

EXPLANATORY STATEMENT

Prepared by the Australian Communications and Media Authority

Telecommunications (Backup Power and Informed Decisions) Service Provider Determination 2014

Telecommunications Act 1997

The *Telecommunications (Backup Power and Informed Decisions) Service Provider Determination 2014* (the **Determination**) is made by the Australian Communications and Media Authority (the **ACMA**) under subsection 99(1) of the *Telecommunications Act 1997* (the **Act**).

Background

Legislative provisions

Subsection 99(1) of the Act provides that the ACMA may, by legislative instrument, make a determination setting out rules that apply to service providers in relation to the supply of specified carriage services or specified content services. A service provider is a carriage service provider (**CSP**) or a content service provider (see section 86 of the Act).

The rules set out in a service provider determination are service provider rules for the purpose of the Act (see subsection 98(1) of the Act). A service provider must comply with the service provider rules that apply to the provider (see subsection 101(1) of the Act).

A service provider determination must relate to a matter specified in the regulations or in section 346 (see subsection 99(3) of the Act). Regulation 3.13 of the *Telecommunications Regulations 2001* applies to, among other things, the supply of standard telephone services (see sub-regulation 3.13(1)). Sub-regulation 3.13(2) provides that the ACMA may make a service provider determination setting out rules that apply to service providers in relation to a customer's interests as regards the supply of those services.

Standard telephone services supplied by means of the National Broadband Network

In April 2009, NBN Co¹ was established to design, build and operate a high speed wholesale National Broadband Network (the **NBN**). NBN Co is building a national wholesale-only, open access broadband network offering wholesale services to all CSPs. CSPs may, in turn, offer retail services to customers or wholesale services to other CSPs, or both (**NBN services**).

The use of fibre-to-the premises (**FTTP**) architecture has, to date, been the predominant model for the supply of NBN services to customers' premises.² While the NBN rollout is planned to transition to an optimised multi-technology mix model, FTTP architecture is expected to be used for the supply of NBN services to approximately 26 per cent of customers' premises.

¹ NBN Co is a wholly Commonwealth government owned business enterprise and reports to the Minister for Communications and the Minister for Finance.

² Optical fibre cables reach all the way to customers' premises, allowing for the high speed carriage of communications.

Unlike copper lines used in legacy telecommunications networks, FTTP architecture is unable to carry electrical power to a customer's premises and requires mains power within the customer's premises for the normal operation of an NBN service.

Consequently:

- an NBN service supplied to a customer's premises using FTTP architecture will not operate during a power failure unless there is a backup power supply; and
- if the NBN service is a standard telephone service (**specified carriage service**), an end-user would not be able to make or receive any calls during a power failure (including calls to an emergency service number).

A CSP may supply a service that enables the continued operation of a specified carriage service for a limited period of time during a power failure (**backup power service**) by means of a battery backup power supply unit (**BPSU**).

It is the Australian Government's policy, in relation to the supply of specified carriage services, that:

- a customer who receives "priority assistance" (an enhanced telephone and connection service for people with life-threatening medical conditions) will automatically be supplied with a backup power service by means of a BPSU; and
- any other customer has the option of deciding whether or not to have such a backup power service.

Purpose

The purpose of the Determination is to help protect the interests of customers of CSPs that supply specified carriage services, which will not operate during a power failure unless a backup power service is supplied.

A "customer" does not include a person who carries on a business and has an ABN or who is itself a CSP or a carrier.

A "specified carriage service" is a standard telephone service that is, or is to be, supplied to a customer's premises by means of the NBN using FTTP architecture.

The Determination achieves the stated purpose by requiring the CSPs to do the following, if a customer has requested them to supply a specified carriage service to the customer's premises:

- to give the customer, before entering into any agreement for the supply of the specified carriage service, sufficient information about what a backup power service supplied by means of a BPSU would do, and not do, during a power failure, which:
 - may be relied upon by the customer to make an informed decision about whether or not to have the backup power service; and
 - will ensure that the customer is made aware of the limitations of the backup power service; and
- to make and retain records verifying that the customer was given such information before entering into the agreement.

