



Telecommunications Service Provider (NBN Service Migration) Determination 2018

The Australian Communications and Media Authority makes the following determination under subsection 99(1) of the *Telecommunications Act 1997*.

Dated: 20 July 2018

Nerida O'Loughlin
[signed]
Member

Chris Jose
[signed]
Member/~~General Manager~~

Australian Communications and Media Authority

Part 1—Preliminary

1 Name

This is the *Telecommunications Service Provider (NBN Service Migration) Determination 2018*.

2 Commencement

This determination commences on 21 September 2018.

Note: The Federal Register of Legislation may be accessed at www.legislation.gov.au.

3 Authority

This determination is made under subsection 99(1) of the *Telecommunications Act 1997*.

4 Application

For the purposes of subsection 99(1) of the Act this determination applies to carriage service providers involved (directly or indirectly) in the supply of either or both:

- (a) NBN broadband services; or
- (b) NBN voice services.

5 Definitions

In this determination:

ACMA means the Australian Communications and Media Authority.

Act means the *Telecommunications Act 1997*.

activated means, in relation to an NBN service, that the modem has been connected inside the premises and has been turned on.

alternative arrangement means an arrangement agreed by the NBN CSP and the consumer where the requirement to supply an interim service under Part 3 applies and it may include:

- (a) the payment of reasonable compensation;
- (b) the application of credit to the consumer's account for mobile data;
- (c) the reconnection of a legacy service;
- (d) payment to an alternative provider for the provision of a mobile data service;
or
- (e) any other terms agreed by the NBN CSP and the consumer.

applicable speed means the layer 2 line rate for the speed tier specified in the consumer contract for an NBN consumer plan.

consumer means:

- (a) an individual who acquires or may acquire a carriage service for the primary purpose of personal or domestic use and not for resale; or
- (b) a business or non-profit organisation which acquires or may acquire one or more carriage services which are not for resale and which, at the time it enters into the consumer contract:
 - (i) does not have a genuine and reasonable opportunity to negotiate the terms of the consumer contract; and
 - (ii) has or will have an annual spend with the carriage service provider which is, or is estimated on reasonable grounds by the carriage service provider to be, no greater than \$20,000.

A reference to a consumer includes a reference to the consumer's representative.

consumer contract means an arrangement or agreement between a carriage service provider and a consumer for the supply of a carriage service to that consumer, and includes a standard form of agreement formulated by a carriage service provider for the purposes of section 479 of the Act.

consumer supplied modem means a modem other than a modem that is supplied by the NBN CSP in connection with the supply of the NBN service to the consumer.

interim service means a voice service or broadband service, or both, other than an NBN backup service or an NBN service, supplied or arranged to be supplied by an NBN CSP to a consumer.

layer 2 line rate means the layer 2 downstream synchronisation rate between a modem and a digital subscriber line access multiplexer or a distribution point unit.

legacy CSP means a carriage service provider who supplied a legacy service to a consumer at the relevant premises under a consumer contract using a legacy network immediately prior to the consumer attempting to migrate to the NBN.

legacy service means:

- (a) a legacy service within the meaning of Part 4 of the *Telecommunications Regulations 2001*; and
- (b) a telecommunications service supplied using a hybrid fibre-coaxial network.

line capability data means any information made available by NBN Co to carriage service providers on a regular basis regarding the maximum attainable speed of a next-generation NBN broadband service.

line capability testing means a test which:

- (a) determines the layer 2 line rate of the NBN service; and
- (b) is performed on the part of the network unique to the consumer.

major rural area means an area that is an urban centre, locality or other recognised community grouping with a population of greater than 2,500 but less than 10,000 people.

maximum attainable speed means the theoretical maximum speed that could be delivered to a consumer given the technical capabilities of the part of the network unique to the consumer.

migration means the process of connecting a premises to the NBN, which connection allows for the supply of an NBN service to the consumer.

minor rural or remote area means an area that is an urban centre, locality or other recognised community grouping with a population of less than or equal to 2,500 people.

NBN has the same meaning as “national broadband network” in the *National Broadband Network Companies Act 2011*.

NBN backup service means a voice service or broadband service, or both, other than an NBN service, supplied by an NBN CSP to a consumer to provide reliable and immediate service continuity for each component of an NBN service.

