.g. by making ducts too narrow for competitors). Conversely, it will facilitate the later roll-out of fibre by other industry participants. If Telstra is requested to service a development as the universal service provider, it will need to decide whether it will use copper, wireless or FTTP, noting that non-fibre technologies will soon be superseded by fibre.

FTTP: If there was a requirement for FTTP, Telstra would be forced to move away from its traditional reliance on copper infrastructure. This said, Telstra has generally been supportive of the move towards FTTP. Telstra, other carriers and wholesale and retail service providers would be expected to benefit from greater market certainty and an expanded competitive market. By promoting the roll-out of FTTP, the approach would be expected to have the positive impacts on competition noted in ‘Expected economic, social and environmental impacts generally’ above.

By limiting the installation and subsequent replacement of copper infrastructure, these measures may reduce the demand for copper-based equipment, including cabling and increase the demand for fibre based equipment. The degree to which this happens depends on the effectiveness of the measure. Vendors of network equipment often supply both copper and fibre products.

NBN Co.

Whatever arrangements are put in place by the Commonwealth, it would be open to NBN Co to install fibre in new estates as part of its roll-out plan. To the extent developments are not supplied with FTTP, it is envisaged NBN Co would eventually connect them as part of its national rollout. As noted above, the cost of retrofitting these developments is estimated at up to $3,000 per lot where there is no fibre-ready infrastructure. If the property is made fibre-ready, this could be reduced to $2,000 per lot. It would be up to NBN Co how it recovered these retrofitting costs. There is also a risk that the developments NBN Co would have to service would be those which are the less commercially attractive (on the basis the most commercially attractive would readily attract carriers). Clearly, if the Commonwealth establishes a requirement for FTTP, NBN Co’s retrofitting task will be smaller.
No intervention: In the absence of Commonwealth action, as the entities primarily responsible for planning, State, Territory and local governments are likely to come under increasing pressure to require the installation of fibre-ready and FTTP infrastructure. There would be a risk that they would respond to this in an ad hoc manner which could increase costs for them and lead to inefficiencies in terms of the actual roll-out of FTTP. This has been a concern expressed by a range of stakeholders in consultations. Development without FTTP could have flow-on effects to wider planning issues, for example, the need for transport and other community facilities.

Implementation of a Commonwealth requirement to install fibre-ready and/or FTTP could provide a focal point for the development of complementary planning measures of State, Territory and local governments, thus reducing costs and confusion and increasing consistency. Conversely, complementary State and Territory planning could help reinforce Commonwealth fibre-ready and FTTP requirements. This would involve some upfront and ongoing costs. In consultations State, Territory and local governments have expressed concerns about being burdened by additional costs. These costs could be mitigated by leveraging off the proposed Commonwealth legislation and/or the adoption of model laws that might be developed with the assistance of the Commonwealth. Costs could be further mitigated by the development and adoption of standards and guidelines and mechanisms to apply them such as the accreditation of FTTP providers and the certification of networks.

5. Consultation
There has been an extensive consultation process in relation to the implementation of the Government’s fibre in greenfields policy. As it is the stated policy goal to maximise the installation of FTTP 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\(^\text{22}\). In light of these consultations, a Fibre in Greenfields Stakeholder Reference Group, comprised of representatives of the affected groups, was established to provide views on implementation issues and to help disseminate information. The membership of the Group is given at Attachment A.

An exposure draft of the Fibre Deployment Bill was sent to the Stakeholder Reference Group, State and Territory Planning Ministers and members of the Online and Communications Council in November 2009. The exposure draft of the Bill and its Explanatory Memorandum was released to the public on 23 December 2009. Written comments were provided by 17 stakeholders, including nine members of the Stakeholder Reference Group.

In the submission process and subsequent consultations, stakeholders have expressed strong support for the policy objective that FTTP should be installed in new developments to the greatest extent practicable and, where this is not practicable in the short term, that fibre-ready infrastructure should be installed. Some stakeholders have objected to the mandating of FTTP in new developments under law.

Most comments, however, have focussed on implementation issues.

Many stakeholders have asked that the Commonwealth more clearly articulate its overall framework for the provision of FTTP in new developments. The Commonwealth considers that it has done this to the greatest extent possible at this time, noting that the final framework is dependent on the outcome of a range of concurrent processes and ongoing discussions with stakeholders. In this context, the Commonwealth considers it is reasonable to move forward with a legislative framework that provides a head of power for more detailed requirements. It notes, however, that these more detailed arrangements are already being developed in consultation with stakeholders.

Key issues for many stakeholders, particularly from the construction industry, have been the cost of FTTP, the potential additional cost of backhaul, the potential impact on housing affordability and equity vis a vis the provision of fibre infrastructure in brownfields by NBN Co. In this context these stakeholders have, as noted, suggested that new developments should be serviced by NBN Co or subsidy programs should be established. As noted above, these are approaches outside the current parameters set for this policy and additional to the establishment of a legislative head of power. The goal of having FTTP installed to the greatest extent possible in new developments and establishing a framework to require it is one thing. Who then provides services within that framework and whether they receive assistance is considered to be a separate issue.

As discussed above the fibre in greenfields policy is premised on the incremental costs of installing FTTP compared to copper being reasonable and outweighed by the immediate and long benefits to consumers in these estates. The Government also considers that the cost of providing FTTP will be reflected in the value of properties, and properties without the technology will be at a disadvantage. Moreover, it may be that adoption of a targeted implementation approach, which takes into account any additional costs of servicing high cost areas, will reduce concerns in this area. What role NBN Co may play in new developments is, at this time, a matter for the company, particularly noting it is only in its start-up phase.

A further concern arising from the consultation process has been the desirability of achieving, as far as possible, consistent outcomes nationally, in terms of network design and performance, compatibility with the NBN and service outcomes for consumers. This is seen as beneficial in terms of network operation, administration and consumer equity. There are some challenges in achieving these goals under a competitive market model. To a large extent that competitive model should deliver a high level of service in its own right. Beyond that, it is envisaged that guidelines, codes and standards will be used to provide a high degree of consistency. In this regard NBN Co is developing specifications that can be drawn upon. The Communications Alliance is also doing work in this area. As is now the case, regulation may be required to ensure other important consumer outcomes are delivered.
In terms of the form a legislative approach should take, there has also been a range of views. There has been a general consensus that a nationally consistent approach is preferable. There has been a general preference for Commonwealth legislation, reinforced by industry-developed guidelines or standards, over State, Territory and local government approaches.

6. Conclusion and recommended option

It is not known how many developments would install FTTP or fibre-ready infrastructure in the absence of Government intervention, so it is difficult to judge the effectiveness of Option 1, allowing the market to determine the installation of FTTP, in delivering the key objective of having such infrastructure provided. Given competing interests, the risk of property buyers not looking far enough ahead to make a considered judgement and their lack of experience in dealing with FTTP providers its effectiveness would be uncertain and possibly low. Lower levels of connection and the need for more retrofitting would lead to higher costs in the future and reduce the benefits associated with consumers in these estates having superfast broadband during the interim period. Option 1 involves a high risk of not delivering the required policy outcome.