Operation of the Determination

The Determination sets out rules that apply to CSPs in relation to the supply of specified carriage services to customers.

The rules apply to a CSP if a customer has requested the CSP to supply a specified carriage service to the customer's premises, even if the CSP is not offering to supply a backup power service by means of a BPSU or any other form of backup power service.

The CSP must not enter into an agreement with the customer to supply a specified carriage service to the customer's premises unless the CSP has given the customer certain information.

If the customer enters into an agreement with the CSP for the supply of a specified carriage service to the customer's premises, the CSP must:

- obtain from the customer an acknowledgement that the required information was given; and
- make a record of certain matters, including a description of that information and the customer's decision about whether or not to have a backup power service supplied by means of a BPSU.

The CSP must also comply with rules relating to the form, retention and provision of records made under the Determination.

Consultation

The ACMA has consulted widely on potential regulatory mechanisms in relation to supply of specified carriage services.

The consultation process commenced in July 2013 with a meeting of a working group including representatives from the telecommunications industry under the auspices of Communications Alliance (the primary representative industry body for telecommunications in Australia). A workshop with industry was held in August 2013.

A media release and consultation paper were published on the ACMA website on 26 November 2013, inviting comment on the potential regulatory mechanisms and the terms of a draft version of the Determination (which was attached to the paper). The ACMA received 13 submissions.

The draft version of the Determination was revised in response to the submissions and circulated to the working group and the submitters for comment in May 2014. The ACMA received four further submissions.

The ACMA also consulted the ACCC before making the Determination, as required by subsection 99(4) of the Act.

All issues raised during the consultation process were considered by the ACMA and subsequently informed the content of the Determination.

Notes on Sections

The provisions of the Determination, and how they operate, are described in **Attachment A**.

Statement of Compatibility with Human Rights

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

Regulation Impact Statement

A Regulation Impact Statement was prepared by the ACMA and is available on the Office of Best Practice Regulation (**OBPR**) website at <http://ris.finance.gov.au/>. The OBPR reference number is 15138.

Notes on Sections

Part 1 – Preliminary

Section 1 – Name of Determination

Section 1 provides for the citation of the Determination as the *Telecommunications (Backup Power and Informed Decisions) Service Provider Determination 2014*.

Section 2 – Commencement

Section 2 provides that the Determination commences on 2 October 2014.

Section 3 – Object

Section 3 sets out the object of the Determination and how the Determination achieves that object.

Section 4 – Definitions

Section 4 set outs out the definitions of key terms used in the Determination, including “backup power service”, “BPSU”, “customer” (which refers to the meaning given in section 6) and “specified carriage service” (which refers to the meaning given in section 5).

Section 5 – Specified carriage service

Section 5 provides that a carriage service that is, or is to be, supplied to a customer is a specified carriage service if the carriage service:

- is a standard telephone service irrespective of whether or not the service is, or is to be, supplied as part of, or in conjunction with, another carriage or some other kind of service; and
- is, or is to be, supplied to the customer’s premises by means of the NBN using FTTP architecture.

This definition covers the supply or proposed supply to a customer of voice telephony services, including two way voice over internet protocol (**VoIP**) services, by means of the NBN using FTTP architecture.

Section 6 – Customer

Section 6 provides that a person is a customer of a CSP that supplies specified carriage services if the person:

- has requested the CSP to supply the specified carriage service to the customer’s premises; or
- has entered into an agreement with the CSP for the supply of such a service.

Section 6 also provides that a customer does not include a person who carries on a business and has an ABN or who is itself a CSP or a carrier.

Part 2 – Rules relating to informing customers about backup power services

Section 7 – Application of Part 2

Section 7 provides that Part 2 applies to a CSP if a customer has requested the CSP to supply a specified carriage service to the customer's premises.

Section 8 – Obligation to inform before entering into an agreement for the supply of a specified carriage service

Subsection 8(1) provides that the CSP must not enter into an agreement with the customer to supply a specified carriage service to the customer's premises unless the CSP has given the customer certain information specified in paragraphs 8(1)(a) and (b).