Note: Where an NBN service includes both NBN voice service and NBN broadband service components, the NBN backup service must support both of those services to the consumer. Where an NBN service only comprises an NBN voice or an NBN broadband service the NBN backup service must support that individual component of the NBN service which the consumer has contracted to receive.

NBN broadband service means a broadband carriage service supplied using an NBN ethernet product, but does not include an NBN voice service.

NBN Co means NBN Co Limited (ACN 136 533 741) (even if its name is later changed).

NBN consumer plan means a plan for NBN services offered by an NBN CSP to consumers.

NBN CSP means a carriage service provider which supplies a service to a consumer under a consumer contract using an NBN ethernet product.

NBN ethernet has the same meaning given in the Dictionary to the Wholesale Broadband Agreement.

NBN service means a carriage service supplied using the NBN and includes an NBN broadband service, or an NBN voice service, or both.

NBN voice service means a voice telephony service that may be supplied by a carriage service provider over an NBN ethernet product, but does not include a public mobile telecommunications service or an NBN broadband service.

next-generation broadband service has the same meaning as set out in regulation 4.2 of the *Telecommunications Regulations 2001*.

next-generation NBN broadband service means a next-generation broadband service using the NBN.

operational means, in relation to a carriage service, that the service is working and can be used by a consumer who has entered into a consumer contract with a carriage service provider for the supply of that service.

parallel migration means migration where disconnection of a consumer’s legacy service is not required in order to connect an NBN service at the consumer’s premises.

part of the network unique to the consumer means the part of the network located between the modem in the consumer's premises and the digital subscriber line access multiplexer or the distribution point unit.

Note: This definition excludes elements of the network that are on the consumer's side of the boundary of a telecommunications network, including a consumer supplied modem and in-premises cabling.

port, in relation to a consumer's telephone number, means the transfer of a consumer's telephone number used in connection with one carriage service to another carriage service (the ***second service***) for the purpose of allowing the consumer to continue to use that number in connection with the second service.

post-migration testing means a test performed, or arranged to be performed, by an NBN CSP after an NBN service has been successfully migrated to determine whether or not the NBN service is operational.

premises means an addressable location to which a carriage service may be supplied for use by a consumer.

speed tier means the maximum download and upload wholesale access speed of an NBN broadband service measured in megabits per second (Mbps), that NBN Co provides, and is used by NBN CSPs to create NBN consumer plans, including the following speed tiers:

- (a) NBN broadband service - speed tier 12/1 (Mbps);
- (b) NBN broadband service - speed tier 25/5 (Mbps);
- (c) NBN broadband service - speed tier 50/20 (Mbps);
- (d) NBN broadband service - speed tier 100/40 (Mbps); and
- (e) any other NBN broadband speed tier that is, or becomes, available.

Unwelcome Communications Code means the *Handling of Life Threatening and Unwelcome Communications Code C525:2017* or an industry code that replaces that code and is registered by the ACMA.

Note 1: Industry codes registered by the ACMA are kept on the ACMA's register of telecommunications industry codes and practices on the ACMA's website: www.acma.gov.au.

Note 2: Replacement of an industry code can occur in the manner set out in subsection 117(4) or section 120 of the Act.

urban area means an urban centre with a population equal to or greater than 10,000 people.

valid reason, in relation to the disconnection of a carriage service, means that the carriage service provider has disconnected the consumer's carriage service in accordance with:

- (a) valid credit management processes; or
- (b) the Unwelcome Communications Code.

Wholesale Broadband Agreement means the standard form of access agreement for the purposes of Part XIC of the *Competition and Consumer Act 2010*, setting

out the contractual terms on which NBN Co supplies products and services to a person mentioned in section 4.

Note: The Wholesale Broadband Agreement is published on NBN Co's website at <https://www.nbnco.com.au>.

working day means:

- (a) in Part 2, Part 3, Part 4 and Part 5, a day that is not a Saturday, Sunday or gazetted public holiday in the location of the consumer's premises or principal place of business; and
- (b) in Part 6 and Part 7, a day that is not a Saturday, Sunday or gazetted public holiday in the location of the principal place of business of the relevant NBN CSP.