Option 2, requiring fibre-ready infrastructure, would not immediately deliver the benefits of FTTP, but it would pave the way for FTTP and significantly reduce future retrofitting costs where FTTP is not immediately practicable. Requiring fibre-ready infrastructure would also be able to take account of possible short term constraints in the supply of FTTP, particularly while NBN Co is in its start-up phase. It could also take account of circumstances where stakeholders need more time to adjust to the transition to FTTP.

Option 3, requiring FTTP in all new premises, would maximise access to FTTP as soon as possible and result in the least retrofitting costs and therefore the greatest savings. However, there may be practical impediments to the immediate installation of FTTP in all new developments in the short term. For example, there is a need to ensure stakeholders are prepared, providers have the capacity to provide fibre in all new developments, backhaul capacity is readily available at affordable prices and new developments receive quality outcomes consistent with those to be delivered over the NBN.

In this context, a targeted and phased implementation of the policy may be required. Consultations with stakeholders indicate this may be the case. In this context, Option 2, the installation of fibre-ready infrastructure, could help reduce long term costs. It would ensure that any costs incurred in retrofitting FTTP in these estates are minimised to the greatest extent possible.

The recommended option is therefore a mix of Options 2 and 3. FTTP should be required where it is practicable and cost-effective to do, but where this is not immediately the case, fibre-ready infrastructure should be required so FTTP can be installed later at lower cost.

This mix could be achieved by targeting of the requirement for FTTP, so it applies only to specified classes of developments that have appropriate characteristics. Requirements could also be introduced on a phased basis, for example, to take
account of transitional factors. The targeting and phasing of implementation could impact on the number of premises affected by the process and thus overall costs.

As discussed above, if FTTP was deployed to 189,000 premises per annum, the estimated cost would be $472.5 million per annum. If fibre-ready infrastructure was deployed to these premises and was latter retrofitted, the estimated cost would be $567 million per annum. If a mixed approach is adopted in which, say, 50 per cent of premises are provided with fibre-ready infrastructure and 50 per cent with FTTP the total cost per annum, would be $519.75 million. While clearly a higher cost than that of a full FTTP solution, it still represents a saving of $42.75 million. The final ratio of costs and savings will depend on the final mix adopted. In all instances, however, the highest estimated anticipated costs under a scenario are those identified here.

A mixed approach using Options 2 and 3 would enable the benefits of FTTP to be captured where practicable, pave the way for FTTP where this was not the case and result in savings by reducing the need for retrofitting, or cost of retrofitting. Ensuring that developments are fibre-ready will save a large part of potential retrofitting costs. The maximum saving if all developments were fitted with FTTP rather than just made fibre-ready using the parameters outlined above would be $94.5 million.

The actual balance of FTTP and fibre-ready infrastructure and their costs and savings will depend on where thresholds for applying the measure to new developments are set. These would be contained in subordinate legislation. Similarly, when new developments are subjected, in a practical sense, to FTTP requirements will be influenced by the definition of ‘planning approval’ adopted in subordinate legislation. The earlier in the planning pipeline the ‘planning approval’ definition comes, the later the requirements will take practical effect, noting the time lag in new developments coming on stream. Consequently any new costs would lag accordingly.

The precise composition of a mixed approach involving Options 2 and 3 will be subject to further detailed consultation with stakeholders and the public on the content of the subordinate legislation needed to give practical effect to the proposed requirements. This subordinate legislation would also be subject to Parliamentary scrutiny.

The level of the saving also depends on the costs of installing fibre and fibre-ready infrastructure in new developments. These are expected to fall steadily in coming years as economies of scale are realised.

7. Implementation

On the basis that a mixed approach of requiring fibre-ready and FTTP is the best course of action and this cannot be assured in the absence of intervention, the Commonwealth has decided to introduce legislation to achieve these objectives.

Two main legislative options have been identified and considered:
- using the Commonwealth’s power under the Constitution to regulate corporations to directly require developers to have fibre-ready infrastructure and FTTP installed in new developments; and
• using the Commonwealth’s power under the Constitution to regulate communications to require relevant facilities that are to be installed to be fibre or fibre-ready.

For the first approach to be effective, it would require the Commonwealth to prohibit the trading in land by developers unless the relevant fibre requirements were met. This was seen as highly intrusive and might cause considerable uncertainty in the sector. As such it was not considered to be a viable option and the second option is being pursued.

The Commonwealth’s proposed legislation, the Telecommunications Legislation Amendment (Fibre Deployment) Bill 2010, will amend the *Telecommunications Act 1997* to create a head of power for the Minister to designate classes of developments in which:

• passive infrastructure that is to be installed will need to be fibre-ready; and/or
• fixed lines that are to be installed will need to be optical fibre; and
• the infrastructure will need to meet conditions (if any) specified by the Minister.

Enabling the Minister to specify these matters in subordinate legislation will provide flexibility to mix-and-match and target the requirements according to market circumstances. Factors that could be taken into account include the size and location of developments, the costs of providing fibre solutions in developments, the capacity of suppliers and other stakeholders, and the proximity and cost of backhaul capacity.

It is envisaged that classes of development will be determined by reference to thresholds that may relate matters such as the size of developments and/or costs of providing FTTP and/or cost of backhaul.

While the flexibility afforded the Minister in determining whether fibre or fibre-ready facilities are to be required in developments has the potential to create some uncertainty for stakeholders in the short term, this will be addressed by detailed subordinate legislation, which is currently being developed in consultation with stakeholders. The Government’s intention is to release this subordinate legislation for comment in parallel in advance of debate on the Bill.

Consistent with its stated policy, the Government’s objective is to have this legislative framework in place by 1 July 2010. However, when requirements under the framework take practical effect will depend on the details set out in the subordinate legislation, including any definitions of planning approval used to trigger requirements.

The proposed legislation will also amend the Telecommunications Act to simplify the making of codes and standards for FTTP and fibre-ready facilities in new developments. These can be used to promote consistent design and performance outcomes.

The proposed legislation also provides for a regime for accessing fibre-ready facilities to be set out in regulations. This will enable FTTP providers to secure ready access to these facilities so that they can provide FTTP at a reasonable cost.

The use of subordinate legislation and guidelines, codes and standards provides both flexibility in the implementation of the policy and the ability to provide necessary technical specificity.
As the proposed legislation will amend the Telecommunications Act, it will be part of, and consistent with, existing regulation of the sector.

As discussed above, there will be some administrative compliance costs but these are not expected to be burdensome. Developers, builders, carriers and other stakeholders must already deal with arrangements relating to the installation of copper-based telecommunications infrastructure in new estates. Increasingly they are dealing with arrangements relating to FTTP. It is envisaged that clear guidelines and standards for FTTP, together with accreditation and certification processes for infrastructure, will help contain costs.

