

Chapter 2

Overview of the Bill

Outline of the Bill

2.1 The Bill provides for the amendment of the *Telecommunications Act 1997* as set out in Schedule 1 to the Bill.

2.2 Schedule 1 has two parts. Part 1 would insert a new Part 20A into the *Telecommunications Act 1997*. Proposed Part 20A will create a mandatory requirement that optical fibre be deployed, or fibre-ready facilities be installed, in specified real estate development projects, or types of projects. Part 2 of Schedule 1 would make consequential amendments relating to civil penalty provisions.

2.3 Part 1 contains the key provision of the Bill, specifically Item 10, which would insert proposed Part 20A with four main aspects:

- *Requirement that optical fibre be deployed.* If a real estate development project is specified in a legislative instrument made by the minister, a person is prohibited from installing a telecommunications line in the project area unless the line is an optical fibre line. In effect, the requirement would prohibit the deployment of a copper line to those development projects.
- *Requirement that 'fibre-ready' facilities be installed.* If a real estate development project is specified in a legislative instrument made by the minister, a person is prohibited from installing or constructing a fixed-line facility in the project area unless the facility is a 'fibre-ready' facility.
- *Ministerial power to make legislative instruments.* The minister can make legislative instruments necessary to give effect to the above requirements. The minister has power, for example, to specify or identify the developments in which the requirements apply, determine the characteristics of a 'fibre-ready facility', and set any other conditions that are to apply.
- *Exemptions.* The minister can also specify, in a legislative instrument, exemptions to the above requirements.

2.4 Clause 2 of the Bill provides that Schedule 1, Part 1, commences on 1 July 2010.¹

1 The commencement of Part 2 is contingent on the passage of the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010, which is yet to be passed by the Senate. Commencement details are specified in cl 2 of the Bill.

Key provisions

2.5 As described above, the key provisions are contained in Item 10 of Schedule 1, which would insert proposed Part 20A into the *Telecommunications Act 1997*.²

2.6 Proposed Part 20A has two main divisions. Division 2 deals with the fibre connection requirement, that is, the installation of optical fibre lines as part of 'real estate development projects'. Division 3 deals with the fibre ready infrastructure requirement, that is, the installation of fibre-ready facilities as part of 'real estate development projects'.

Proposed Division 2—Deployment of optical fibre

2.7 Proposed Division 2 of Part 20A applies to the deployment of optical fibre to building lots (proposed section 372B) and to building units (proposed section 372C).

2.8 Proposed subsections 372B(2) and 372C(2) provide the general rule that where telecommunications lines are installed in specified real estate development projects, those lines must be optical fibre lines.³ Any conditions specified by the minister relating to the deployment of the line must also be complied with.⁴ Together, these constitute the 'fibre connection requirement'.

2.9 The fibre connection requirement applies to 'specified' real estate development projects. The cumulative criteria for what is a 'specified real estate development project' is provided by sections 372B(1) and 372C(1). They include that:

- (a) *the project involves the subdivision of land into one or more lots; and*
- (b) *the project is 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 *Legislative Instruments Act 2003*, or of nominating characteristics of projects to which the rule is to apply; and
- (c) and (d) *the line has a particular intended use of supplying carriage services to end-users or prospective end-users in one or more building units that have been, are being, or may be, constructed on any of the building lots; and*
- (e) *the line is not on the customer side of the boundary of a telecommunications network;*⁵ and

2 The following section draws heavily on the EM.

3 Proposed ss. 372B(2)(a), 372C(2)(a).

4 Proposed ss. 372B(2)(b), 372C(2)(b)

5 Section 22 of the *Telecommunications Act 1997* defines the 'boundary of a telecommunications network'. The Bill does not seek to amend that definition.