Paragraph 8(1)(a) provides that a CSP must inform the customer that the ability to use the specified carriage service to make or receive any calls during a power failure, including calls to an emergency service number, depends on whether a backup power service is supplied to the customer's premises by means of a BPSU.

Subparagraph 8(1)(b)(i) provides that the CSP must give the customer accurate, clear and concise information concerning the impact that a power failure would have on the operation of the specified carriage service if a backup power service is not supplied to the customer's premises. This includes information about an end-user's inability to use the specified carriage service during a power failure to make any calls to an emergency service number or to make any other calls or receive any calls.

Subparagraph 8(1)(b)(ii) provides that the CSP must give the customer accurate, clear and concise information concerning the impact that a power failure would have on the operation of the specified carriage service if a backup power service is supplied to the customer's premises by means of a BPSU. This includes information about the estimated period of time during which the backup power service would enable the continued operation of the specified carriage service and the fact that customer equipment for use in connection with the specified carriage service will not operate during a power failure unless:

- it has its own backup power supply; or
- it is a standard corded telephone device that is not dependent on mains power and is connected to a voice (UNI-V) port on the NBN connection box designated for the supply of the specified carriage service.

The intent of this provision is to make it clear to the customer that the period of time the backup power service would enable the continued operation of the specified carriage service during a power failure is not unlimited. The charge of the battery installed in the BPSU, by means of which the backup power service is supplied, only lasts for a limited period of time during a power failure. If a power failure lasts for a longer period, an end-user will be unable to use the specified carriage service to make or receive any calls (including calls to an emergency service number, such as Triple Zero).

The intent of the provision is to also make it clear to the customer that any customer equipment for use in connection with the specified carriage service may need its own backup power supply unless it is not dependent on mains power.

Customer equipment that typically requires its own backup power supply to operate during a power failure includes a cordless telephone handset and base station, wireless router and medical/security alarm.

Subsection 8(2) provides that, if the customer enters into an agreement with the CSP for the supply of a specified carriage service to the customer's premises, the CSP must obtain from the customer an acknowledgement that the information described in subsection 8(1) was given and make a record of certain matters including:

- a description of the information that was given;
- the acknowledgment obtained, and the date it was obtained;
- the customer's decision about whether or not to have a backup power service supplied by means of a BPSU; and
- the date the CSP entered into the agreement with the customer.

The intent of this provision is to ensure that there are appropriate records to enable the ACMA to verify the CSP's compliance with the Determination.

The CSP may make a record of a description of the information that was given to a customer by indicating that the customer was given the information described in a specified policy or script of the CSP in effect at the time the information was given.

The CSP may make a record of other matters by asking the customer to complete a form in hard copy or online or by making database entries which capture those matters.

Section 9 – Provision of information

Section 9 provides that the following does not constitute the giving of information by a CSP to a customer for the purposes of Part 2:

- giving information to a customer as part of a standard form of agreement formulated by a carriage service provider for the purposes of section 479 of the Act; or
- making information available to a customer as part of marketing, promotional or advertising material by broadcast, publication or by any other means.

The intent of this provision is to ensure that the information required to be given to customers is properly considered and not subsumed within other information, which is typically made available to them.

Part 3 – Rules relating to the making, retention and provision of records

Section 10 – Making of records

Section 10 provides that any record required to be made by a CSP under a provision of the Determination must be in writing or in such electronic form that will enable the ACMA to verify the CSP's compliance with that provision.

Section 11 – Retention of records

Section 11 provides that any record required to be made by a CSP under a provision of the Determination must be retained for:

- at least 6 years after the creation of the record; or
 - 6 months after the CSP ceases to supply the specified carriage service to the customer to which the record relates;
- whichever is the earlier.

It is anticipated that any compliance issues are likely to arise within the retention period specified and the records so retained will assist the ACMA in any investigation of such issues.

Section 12 – Provision of records to the ACMA

Section 12 provides that any record required to be made by a CSP under a provision of the Determination must be provided to the ACMA, if required by written notice issued pursuant to that section, within one month or such longer period as the ACMA allows.