This may be further reinforced by complementary State, Territory and local government planning arrangements.

8. Monitoring and review

The NBN is a major Commonwealth initiative to future-proof Australia’s communications infrastructure. The fibre in greenfields policy is an important adjunct to the NBN. The fibre in greenfields policy will involve significant infrastructure investment in its own right. In this context, the effective implementation of the policy to have FTTP or fibre-ready infrastructure installed in new developments will be closely monitored on an ongoing basis. Should monitoring identify that the policy objective is not being met or the approach is having unforeseen consequences, remedial action would be taken promptly. Any regulatory fine-tuning would be facilitated by the ability to make subordinate legislation under the proposed legislation.

Given the nature of the proposed arrangements in ensuring that appropriate forward-looking telecommunications infrastructure is installed in new developments, it is likely that the proposed arrangements will become part of the package of regulation for the provision of utilities such as water, power and sewerage to new developments.

That said, it is normal practice to review legislation and any subordinate legislation within 5 years of its enactment. Moreover, the proposed framework will, as noted, be subject to ongoing monitoring and will be reviewed as required. This has been the Government’s experience in relation to telecommunications legislation generally.
## Fibre in Greenfields Stakeholder Reference Group

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<th>Department of Broadband, Communications, the Digital Economy (DBCDE) (chair)</th>
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ABBREVIATIONS

The following abbreviations are used in this explanatory memorandum:

ACCC: Australian Competition and Consumer Commission
ACMA: Australian Communications and Media Authority
Act: *Telecommunications Act 1997*
AIA: *Acts Interpretation Act 1901*
Bill: Telecommunications Legislation Amendment (Fibre Deployment) Bill 2010
LIA: *Legislative Instruments Act 2003*
Minister: Minister for Broadband, Communications and the Digital Economy
TPA: *Trade Practices Act 1974*
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 2010.

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), would commence on the day on which the Bill receives Royal Assent.

Parts 1 and 2 of Schedule 1 of the Bill would commence on 1 July 2010. Under
section 4 of the AIA, however, legislative instruments can be made in advance of the
commencement date of these provisions of the Bill. Such legislative instruments will
commence on the date that these provisions of the Bill commence, or a later date as
specified in the instruments (see subsection 4(2A) of the AIA). It is anticipated that
legislative instruments required to give effect to the Bill will be made in advance of
1 July 2010, so that stakeholders are given advance notice of requirements relevant to
them before that date.

If Part 8 of Schedule 1 to the Telecommunications Legislation Amendment
(Competition and Consumer Safeguards) Bill 2009 commences on or before
1 July 2010, the provisions in Part 2 of Schedule 1 of the Bill would not commence at
all. This is because the commencement of Part 2 of Schedule 1 of the Bill would
result in an amendment to the definition of ‘civil penalty provision’ in section 7 of the
Act. This amendment would not be necessary if Part 8 of Schedule 1 of the
Telecommunications Legislation Amendment (Competition and Consumer
Safeguards) Bill 2009 had already commenced, given that the commencement of that
Part would result in an all-encompassing change to the definition of ‘civil penalty
provision’.

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 which amends 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 advance the deployment of optical fibre based and optical fibre-ready telecommunications infrastructure in specified real estate development projects, and also makes a necessary change to the TPA as a result of the amendments made to the Act.

Telecommunications Act 1997

Item 1 – Section 7

Item 1 would insert a definition of ‘building lot’ in section 7 by reference to the meaning given by proposed section 372D. The definition of ‘building lot’ is discussed in the explanatory note for proposed section 372D.

Item 2 – Section 7

Item 2 would insert a definition of ‘building unit’ in section 7 by reference to the meaning given by proposed section 372F. The definition of ‘building unit’ is discussed in the explanatory note for proposed section 372F.

Item 2A – Section 7

Item 2A would insert a definition of ‘fibre-ready facility’ in section 7 by reference to the meaning given by proposed section 372HB. The definition of ‘fibre-ready facility’ is discussed in the explanatory note for proposed section 372HB.

Item 2B – Section 7

Item 2B would insert a definition of ‘fixed-line facility’ in section 7 by reference to the meaning given by proposed section 372HA. The definition of ‘fixed-line facility’ is discussed in the explanatory note for proposed section 372HA.

Item 3 – Section 7

Item 3 would insert a definition of ‘optical fibre line’ in section 7. An ‘optical fibre line’ is defined as a line that consists of optical fibre, or encloses optical fibre. The reference to ‘encloses optical fibre’ refers to the immediate casing surrounding the fibre, not clearly separate facilities like ducting. The definition recognises that fibres are generally sheathed in plastic tubes which in turn are bundled together and further sheathed to form a cable. The definition includes such a cable, but not the duct in which such a cable may be laid.

Item 4 – Section 7

Item 4 would insert a definition of ‘project area’ in section 7 by reference to the meaning given by proposed section 372D. The definition of ‘project area’ is discussed in the explanatory note for proposed section 372D.
Item 5 – Section 7

Item 5 would insert a definition of ‘real estate development project’ in section 7 by reference to the meaning given by proposed section 372D. The definition of ‘real estate development project’ is discussed in the explanatory note for proposed section 372D.

Item 6 – Section 7

Item 6 would insert 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 372G and 372H. The definition of ‘sell’ is discussed in the explanatory notes for proposed sections 372G and 372H.

Item 7 – Section 7

Item 7 would insert a definition of ‘subdivision’ in section 7 by reference to proposed section 372E. The definition of ‘subdivision’ is discussed in the explanatory note for proposed section 372E.

Item 8 – At the end of subsection 110(2)

Item 8, along with Items 8A, 9 and 9A, is one of a series of amendments to the industry code and standards processes under Part 6 of the Act to make it easier for codes and standards to be made about optical fibre infrastructure and services, if required. By facilitating the development of codes and standards of this kind, the measure will help provide necessary guidance on relevant technical matters and help respond to calls from stakeholders for such guidance to promote nationally consistent network and service outcomes.

Item 8 would amend subsection 110(2) by adding the group of persons specified in proposed paragraph 110(2)(j) to the list of groups in subsection 110(2) that are, for the purposes of Part 6 of the Act, regarded as ‘sections of the telecommunications industry’. Accordingly, ‘persons who install optical fibre lines or facilities used or for use in, or in connection with, optical fibre lines in the project area, or any of the project areas, for a real estate development project to which section 372B or 372C applies’ would be a ‘section of the telecommunications industry’ for the purposes of Part 6 of the Act.