Note: A number of other expressions used in this determination are defined in the Act, including the following:

- (a) ACCC;
- (b) boundary of a telecommunications network;
- (c) carriage service;
- (d) carriage service provider;
- (e) carrier;
- (f) hybrid fibre-coaxial network;
- (g) public mobile telecommunications service.

6 References to other instruments

In this determination, unless the contrary intention appears:

- (a) a reference to any other legislative instrument is a reference to that other legislative instrument as in force from time to time; and
- (b) a reference to any other kind of instrument is a reference to that other instrument as in force from time to time.

Note 1: For references to Commonwealth Acts, see section 10 of the *Acts Interpretation Act 1901*; and see also subsection 13(1) of the *Legislation Act 2003* for the application of the *Acts Interpretation Act 1901* to legislative instruments.

Note 2: All Commonwealth Acts and legislative instruments are registered on the Federal Register of Legislation.

Note 3: For references to instruments that are not legislative instruments, see section 589 of the Act.

Part 2—Rules about testing following service migration

7 Post-migration testing

- (1) Under this Part, the requirement to perform post-migration testing only applies where:
 - (a) the location of the consumer's premises has been declared ready for service by NBN Co; and

- (b) an NBN CSP has entered into a consumer contract with the consumer for the supply of an NBN service to the premises.
- (2) Within one working day after the NBN CSP referred to in paragraph (1)(b) becomes aware that the migration at the consumer's premises has been successful, the NBN CSP must perform, or arrange for the performance of, post-migration testing.
- (3) If the NBN CSP's post-migration testing has determined that the NBN service is not operational, and the NBN CSP subsequently considers that the issue affecting the service has been rectified, then, within one working day after it considers the issue has been rectified, the NBN CSP must perform or arrange for the performance of further post-migration testing.

Note: In accordance with subsection 7(1) of the *Telecommunications (NBN Continuity of Service) Industry Standard 2018*, an NBN CSP must take all reasonable steps to manage the migration at a consumer's premise in order to minimise disruption to the continuous supply of carriage services to the consumer and expedite the supply of an operational NBN service to the consumer.

- (4) Where the results of the further post-migration testing performed in accordance with subsection (3) indicate that the service is not operational, the NBN CSP must ensure that further post-migration testing is performed until the results of the testing indicate that the NBN service is operational.
- (5) An NBN CSP does not contravene this section if it takes all reasonable steps to perform post-migration testing, but is unable to do so because:
 - (a) the consumer is using a consumer supplied modem in connection with the supply of the NBN service; or
 - (b) the consumer has not activated the NBN service.

Note: Where an NBN service includes both NBN voice service and NBN broadband service components, this section requires the post-migration testing to test whether both of those services are operational.

Part 3 - Rules about the supply of an interim service

8 Requirement to supply an interim service only applies to particular services

Under this Part the requirement to supply an interim service under subsection 9(1) applies where:

- (a) the area in which the consumer's premises is located has been declared ready for service by NBN Co; and
- (b) an NBN CSP has entered into a consumer contract with the consumer for the supply of an NBN service to the premises; and
- (c) either:
 - (i) the migration at the consumer's premises is not a parallel migration; or
 - (ii) the following applies:
 - (A) the migration at the consumer's premises is a parallel migration; and
 - (B) the NBN CSP is not the legacy CSP;and either:
 - (C) a port of the consumer's telephone number has occurred; or
 - (D) the legacy CSP has disconnected the legacy service at the request of the consumer.

9 Requirement to supply an interim service

- (1) An interim service must be supplied to a consumer by the NBN CSP where:
 - (a) the migration at the consumer's premises has been unsuccessful, and is unlikely to be successful within three working days of the NBN CSP becoming aware of the unsuccessful migration; or
 - (b) the migration at the consumer's premises has been successful, but an operational NBN service has not been supplied to the consumer and cannot be supplied to that consumer within three working days of the NBN CSP becoming aware that the consumer's NBN service is not operational,unless an exception in subsection (2) applies.

Exceptions to the requirement to supply an interim service

- (2) The requirement to supply an interim service does not apply where:
 - (a) the NBN CSP has agreed with the consumer on an alternative arrangement; or
 - (b) the NBN CSP has:
 - (i) sought the consumer's consent to supply the interim service and the consumer does not consent to the supply of the interim service; and
 - (ii) has agreed with the consumer on an alternative arrangement; or
 - (c) the NBN CSP is supplying an NBN backup service to the consumer.