Statement of Compatibility with Human Rights

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

Telecommunications (Backup Power and Informed Decisions) Service Provider Determination 2014

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative instrument

Subsection 99(1) of the *Telecommunications Act 1997* (**the Act**) provides that the Australian Communications and Media Authority (the **ACMA**) may, by legislative instrument, make a determination setting out rules that apply to service providers in relation to the supply of specified carriage services or specified content services. A service provider is a carriage service provider (**CSP**) or a content service provider (see section 86 of the Act).

A service provider determination must relate to a matter specified in the regulations or in section 346 (see subsection 99(3) of the Act). Regulation 3.13 of the *Telecommunications Regulations 2001* (the **Regulations**) applies to, among other things, the supply of standard telephone services (see sub-regulation 3.13(1)). Sub-regulation 3.13(2) provides that the ACMA may make a service provider determination setting out rules that apply to service providers in relation to a customer's interests as regards the supply of those services.

The Legislative Instrument has been made by the ACMA under subsection 99(1) of the Act to help protect the interests of residential customers of CSPs that supply standard telephone services, by means of the National Broadband Network using fibre-to-the-premises architecture, (**specified carriage services**) which will not operate during a power failure unless a backup power service is supplied.

The Legislative Instrument requires the CSPs to do the following, if a residential customer has requested them to supply a specified carriage service to the customer's premises:

- to give the customer, before entering into any agreement for the supply of the specified carriage service, certain information about what a backup power service supplied by means of a battery backup supply unit (**BPSU**) would do, and not do, during a power failure, which:
 - may be relied upon by the customer to make an informed decision about whether or not to have the backup power service; and
 - will ensure that the customer is made aware of the limitations of the backup power service; and
- to make and retain records verifying that the customer was given such information before entering into the agreement.

The Legislative Instrument restricts the CSPs from giving the relevant information in any of the following ways:

- giving information to a customer as part of a standard form of agreement formulated by a carriage service provider for the purposes of section 479 of the Act; or
- making information available to a customer as part of marketing, promotional or advertising material by broadcast, publication or by any other means.

Human rights implications

Right to freedom of expression

It is possible that the requirement to give certain information to customers and the restriction on the way in which that information may be given (the **rules**) may be viewed as limiting the right to freedom of expression in Article 19(2) of the International Covenant on Civil and Political Rights. Article 19(2) protects the right to freedom of expression, including the right to seek, receive and impart information and ideas through any media of a person's choice. However, this right is subject to any limitation that is:

- authorised by law;
- aimed at achieving a legitimate objective (such as the protection of the rights of others and the protection of public health); and
- reasonable, necessary and proportionate.

The rules are authorised by subsection 99(1) of the Act and Regulation 3.13 of the Regulations and are aimed at achieving legitimate objectives, being the protection of the interests of customers as regards the supply of specified carriage services and their access to emergency call services and, by extension, the protection of public health.

The intent of the rules is to ensure that customers are given information in a way that will enable them to fully appreciate the consequences of having or not having a backup power service supplied and to take appropriate measures to safeguard their access to emergency call services. Those measures may include having a backup power service supplied by means of a BPSU with a telephone device that will operate during a power failure or having a fully charged mobile telephone, or both.

Without the restriction on the way in which the information may be given, the noticeability and effectiveness of the information may be reduced. The information may be subsumed within other information, which is typically made available to them, and customers may make poorly-informed decisions about whether or not to have a backup power service supplied.

Customers who are not properly informed may fail to appreciate that they will be unable to use their specified carriage service to make or receive any calls during a power failure (including any calls to Triple Zero) if:

- they do not have a backup power service; or
- (even if they do have a backup power service) they have a telephone device that is dependent on mains power, but does not have its own backup power supply.

Access to emergency call services is a vital public protection which the Determination seeks to safeguard. A lack of immediate access to an emergency call service can have very serious consequences in the event that there is a health or safety issue requiring urgent attention. The rules are reasonable, necessary and proportionate as they are aimed at protecting the interests of customers and mitigating any risks to health and safety which could arise if those customers are not given, or do not properly consider, the relevant information.

Conclusion

This Legislative Instrument is compatible with human rights. Any limit of the right to freedom of expression is authorised by law and reasonable, necessary and proportionate to give effect to legitimate objectives.