This would capture persons, who, for example, dig trenches or install pits, ducts or other conduit. The effect of this proposed amendment is that the provisions in Part 6 of the Act, which relate to industry codes and standards, would apply to the persons identified by proposed paragraph 110(2)(j). Specifically, the ACMA could register an industry code prepared by a body or association representing this section of the telecommunications industry (subsection 117(1)). The ACMA could also determine an industry standard if it is satisfied that there is no representative body or association for this section of the telecommunications industry (subsection 124(1)).
Item 8A – After paragraph 113(3)(p)

Item 8A would amend subsection 113(3) by adding the examples specified in proposed paragraphs 113(3)(pa), 113(3)(pb), 113(3)(pc) and 113(3)(pd) to the list of non-exhaustive examples in subsection 113(3) that are matters that may be dealt with by industry codes and standards. Accordingly the following would be examples of matters that could be dealt with by industry codes and standards for the purposes of section 113:

- the design features of optical fibre lines or facilities used, or for use, in or in connection with optical fibre lines in the project area, or any of the project areas, for a real estate development project to which section 372B or 372C applies (proposed paragraph 113(3)(pa));
- performance requirements to be met by optical fibre lines or facilities used, or for use, in or in connection with optical fibre lines in the project area, or any of the project areas, for a real estate development project to which section 372B or 372C applies (proposed paragraph 113(3)(pb));
- the characteristics of carriage services supplied using optical fibre lines (proposed paragraph 113(3)(pc)); and
- performance requirements to be met by carriage services supplied using optical fibre lines (proposed paragraph 113(3)(pd)).

Item 9 – At the end of section 115

Item 9 would amend section 115 of the Act by adding proposed subsection 115(5). Proposed subsection 115(5) provides a limited exception to the application of the rule in subsection 115(1).

The rule in subsection 115(1) states that an industry code or standard has no effect to the extent it requires customer equipment, customer cabling, a telecommunications network or a facility to have particular design features, or to meet particular performance requirements; or to the extent to which it deals with the content of content services. This rule can already be set aside by regulations (see subparagraphs 115(2)(a)(iii) and 115(2)(b)(iii)). However, item 9 would amend section 115 to provide a statutory exemption to the rule to expedite the making of any relevant codes or standards that may be necessary to implement the policy of having fibre to the premises installed in new developments.

Proposed subsection 115(5) provides that the rule in subsection 115(1) does not apply to an industry code or an industry standard to the extent (if any) to which compliance with the code or standard is likely to have the effect of requiring optical fibre lines or facilities that are used, or that are for use, in or in connection with optical fibre lines in a project area for a real estate development project to which proposed sections 372B or 372C applies, to have particular design features or to meet particular performance requirements. The terms ‘facility’ and ‘optical fibre line’ are defined in section 7 of the Act.

In effect, the proposed provision facilitates the development of industry codes and standards covering optical fibre lines and related facilities in a project area by providing that the ability to make such codes and standards is not limited by preventing them from having the effect of requiring particular design features or
particular performance requirements. For codes and standards of the kind envisaged to be useful, they need to be able to deal with design features or particular performance requirements. Moreover, these design features or particular performance requirements may need to have effect both within the project area and outside the project area. This recognises that optical fibre requirements in a new development may also have implications for network design features and performance requirements in other parts of the network.

Industry codes are registered by the ACMA in accordance with Part 6 of the Act. In particular, before registering a code that is given to it by a body or association representing a particular section of the telecommunications industry, in a case where the code does not deal with matters of substantial relevance to the community, in accordance with subparagraph 117(1)(d)(ii), the ACMA must be satisfied that the code deals with the matters covered by the code in an appropriate manner. In assessing any codes it is expected that this would include the ACMA having regard to the efficacy of the content of the codes in achieving their intended purpose.

**Item 9A – After subsection 118(4)**

Item 9A would amend section 118 by adding proposed subsection 118(4AA). Proposed subsection 118(4AA) provides a limited exception to the application of the rule in subsection 118(4).

The rule in subsection 118(4) states that the ACMA must not make a request under subsection 118(1) for a body or association in the telecommunications industry (or the telemarketing industry or the e-marketing industry) to develop an industry code, if the code would deal with a matter referred to in paragraph 113(3)(f) (relating to privacy), and compliance with the code would be likely to have the effect of requiring customer equipment, customer cabling, a telecommunications network or a facility to have particular design features or to meet particular performance requirements. The rule in subsection 118(4) does not apply if the ACMA is satisfied that the benefits to the community from the operation of the code would outweigh the costs of compliance with the code.

Item 9A would amend section 118 to provide a specific exception to the rule in subsection 118(4) to expedite the making of any relevant codes that may be necessary to implement the policy of having fibre-to-the-premises or fibre-ready facilities infrastructure installed in new developments.

Proposed subsection 118(4AA) provides that the rule in subsection 118(4) does not apply to an industry code to the extent (if any) to which compliance with the code is likely to have the effect of requiring optical fibre lines or facilities that are used, or that are for use, in or in connection with optical fibre lines in a project area for a real estate development project to which proposed section 372B or 372C applies to have particular design features or to meet particular performance requirements. The terms ‘facility’ and ‘optical fibre line’ are defined in section 7 of the Act.

The effect of the proposed provision is similar to the effect of proposed subsection 115(5) (see the explanatory notes for item 9). By facilitating the development of this kind of industry codes by clarifying the ability of the ACMA to...
request such codes to be developed, the measure will help provide necessary guidance on relevant technical matters and help respond to calls from stakeholders for such guidance to promote nationally consistent network and service outcomes.

**Item 10 – After Part 20**

Item 10 would insert proposed Part 20A into the Act. Proposed Part 20A contains provisions relating to the deployment of optical fibre and the installation of fibre-ready facilities 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.

**Proposed Part 20A—Deployment of optical fibre etc.**

Proposed Part 20A of the Act will include two basic rules:

- the ‘fibre-connection requirement’, under which a person must not install a line in a specified new development unless the line is an optical fibre line and meets any other specified conditions; and
- the ‘fibre-ready infrastructure requirement’, under which a person must not install a fixed-line facility in specified new developments unless the facility is a fibre-ready facility and meets any other specified conditions.

The Minister will be able to make legislative instruments necessary to give effect to these rules (e.g. specifying or identifying the developments in which they are to apply; determining the characteristics of a ‘fibre-ready facility’; setting any other conditions that are to apply; and providing exemptions from the rules).

Proposed Part 20A has two main divisions. Division 2 deals with the fibre connection requirement, i.e. the installation of optical fibre lines as part of ‘real estate development projects’ (see proposed section 372D). Division 3 deals with the fibre-ready infrastructure requirement, i.e. the installation of fibre-ready facilities as part of ‘real estate development projects’.

Where optical fibre is installed in new developments, it will, as with other types of telecommunications infrastructure, need to be connected to the wider telecommunications network to have its full utility—for example to provide ‘any-to-any connectivity’ (see Part 7 of Schedule 1 to the Act). The provision of backhaul, for example, for such optical fibre infrastructure will be a necessary consequence of installing a network in a new development. Should it be necessary, it is envisaged that guidance on this matter could be provided either under industry codes or standards made under Part 6 of the Act, or through the specification of conditions under proposed paragraphs 372B(2)(b) and 372C(2)(b) (see below).