Note: Under section 11 the NBN CSP must advise the consumer of specified matters as soon as possible after becoming aware of the matter in subsection 9(1), and before obtaining the consumer's consent to the supply of the interim service.

- (3) For paragraph (2)(a) and subparagraph 2(b)(ii), a consumer must have expressly agreed on an alternative arrangement and not as part of a standard form of agreement formulated by a carriage service provider for the purposes of section 479 of the Act.

10 Conditions for the supply of an interim service by an NBN CSP

- (1) Where the requirement to supply an interim service under subsection 9(1) applies:
 - (a) the amount payable by a consumer to the NBN CSP for the supply of the interim service must not exceed the monthly fee applicable to the lowest speed tier plan offered by the NBN CSP; and
 - (b) when the interim service ceases to be supplied, the costs of returning any equipment used in the supply of the interim service must be borne by the NBN CSP.

Note: An NBN CSP may provide a refund or credit to a consumer in the subsequent billing period in order to satisfy the requirement in paragraph (b).

- (2) If a consumer advises an NBN CSP that the interim service supplied by the NBN CSP is not performing as reasonably expected, having regard to the features and limitations of the interim service disclosed to the consumer by the NBN CSP, the NBN CSP must take all reasonable steps to improve the performance of the interim service to the reasonable satisfaction of the consumer.

Note: Under paragraph 11(b), before obtaining a consumer's consent to supply an interim service, the NBN CSP must advise the consumer of the details of the key features and limitations of the interim service.

- (3) If the performance of the interim service cannot be improved to the reasonable satisfaction of the consumer, the NBN CSP must use its best endeavours to negotiate an alternative arrangement with the consumer.
- (4) If an NBN CSP and a consumer agree on an alternative arrangement under subsection (3), the requirement to supply an interim service under subsection 9(1) no longer applies to the NBN CSP.

11 Requirements for an NBN CSP to advise a consumer

Where the requirement to supply an interim service under subsection 9(1) applies, the NBN CSP must advise the consumer of:

- (a) the applicable timeframes for the supply of the interim service set out in sections 12 and 13; and
- (b) details of the key features and limitations, fees and charging arrangements that will apply to the NBN CSP's proposed supply of the interim service to the consumer,

as soon as possible after becoming aware of the matter in subsection 9(1), and before obtaining the consumer's consent to the supply of that service.

12 Timeframes for the supply of an interim service

- (1) Where an NBN CSP is required to supply an interim service to a consumer under subsection 9(1), it must be supplied to the consumer:
 - (a) where the consumer is located in an urban area - within 3 working days;
 - (b) where the consumer is located in a major rural area - within 4 working days; or
 - (c) where the consumer is located in a minor rural or remote area - within 6 working days,of the NBN CSP obtaining the consumer's consent to that supply.
- (2) The requirement to supply an interim service within a period set out in subsection (1) ceases to apply where the consumer's NBN service becomes operational prior to the supply of the interim service in accordance with paragraphs (1)(a), (b) and (c), whichever is applicable.

13 Timeframes for the continued supply of an interim service

Where an NBN CSP supplies an interim service in accordance with subsection 9(1), it must continue to supply that service to the consumer until the first to occur of the following:

- (a) the NBN CSP supplies an operational NBN service to the consumer; or
- (b) the consumer contract with the NBN CSP for the NBN service expires; or
- (c) the consumer contract with the NBN CSP for the NBN service has otherwise been terminated for a valid reason; or
- (d) subsection 10(4) applies.