- (f) *the line is used or for use to supply a carriage service to the public;*⁶ and
- (g) *the line is installed after the commencement of this section (1 July 2010).*⁷

Minister to specify conditions

2.10 The minister may, by legislative instrument, specify conditions for the purposes of the fibre connection requirement.⁸ The intention is 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. The EM explains that, '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'.⁹ The EM also notes that, by virtue of section 589 of the *Telecommunications Act 1997*, conditions could be specified, if necessary, by reference to external documents such as industry codes and standards.

2.11 Different types of conditions could be specified in relation to different types of real estate development projects, in reliance on subsection 33(3A) of the *Acts Interpretation Act 1901* (Cth).

Minister may exempt specified conduct

2.12 The minister may exempt conduct specified in, or ascertained in accordance with, a legislative instrument from the scope of the fibre connection requirements.¹⁰ The exemption may be unconditional or subject to such conditions (if any) as are specified in the exemption.¹¹

2.13 The EM gives the following examples of circumstances in which the Minister might exempt the installation of copper lines from the prohibition on installation in proposed subsection 372B(1):

- 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

6 Proposed section 372J provides what is meant by 'supply to the public' for the purposes of proposed Part 20A. Its effect is that the requirement to deploy optical fibre will not apply to customer cabling nor private networks. Section 20(4) of the *Telecommunications Act 1997* defines 'customer cabling'. The Bill does not seek to amend that definition.

7 Clause 2 of the Bill provides that proposed section 372B will commence on 1 July 2010.

8 Proposed ss. 372B(4) and 372C(4).

9 EM, p. 35.

10 Proposed ss. 372B(5) and 372C(5).

11 Proposed ss. 372B(6) and 372C(6).

- 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.

Role for ACMA

2.14 The minister may confer functions or powers on the Australian Communications and Media Authority (ACMA) in a legislative instrument for the purposes of specifying project areas subject to, or exempted from, the fibre connection requirements.¹² For example, if an exemption applied where the anticipated cost of installing optical fibre lines is above a certain threshold, ACMA could be given a role in approving a developer's estimate of those costs.

Ancillary provisions

2.15 Proposed subsections 372B(8) and 372C(8) contain ancillary contravention provisions which prohibit the involvement of a person in a contravention of the fibre connection requirement.

Civil penalty provisions

2.16 The fibre connection requirements in sections 372B(2) and 372C(2) and the ancillary provisions in sections 372B(8) and 372C(8) are civil penalty provisions.¹³ Persons who contravene one of these, would be subject to the pecuniary penalty provisions in Part 31 of the *Telecommunications Act 1997*.

Proposed Division 3—Installation of fibre-ready facilities

2.17 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.

2.18 The EM explains that it is intended that 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, due, for example, to the immediate cost of installation of fibre or other considerations.¹⁴ 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, for example NBN Co, will be able to

12 Proposed ss. 372B(7) and 372C(7).

13 Proposed ss. 372B(8) and 372C(8).

14 EM, p. 37.

install optical fibre lines at a later date quickly, at low cost and with minimum inconvenience to the community.¹⁵

2.19 There is nothing in the Bill which would prevent a developer from installing optical lines in a real estate development project (so long as those lines comply with any relevant industry codes and/or standards) where that project is subject to the *fibre-ready* requirement but not the *fibre connection* requirement.

Requirement that fibre-ready facilities be installed in building lots and building units

2.20 Proposed sections 372CA(2) and 372CB(2) provide the general rule that where fixed-line facilities are installed in specified real estate development projects, those facilities must be fibre-ready.¹⁶ Any conditions specified by the minister in a legislative instrument for this purpose must also be complied with.¹⁷ Together, these constitute the 'fibre-ready requirement'.

2.21 The fibre-ready requirement applies where a real estate development project meets criteria set out at paragraphs 372CA(1)(a)–(c) and 372CB(1)(a)–(c).¹⁸

Definition: 'fixed-line' facility

2.22 The definition of 'fixed-line facility' is given at proposed section 372HA: a fixed-line facility is a facility¹⁹ 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, and poles are examples of fixed-line facilities.