**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

Proposed Division 2 of Part 20A applies to the deployment of optical fibre to building lots and to building units.

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

Proposed section 372B provides the general rule that where telecommunications lines 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 clarify the types of fixed lines in specified new development projects that 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 described criteria set out 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 in-fill 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 have a broad discretion as to how real estate development projects are specified or identified. For example, it is envisaged that the Minister might make an instrument specifying real estate development projects by reference to the name, size, location, date of planning approval, proximity to existing infrastructure, the number of lots, or estimated cost of providing fibre-to-the-premises in a real estate development project.

Proposed paragraph 372B(1)(c) provides that the rule in proposed subsection 372B(2) only applies to lines that have a particular intended use: a line will be subject to the rule if the line is wholly or primarily used or for use to supply carriage services to end-users or prospective end-users in building units. 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 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 (telephone, computer, wireless router). There may be customer cabling (see section 20 of the Act) between the customer equipment and the line in question. (Note that 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 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. 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. End-users of services provided using a mobile phone tower would frequently access those services outside of the building units in question. For this reason, a line that is installed in a real estate development project for this purpose would not be subject to the rule at subsection 372B(2), since it would not satisfy the criteria at proposed paragraphs 372B(1)(c) and (d).

Proposed paragraph 372B(1)(e) provides that the prohibition on installation of non-fibre lines for 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. Proposed Part 20A does not affect such customer cabling.

The prohibition on installation of non-fibre lines in specified developments does not apply to private networks. The fibre-connection requirement does not apply unless a line is used (or intended for use) to supply a carriage service to the public (proposed paragraph 372B(1)(f)). Section 44 of the Act provides an explanation of when a network unit is taken to be used to supply a carriage service ‘to the public’. Proposed section 372J (described below) adopts this for the purpose of determining whether a line is used to supply a carriage service to the public. 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 only intended for private use.

The rule in proposed subsection 372B(2) will only apply to lines installed after the commencement of proposed section 372B (proposed paragraph 372B(1)(g)). This is to clarify that the fibre connection requirement is not intended to apply retrospectively.
Proposed subsection 372B(2) provides that, where the criteria specified at 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 optical fibre is deployed, optical fibre (rather than copper) is used throughout the development: ie. 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. 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 already provides that legislative instruments made under that Act (including 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 by a particular carrier (e.g. NBN Co), 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 minimum size. For example, the capacity to provide higher data speeds may be required of 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. This would provide guidance to infrastructure providers and assurance to developers, property buyers, local councils and others that appropriate fibre-to-the-premises 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) allows the Minister to exempt conduct specified in, or ascertained in accordance with, a legislative instrument from the scope of proposed subsection 372B(1). Proposed subsection 372B(6) confirms that an exemption under proposed subsection 372B(5) may be unconditional or subject to such conditions (if any) as are specified in the exemption. For example, subsections 372B(5) and (6) could allow the Minister to exempt the installation of copper lines from the prohibition on installation in proposed subsection 372B(1) if:

- fibre-ready facilities were installed to prepare the relevant project area for installation of optical fibre lines at a later date; or
- complying optical fibre lines were installed simultaneously; or
- copper infrastructure is required to operate particular customer equipment because of its technical characteristics; or
- the anticipated cost of installing optical fibre lines is above an identified threshold.

Proposed subsection 372B(7) provides that a legislative instrument made by the Minister under proposed paragraph 372B(1)(b) or proposed subsection 372B(5) 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). Under such an instrument, the ACMA may be empowered to make decisions about individual real estate development projects that are subject to the rule in proposed subsection 372B(2). Similarly, an instrument made under proposed subsection 372B(5) may provide the ACMA with a decision making role in determining whether or not conduct is exempt from the rule in proposed subsection 372B(2). For instance, if such an instrument provides an exemption where the anticipated cost of installing optical fibre lines is above a certain threshold, the ACMA may be given a role in approving a developer’s estimate of those costs.

Proposed subsection 372B(8) contains ancillary contravention provisions which prohibit the involvement of a person in a contravention of proposed subsection 372B(2) in any manner that is outlined in that subsection.

Proposed subsection 372B(9) provides that proposed subsections 372B(2) and (8) are civil penalty provisions. This means if a person contravened subsection 372B(2) or 372B(8)—e.g. 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. As such it covers situations where land has already been subdivided but buildings are yet to be constructed or where existing buildings are demolished and new ones built. 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. (Note that the rule in proposed section 372B only applies where a development involves a subdivision will, eventually, also involve construction of a building: see proposed paragraph 372B(1)(d), described above, and the definition of ‘real estate development project’ at proposed subsection 372D(1), described below.)

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 clarify the types of fixed lines in specified new development projects that 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 described criteria set out 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 372F, 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-premise leasehold or freehold buildings such as shopping centres. The construction of a building unit on a vacant lot, knock-down and rebuild projects and projects involving additions to buildings could all potentially fall under proposed paragraph 372C(1)(a).

Proposed paragraph 372C(1)(b) provides that the rules in proposed section 372C only apply 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 might 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 dwellings, or estimated cost of providing fibre-to-the-premises in a real estate development project.
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 at 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.

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(4) to (9) mirror the provisions in proposed subsections 372B(4) to (9), 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). Accordingly, see the earlier explanatory notes for proposed subsections 372B(4) to (9) for information about proposed subsections 372C(4) to (9) above.

**Proposed Division 3—Installation of fibre-ready facilities**

Proposed 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 connection requirement may be imposed in real estate development projects where it would not be practicable to immediately impose the fibre connection requirement under proposed Division 2, due, for example, to the immediate cost of installation of fibre or other considerations. In these circumstances, the application of fibre-ready infrastructure requirement in these projects is intended to ensure that there is appropriate passive infrastructure installed at the time of the subdivision, so that a carrier (e.g. NBN Co) will be able to install optical fibre lines at a later date quickly, at low cost and with minimum inconvenience to the community. The requirement could apply to any type of passive infrastructure: 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.
However, even where a real estate development project is subject to the fibre-ready infrastructure requirement under proposed Division 3 and not the fibre connection requirement under proposed Division 2, there is nothing to prevent a developer from installing optical fibre lines in that project, so long as those lines comply with any relevant industry codes and/or standards.

Generally the principles and concepts used in proposed Divisions 2 and 3 are the same. Much of the commentary in relation to Division 2 is also relevant to Division 3.

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

Proposed section 372CA provides the general rule that where fixed-line facilities are installed in specified real estate development projects that involve the subdivision of land, those facilities must be fibre-ready.

Proposed subsection 372CA(1) limits the operation of proposed section 372CA by providing that the rule in proposed subsection 372CA(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 at paragraphs 372CA(1)(a)-(c) are satisfied. Those criteria are:

- the project involves the subdivision of one or more areas of land into building lots (proposed paragraph 372CA(1)(a)); and
- the project is specified in, or ascertained in accordance with, a legislative instrument made by the Minister (proposed paragraph 372CA(1)(b)); and
- the installation occurs after the commencement of section 372CA (proposed paragraph 372CA(1)(c)).