Part 4 – Rules relating to line capability assessment

14 Line capability assessment of next-generation NBN broadband services

- (1) This section applies to NBN services that are next-generation NBN broadband services.
- (2) As soon as practicable, and in any event within 20 working days, after a next-generation NBN broadband service becomes operational the NBN CSP supplying the service must either:
 - (a) confirm the maximum attainable speed of the service identified in the line capability data relating to the service; or
 - (b) perform, or arrange for the performance of, line capability testing in relation to the service.
- (3) If the line capability data referred to in paragraph (2)(a) or the line capability testing referred to in paragraph (2)(b) indicates that the part of the network unique to the consumer is not capable of providing the applicable speed, then the NBN CSP must, as soon as practicable, and in any event within 5 working days, advise the consumer:
 - (a) of the maximum attainable speed of the part of the network unique to the consumer; and
 - (b) that they may, at no cost, move to a lower speed tier plan at a lower price that reflects the maximum attainable speed; and
 - (c) that they are free to exit the consumer contract which the NBN CSP has entered into with the consumer, without cost.
- (4) Nothing in this section precludes the NBN CSP and the consumer agreeing to another remedy.

Part 5 – Other consumer protections in relation to NBN services

15 Circumstances where an NBN CSP must not charge a consumer for an NBN service

- (1) An NBN CSP must not charge a consumer for an NBN service unless:
 - (a) the service is operational; and
 - (b) in relation to a next-generation NBN broadband service, either:
 - (i) the maximum attainable speed identified in the line capability data relating to the service under paragraph 14(2)(a) or the line capability testing under paragraph 14(2)(b) indicates that the part of the network unique to the consumer is capable of providing the applicable speed; or
 - (ii) 10 working days have passed since the NBN CSP advised the consumer of the matters set out in subsection 14(3) and the consumer has not requested that the NBN CSP provide an available remedy.
- (2) An NBN CSP does not contravene subsection (1) if it promptly provides a refund or credit to a consumer for an amount specified in a bill issued to the consumer.

16 Requirements where there is unreasonable delay in the supply of an operational NBN service

- (1) This section applies where section 8 applies.
- (2) If, at 20 working days after the expiration of a timeframe referred to in paragraph 9(1)(a) or (b), whichever is applicable, the NBN service is not operational, the NBN CSP must within 2 working days, prepare a plan directed at ensuring that the consumer is provided with an operational NBN service as soon as possible.
- (3) Where a plan is prepared by an NBN CSP in accordance with the requirement in subsection (2), the NBN CSP must send a copy of the plan to the consumer within 2 working days of its being prepared.
- (4) A plan mentioned in subsection (2) must contain the following minimum requirements:
 - (a) a diagnosis of the issue that has caused the NBN service to be not operational;
 - (b) the steps required to remediate the issue and establish an operational NBN service;
 - (c) the timeframe for completing the required remedial work;
 - (d) any compensation that will be offered to the consumer; and
 - (e) contact details that the consumer can use to gain updates on the completion of the remedial work.
- (5) If, at a further 20 working days (the *further period*) after the expiration of the 20 working day timeframe mentioned in subsection (2), the NBN service is not operational, the NBN CSP must arrange for a technical audit to be completed within 10 working days after the expiration of the further period.

- (6) A technical audit under subsection (5) must identify:
 - (a) why the plan mentioned in subsection (2) did not result in the establishment of an operational NBN service;
 - (b) the steps that are required to remediate the issue and establish an operational NBN service as soon as possible; and
 - (c) the measures that can be instituted to avoid similar problems in other cases.
- (7) An NBN CSP is not required to prepare a plan mentioned in subsection (2) or complete a technical audit under subsection (5) where it determines on reasonable grounds that the reason why the NBN service is not operational is due to an issue on the consumer's side of the boundary of a telecommunications network.

17 Information to be supplied to consumers about the use of a consumer supplied modem

- (1) This section applies when:
 - (a) a consumer seeks to enter into a consumer contract with an NBN CSP for the provision of an NBN service; and
 - (b) the consumer notifies the NBN CSP that they intend to use a consumer supplied modem in connection with the supply of the NBN service.
- (2) Prior to entering into the consumer contract with the consumer, the NBN CSP must:
 - (a) advise the consumer that:
 - (i) it is required to undertake post-migration testing under this determination; and
 - (iii) it may be unable to perform that testing if the consumer uses a consumer supplied modem in connection with the supply of the NBN service; and
 - (b) following the provision of advice under paragraph (a), obtain express confirmation from the consumer that:
 - (i) they understand that post-migration testing under this determination may not be able to be performed; and
 - (ii) they will need to inform their NBN CSP of any issues with their NBN service before those issues will be rectified.
- (3) If:
 - (a) a consumer is using a consumer supplied modem in connection with the supply of an NBN service; and
 - (b) the consumer requests information regarding modem configuration settings from the NBN CSP who has entered into a consumer contract with the consumer for the supply of an NBN service to the premises,then the NBN CSP must provide the consumer with that information as soon as practicable.