Minister to declare what is a 'fibre-ready' facility

2.23 The minister may make a legislative instrument declaring that a specified fixed-line facility is a 'fibre-ready facility'.²⁰ The minister may also specify in a legislative instrument conditions that must be met in the installation of fibre-ready facilities.²¹

15 EM, p. 37.

16 Proposed ss. 372CA(2)(a) and 372CB(2)(a).

17 Proposed ss. 372CA(2)(b) and 372CB(2)(b).

18 Namely, that the project involves the subdivision of one or more areas of land into building lots; the project is specified in, or ascertained in accordance with, a legislative instrument made by the minister; and the installation occurs after the commencement of sections 372CA and 372CB (1 July 2010).

19 A term defined in s. 7 of the *Telecommunications Act 1997*.

20 Proposed s. 372HB.

21 Proposed ss. 372CA(3) and 372CB(3).

2.24 The EM explains that the intention of Division 3 is ensuring 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.²² Therefore, it is intended that the minister would exercise power to:

- 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.²³

2.25 The EM also provides the following examples of possible required attributes for fixed-line facilities that could be specified by the minister:

- 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).

Minister may exempt conduct from requirements to install ‘fibre-ready facilities’

2.26 The minister may exempt conduct specified in, or ascertained in accordance with, a legislative instrument from the scope of the fibre-ready requirement.²⁴ An exemption may be unconditional or subject to such conditions (if any) as are specified in the exemption.²⁵

Role for ACMA

2.27 As with the fibre connection requirement described above, the minister may confer, in a legislative instrument, powers or functions on the ACMA for the purposes of the fibre-ready requirement.²⁶

22 EM, p. 38.

23 EM, p. 38.

24 Proposed ss. 372CA(5) and 372CB(5).

25 Proposed ss. 372CA(6) and 372CB(6).

26 Proposed ss. 372CA(7) and 372CB(7).

Regulations to provide for third party access regime

2.28 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 subsections 372CA(4) and 372CB(4) provide 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.

2.29 The EM states that 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.²⁷ Regulations are subject to Parliamentary scrutiny and disallowance as a matter of course.

2.30 Proposed subsections 372CA(8) and 372CB(8) provide that regulations made for the purposes of proposed subsections 372CA(4) and 372CB(4) may confer functions or powers on the Australian Competition and Consumer Commission (ACCC). 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 by virtue of an amendment to subsection 25(1) of the *Trade Practices Act 1974*, which is proposed by item 11 to Schedule 1.

2.31 Proposed subsections 372CA(9) and 372CB(9) provide that regulations establishing the access regime may confer jurisdiction on a court. This could enable 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 the access regime.

Ancillary provisions

2.32 Proposed subsections 372CA(10) and 372CB(10) contain ancillary contravention provisions which prohibit the involvement of a person in a contravention of the fibre-ready requirement.

Civil penalty provisions

2.33 The fibre-ready requirements in sections 372CA(2) and 372CB(2) and the ancillary provisions in sections 372CA(10) and 372CB(10) are civil penalty provisions.²⁸ If persons contravene these, they would be subject to the pecuniary penalty provisions in Part 31 of the *Telecommunications Act 1997*.

Proposed Division 4—Miscellaneous provisions (definitions)

2.34 Division 4 contains miscellaneous provisions, including definitions for the following:

27 EM, p. 38.

28 Proposed ss. 372B(8) and 372C(8).

- 'Real estate development projects';²⁹
- 'Building unit';³⁰
- 'Fixed line facilities';³¹
- 'Fibre-ready facilities';³² and
- 'Installation' of a facility.³³

29 Proposed s. 372D.

30 Proposed s. 372F.

31 Proposed s. 372HA – discussed above at [2.22].

32 Proposed s. 372HB – discussed above at [2.23].

33 Proposed s. 372HC.