The criteria that are set out in proposed subsection 372CA(1) are almost identical to the criteria set out in paragraphs 372B(1)(a), (b) and (g). See the explanatory notes for proposed subsection 372B(1) for an explanation of those criteria.

Proposed subsection 372CA(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 it is a ‘fibre-ready facility’ (proposed paragraph 372CA(2)(a)) and any conditions specified in a Ministerial instrument under proposed subsection 372CA(3) are satisfied (proposed paragraph 372CA(2)(b)).

The definition of ‘fixed-line facility’ is given at proposed section 372HA: a fixed-line facility is a facility (which is a term defined in section 7 of the Act) other than a line, which is used or for use in connection with a line, where the line is used to supply carriage services to the public and is not on the customer side of the boundary of a telecommunications network. Pits, ducts, sub-ducts, conduit and plinths for equipment housings 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.

Proposed section 372HB provides that the Minister may make a legislative instrument declaring that a specified fixed-line facility is a ‘fibre-ready facility’. The Minister may also specify in a legislative instrument conditions that must be met in the
installation of fibre-ready facilities (proposed subsection 372CA(3)). It is intended that the Minister would exercise these powers in such a way that would:
- specify the types of fixed-line facilities that would be considered to be ‘fibre-ready’ and therefore permitted to be installed in specified developments;
- describe the attributes that fixed-line facilities that could be used in the deployment of fibre must have in order to be classified as ‘fibre-ready’ and therefore permitted to be installed in specified developments; and
- prevent the installation in those developments of any other types of fixed-line facilities that could inhibit the deployment of fibre.

Examples of possible required attributes for fixed-line facilities that could be specified by the Minister would 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). The intention would be to ensure that the fibre-ready fixed-line facilities that are installed in these developments will permit fibre to be installed at a later time in a quick and efficient manner, at low cost and with minimum inconvenience to the community.

It is intended that the Minister may make an instrument under proposed section 372HB 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. NBN Co)—see section 589 of the Act, described in detail in the explanatory note for proposed section 372B above.

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 372CA(2)(b) and proposed subsection 372CA(3)). 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. Conditions could be specified, if necessary, by reference to external documents such as industry codes and standards or the specifications of a particular carrier (e.g. NBN Co)—see section 589 of the Act, described in detail in the explanatory note for proposed section 372B above.

Proposed subsection 372CA(5) allows the Minister to exempt conduct specified in, or ascertained in accordance with, a legislative instrument from the scope of proposed subsection 372CA(1). Proposed subsection 372CA(6) confirms that an exemption under proposed subsection 372CA(5) may be unconditional or subject to such conditions (if any) as are specified in the exemption. For example, proposed subsections 372CA(5) and (6) could allow the Minister to permit the installation of fixed-line facilities other than fibre-ready facilities where:
- a particular facility other than a fibre-ready facility is necessary for the provision of particular non-fibre lines and its provision will not impact on the general availability of fibre-ready facilities;
- fibre-ready facilities are also in place (e.g. a dual provisioning approach); or
• the anticipated cost of installing fibre-ready facilities is above an identified threshold.

Proposed subsection 372CA(7) provides that a legislative instrument made by the Minister under proposed paragraph 372CA(1)(b) or proposed subsection 372CA(5) may confer functions or powers on the ACMA. Proposed subsection 372CA(7) mirrors proposed subsection 372B(8). See the explanatory notes for proposed section 372B for an explanation of this provision.

To ensure that carriers can gain access to the fibre-ready infrastructure that is installed as a result of the operation of the fibre-ready infrastructure requirement, proposed subsection 372CA(4) provides that the regulations may establish a regime for third party access to a fixed-line fibre-ready facility in the project area, or any of the project areas, for a real estate development project. The purpose of proposed subsection 372CA(4) is to flag the eventual introduction at a later stage of an access regime applying to fibre-ready infrastructure, under which the owner or operator of fibre-ready facilities installed in specified developments will be required to give access to those facilities to carriers rolling out telecommunications lines. An access regime is necessary to ensure that the intended purpose of the fibre-ready infrastructure requirement—to permit the later roll-out of optical fibre lines—can be achieved. It is envisaged that an access regime will be established under the regulations under which carriers rolling out fibre-to-the-premises networks, such as NBN Co, can gain access to the fibre-ready infrastructure for deployment of optical fibre infrastructure.

Regulations made under proposed subsection 372CA(4) would have the effect that the third party access regime would apply to a person who installs the fixed-line fibre-ready facility, such as a carrier, but also to any future owner or operator of the facility, including a carrier. Regulations made under proposed subsection 372CA(4) may provide that failure to comply with the third party access regime under those regulations is a civil penalty provision (see the amendment to the definition of ‘civil penalty provision’ proposed by item 12, described below).

The approach of including the access regime in regulations to be made at a later date, rather than in the Bill, is adopted to permit further consultation to occur in the drafting of the access regime. Regulations are subject to Parliamentary scrutiny and disallowance as a matter of course.

Proposed subsection 372CA(8) provides that regulations made for the purposes of proposed subsection 372CA(4) may confer functions or powers on the ACCC. For example, regulations made for the purposes of proposed subsection 372CA(4) could provide that the terms and conditions of an access to a fibre-ready facility may be:

• agreed between the owner or operator of the facility and the carrier who is to install the optical fibre (e.g. NBN Co); or
• as determined by an arbitrator appointed by the owner or operator of the facility and the carrier who is to install the optical fibre (e.g. NBN Co); or
• if the parties fail to agree on an arbitrator, arbitrated by the ACCC.

Such an approach could be modelled on Part 5 of Schedule 1 of the Act. An alternative example is that regulations could provide that the ACCC may establish upfront the terms and conditions of access to a fibre-ready facility.
To enable the effective administration of an access regime, if established by the regulations, the ACCC would have the discretion to delegate the functions and powers in relation to the access regime to a single member of the ACCC (see the amendment to subsection 25(1) of the TPA proposed by item 11, described below).

Proposed subsection 372CA(9) provides that regulations made for the purposes of proposed subsection 372CA(4) may confer jurisdiction on a court. This means that if the regulations establish a regime for third party access to a fixed-line facility installed in the project area, or any of the project areas for a real estate development project, then the regulations could provide for the ACCC or other parties to commence action in a court if an owner or occupier of a fixed-line facility did not comply with a request for access to the facility in accordance with regulations made under proposed subsection 372CA(4).

Proposed subsection 372CA(10) contains ancillary contravention provisions which prohibit the involvement of a person in a contravention of proposed subsection 372CA(2) in any manner that is outlined in that subsection.

Proposed subsection 372CA(11) provides that proposed subsections 372CA(2) and (10) are civil penalty provisions. Proposed subsection 372CA(11) mirrors proposed subsection 372B(10). See the explanatory notes for proposed section 372B for an explanation of that provision.