Part 6—Record-keeping

18 Requirement to keep records

A carriage service provider referred to in section 4 must:

- (a) keep records that are sufficient to demonstrate its compliance with the requirements under Parts 2, 3, 4 and 5 of this determination;
- (b) retain the records required to be kept by paragraph (a) for a minimum of two years; and
- (c) make those records available to the ACMA within 5 working days after receiving a written request from the ACMA.

Part 7 – Reasonable assistance

19 Reasonable assistance regarding post-migration testing, the supply of interim services and line capability assessment

Application of this section

- (1) This section applies to:
 - (a) an NBN CSP (the **first CSP**) seeking to supply an NBN service to a consumer;
 - (b) a person (the **second person**) mentioned in section 4 who:
 - (i) is involved (directly or indirectly) in the supply of the NBN service; and
 - (ii) has a direct contractual relationship with the first CSP; and
 - (c) a person (the **third person**) mentioned in section 4 who:
 - (i) is not the first CSP or the second person;
 - (ii) is involved (directly or indirectly) in the supply of the NBN service;
 - (iii) does not have a direct contractual relationship with the first CSP; and
 - (iv) has a direct contractual relationship with the second person; and
 - (d) a person (the **other person**) mentioned in section 4 who is not the first CSP, the second person or the third person and who is involved (directly or indirectly) in the supply of the NBN service.

Cooperation and provision of reasonable assistance

- (2) The second person must provide reasonable assistance to the first CSP at the request of the first CSP, to enable the first CSP to comply with its obligations under:
 - (a) Part 2 in relation to testing following service migration; and
 - (b) Part 3 in relation to the supply of an interim service; and
 - (c) Part 4 in relation to line capability assessment; and
 - (d) section 16 in relation to the requirements that apply where there is an unreasonable delay in the supply of an operational NBN service.
- (3) Where subsection (2) applies and the second person requires the assistance of the third person to meet its obligations under that provision, the third person must provide reasonable assistance to the second person at the request of the second person.
- (4) Where the assistance of the other person is required to enable the first CSP, the second person or the third person to meet its obligations under this section, the other person must provide reasonable assistance to the person mentioned in section 4 who has requested that assistance (the **requesting person**) provided that the requesting person has a direct contractual relationship with the other person.

- (5) A person who is required to provide reasonable assistance under this section must not fail or delay to take reasonable actions to cooperate nor withhold or delay the provision of reasonable assistance under this section because there has been no agreement on the payment of costs from another person mentioned in this section.

Note: The persons mentioned in this section may agree between themselves on the payment of any reasonable costs of providing any such reasonable assistance.

- (6) A person who has agreed to pay reasonable costs associated with the provision of reasonable assistance under this section must not charge those costs to the consumer.

20 Nomination of contact persons

- (1) A carriage service provider mentioned in section 4 must:
- (a) nominate one or more contact persons responsible for the coordination of activities regarding the provision of reasonable assistance under this Part;
 - (b) notify relevant carriage service providers and, where applicable, carriers, of an email address or other method whereby they can contact a contact person nominated under paragraph (a), or make enquiries about, or request, reasonable assistance under this Part;
 - (c) ensure that the inbox for the email address or other method of contact identified in paragraph (b) is monitored each working day;
 - (d) ensure that all enquiries and requests for reasonable assistance received by the nominated contact person are responded to as soon as practicable; and
 - (e) if an industry body that is representative of the telecommunications industry has established a register for the purposes of this Part, notify that industry body:
 - (i) of the matters referred to in paragraphs (a) and (b) within two working days of making a nomination under paragraph (a); and
 - (ii) of any changes to the information notified under subparagraph (i) within two working days of the information being changed.
- (2) A requirement in subsection (1) does not apply to a carriage service provider to the extent that the provider has complied with a requirement in section 26 of the *Telecommunications (NBN Continuity of Service) Industry Standard 2018* that corresponds with the requirement in subsection (1).