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

Proposed section 372CB provides the general rule that where fixed-line facilities are installed in specified real estate development projects that involve the construction of one or more building units, those facilities must be fibre-ready.

Proposed subsection 372CB(1) limits the operation of proposed section 372CB 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 if the criteria at paragraphs 372CB(1)(a)-(c) are satisfied. Those criteria are:

- the project involves the construction of one or more building units on one or more areas of land (proposed paragraph 372CB(1)(a)); and
- the project is specified in, or ascertained in accordance with, a legislative instrument made by the Minister (proposed paragraph 372CB(1)(b)); and
- the installation occurs after the commencement of proposed section 372CB (proposed paragraph 372CB(1)(c)).

The criteria that are set out in proposed subsection 372CB(1) are almost identical to the criteria set out in proposed paragraphs 372B(1)(a), (b) and (g). See the explanatory notes for proposed subsection 372B(1) for an explanation of those criteria.

Proposed subsection 372CB(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 it is a fibre-ready facility (proposed paragraph 372CB(2)(a)) and any conditions specified in a Ministerial instrument under proposed subsection 372CB(3) are satisfied (proposed paragraph 372CB(2)(b)).
Proposed subsections 372CB(3)-(11) mirror proposed subsections 372CA(3)-(11). See the explanatory notes for proposed section 372CA for an explanation of those provisions, and also for a description of ‘fixed-line facility’ and ‘fibre-ready facility’.

**Proposed Division 4—Miscellaneous**

Division 4 sets out a number of new definitions supporting the operation of proposed Part 20A and any legislative instruments made. The definitions will also support any exemptions contained in legislative instruments.

**Proposed section 372D  Real estate development projects etc.**

Proposed section 372D defines ‘real estate development project’ for the purposes of the Act in relation to projects involving subdivision (proposed sections 372B and 372CA) and/or construction (proposed sections 372C and 372CB). The term is used in two separate but similar manners, depending on whether a project relates to building lots or building units. Proposed section 372D additionally provides meanings of the terms ‘project area’ and ‘building lot’.

Proposed subsection 372D(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 the requirements of proposed paragraphs 372D(1)(a)-(c).

Proposed paragraph 372D(1)(a) indicates that the definition of ‘real estate development project’ in proposed subsection 372D(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 372D(1)(b)(i) indicates that projects involving the making available of lots (as referred to in paragraph 372D(1)(a)) 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. Proposed subparagraph 372D(1)(b)(ii) 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 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. The explanatory note for proposed section 372F, below, discusses the meaning of ‘building unit’ and the definition of ‘building lot’ is discussed below in regard to proposed subsection 372D(3).

Proposed subparagraph 372D(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 also be considered a ‘real estate development project’. Proposed subparagraph 372D(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 buildings.

In order for a project to be a ‘real estate development project’ under proposed subsection 372D(1), the project must also satisfy the conditions (if any) that are specified by the Minister in a legislative instrument (see proposed paragraph 372D(1)(c) and proposed subsection 372D(4)). This allows for provisions to be inserted into a legislative instrument which further specify what is meant by ‘real estate development project’ under proposed subsection 372D(1). This enables greater specificity in relation to this definition should it be required.

Proposed subsection 372D(2) provides a meaning of ‘project area’, for real estate development projects falling under proposed subsection 372D(1), for the purposes of the Act, by reference to an area of land mentioned in proposed subsection 372D(1). A real estate development project can be comprised of one or more project areas.

Proposed subsection 372D(3) provides a definition of ‘building lot’ for the purposes of the Act, by reference to a lot mentioned in proposed subsection 372D(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 372D(1)), is a ‘building lot’.

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

Proposed subsection 372D(5) provides a second meaning of ‘real estate development project’ for projects involving construction of building units. The definition of ‘real estate development project’ in proposed subsection 372D(5) differs from the definition provided in proposed subsection 372D(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 construction projects where land is already subdivided or no subdivision is required.

Proposed subsection 372D(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 buildings 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 372D(5), the project must also satisfy the conditions (if any) that are specified by the Minister in a legislative instrument (see proposed
paragraph 372D(5)(b) and proposed subsection 372D(7)). This allows for provisions to be inserted into a legislative instrument which further specify what is meant by ‘real estate development project’ under proposed subsection 372D(5). This enables greater specificity in relation to this definition should it be required.

Proposed subsection 372D(6) provides a meaning of ‘project area’, for real estate development projects falling under proposed subsection 372D(5).

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

Proposed subsection 372D(8) contains rules to assist in the application of proposed subsections 372D(1) and (5). This provision seeks to take account of the complexity that may be involved in development projects and to make it clear that the intention of the provision is to define ‘real estate development project’ so as to capture developments broadly, notwithstanding complexities of the kind specified.

Proposed paragraph 372D(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 372D(1) and (5).

Proposed paragraph 372D(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 372D(1) and (5).

Proposed paragraph 372D(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 ‘real estate development project’ for the purposes of proposed subsections 372D(1) and (5) is applicable regardless of the number of planning approvals, building approvals or other approvals for the project, however described.

Proposed paragraph 372D(8)(d) states that for the purposes of proposed subsections 372D(1) and (5) 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 paragraph recognises that in some cases different owners of land may 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 those persons.
Proposed section 372E  Subdivision of an area of land

Proposed section 372E 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 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. These will still be covered by these provisions.

Proposed section 372F  Building units

Proposed section 372F provides a definition for ‘building unit’.

Proposed subsection 372F(1) indicates that proposed section 372F applies to a building that has been constructed in the past, is currently being constructed, or is to be constructed in the future. It is necessary for proposed section 372F to apply to past, present and future building constructions given that the provisions proposed under the Bill use definitions and concepts that rely upon the past, present and future construction of buildings in order to describe a number of the obligations set out under the Bill.

Proposed subsection 372F(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 372F(3) provides, for the purposes of the Act, that if 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 part of the building is a building unit. This is to ensure that the prohibition on the installation of lines that are not fibre optic applies appropriately to strata title developments.

Proposed subsection 372F(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’ under this provision. 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 372G  Sale of building lots

Proposed section 372G makes clear, for the purposes of the Act, that a person ‘sells’ a building lot if:

- the person transfers their freehold interest in the land concerned; or
- the person transfers their leasehold interest in the land concerned.

The words ‘transfer’, ‘freehold interest’ and ‘leasehold interest’ have not been defined in a special manner in the Act and are therefore to be given their ordinary meaning.
Proposed section 372H  Sale of building units

Proposed section 372H makes clear, for the purposes of the Act, that a person ‘sells’ a building unit if:

- where the whole of the building is to be used for single occupation or use, and the building is not a strata title building – the person transfers their freehold or leasehold interest in the land on which the building unit is situated; or
- where the building unit is part of a strata title building – the person transfers their unit.

Proposed section 372HA  Fixed-line facilities

Proposed section 372HA provides a definition for ‘fixed-line facility’.

Proposed section 372HA provides, for the purposes of the Act, 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 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 ducting that could be used for customer cabling linking customer equipment to the telecommunications network. It is envisaged that any requirements for fibre-ready facilities beyond the network boundary point within buildings (e.g. equipment rooms, closets, risers, ducts) would be covered by relevant building guidelines, codes or standards. An example of such a document is the Australian Building Code Board’s Guideline Document, National Digital Building Telecommunications Access, published in 2006.

Proposed section 372HB  Fibre-ready facilities

Proposed subsection 372HB(1) provides that the Minister may, by legislative instrument, declare a specified fixed-line facility is a fibre-ready facility for the purposes of the Act. The Minister would have the option of declaring fixed-line facilities as fibre-ready facilities individually or by class (see subsection 13(3) of the LIA).

It is envisaged that the Minister would exercise this power to make a legislative instrument declaring certain fixed-line facilities to be fibre-ready facilities, and at the same time would make a legislative instrument specifying conditions that must be met in the installation of fibre-ready facilities (proposed subsection 372CA(3)). It is envisaged that this could be done in a way that would:

- specify the types of fixed-line facilities that would be considered to be ‘fibre-ready’ and therefore permitted to be installed in specified developments;
• describe the attributes that fixed-line facilities that could be used in the deployment of fibre must have in order to be classified as ‘fibre-ready’ and therefore permitted to be installed in specified developments; and/or
• prevent the installation in those developments of any other types of fixed-line facilities that could inhibit the deployment of fibre.

Examples of possible required attributes for fixed-line facilities that could be specified by the Minister would 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). The intention would be to ensure that the fibre-ready fixed-line facilities that are installed in these developments will permit fibre to be installed at a later time in a quick and efficient manner, at low cost and with minimum inconvenience to the community.

It is intended that the Minister may make an instrument under proposed section 372HB 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. NBN Co)—see section 589 of the Act, described in detail in the explanatory note for proposed section 372B above.

Proposed section 372HC  Installation of a facility

Proposed section 372HC 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. This definition is similar to the definition of ‘installation’ in Schedule 3 to the Act. The term ‘install’ is key to the operation of the fibre connection requirement at proposed sections 372B and 372C and the fibre-ready infrastructure requirement at proposed sections 372CA and 372CB.

Proposed section 372J  Supply to the public

Proposed section 372J 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. That is, if:

• a line consists of, or forms part of a network unit; 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 sections 372B and 372C both prohibit the installation of a line for a real estate development project unless the line is an optical fibre line, and where, among other requirements, the line is used, or for use, to supply a carriage service to the public (see proposed subsections 372B(2) and (7) and proposed subsections 372C(2) and (7)). Therefore, it is necessary to define the circumstances in which a line is taken to be used, or for use, to supply a carriage service to the public.

Although the Act currently does not set out the circumstances in which a ‘line’ is taken to ‘be used, or for use, to supply a carriage service to the public’, the Act does outline, under section 44, 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 under section 44 for a ‘network unit’ are 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’, where in the first instance the line consists of, or forms part of a network unit. Note: a ‘network unit’ includes a single line meeting certain distance requirements as well as multiple line links connecting distinct places in Australia which meet certain aggregate distance requirements (see sections 26 and 27 of the Act).

**Trade Practices Act 1974**

**Item 11 – Subsection 25(1)**

Subsection 25(1) of the TPA provides that the ACCC may by resolution delegate to a single member of the ACCC, either generally or otherwise as provided by the instrument of delegation, any of its powers under:

- the TPA (other than Part VIIA or section 152ELA of the TPA);
- Procedural Rules under Part XIC of the TPA;
- the Act;
- the Telecommunications (Consumer Protection and Service Standards) Act 1999;
- the Water Act 2007;
- Rules of Conduct under Part 20 of the Act; or
- the Australian Postal Corporation Act 1989;

except for the power to grant, revoke or vary authorisations or clearances to a single member of the ACCC.

Item 11 would amend subsection 25(1) of the TPA by adding to this list regulations made for the purposes of proposed subsection 372CA(4) or 372CB(4). Proposed subsections 372CA(4) and 372CB(4) provide that the regulations may establish a regime for third party access to a fixed-line facility in a project area, or any of the project areas for a real estate development project, in relation to installation of fibre-ready facilities for building lots and building units respectively. Proposed subsections 372CA(8) and 372CB(8) provide that regulations made for the purposes of proposed subsections 372CA(4) and 372CB(4) respectively, may confer functions or powers on the ACCC. See the explanatory notes for proposed sections 372CA and 372CB for an explanation of the application of the third party access regime to fibre-ready facilities.

The effect of the proposed amendment is that if regulations were made under proposed subsections 372CA(4) and/or 372CB(4) establishing a third-party access regime for fibre-ready infrastructure, and that regime conferred on the ACCC functions and powers relating to setting the terms and conditions of access to that infrastructure, the ACCC could delegate to a single member of the ACCC the powers and functions conferred on it for the effective administration of the access regime.
Part 2—Consequential amendment relating to civil penalty provisions

Telecommunications Act 1997

Item 12 – Section 7 (before paragraph (k) of the definition of civil penalty provision)

Item 12 inserts proposed paragraphs (jb)-(jj) before paragraph (k) of the definition of ‘civil penalty provision’ in section of the Act. Proposed paragraphs (jb)-(jj) contain references to proposed subsections 372B(2), 372B(8), 372C(2), 372C(8), 372CA(2), 372CA(10), 372CB(2), 372CB(10), and a provision of regulations made for the purposes of subsection 372CA(4) or subsection 372CB(4) that is declared by the regulations to be a civil penalty provision. This amendment would mean that if a person breached a requirement in proposed subsection 372B(2), 372B(8), 372C(2), 372C(8), 372CA(2), 372CA(10), 372CB(2), 372CB(10), or a provision of regulations made for the purposes of proposed subsection 372CA(4) or subsection 372CB(4) that is declared by the regulations to be a civil penalty provision, they would be subject to the pecuniary penalties for breach of civil penalty provisions in Part 31 of the Act.

With respect to the regulations, the effect of this amendment is that the regulations made to establish a third-party access regime for fibre-ready infrastructure may include a provision that a failure to comply with that access regime is a civil penalty. That provision would need to be identified as a civil penalty provision.

As outlined above in relation to clause 2, if Part 8 of Schedule 1 to the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009 commences on or before 1 July 2010, the provisions in this item will not commence.

Part 8 of Schedule 1 to the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009 would amend section 7 of the Act to provide that ‘civil penalty provision’ means a provision of this Act that is declared by this Act to be a civil penalty provision. Under section 7 of the Act, “this Act” is defined to include the regulations. Therefore, under this amendment it would still be the case that the regulations made to establish a third-party access regime for fibre-ready infrastructure could include a provision that a failure to comply with that access regime is a civil penalty, so long as the provision is declared by the regulations to be a civil penalty provision.