

EXPLANATORY STATEMENT

Approved by the Australian Communications and Media Authority

Telecommunications Act 1997

Telecommunications (NBN Consumer Information) Industry Standard Variation 2020 (No. 1)

Authority

The Australian Communications and Media Authority (the **ACMA**) has determined the *Telecommunications (NBN Consumer Information) Industry Standard Variation 2020 (No. 1)* (the **instrument**) under subsection 125AA(1) of the *Telecommunications Act 1997* (the **Act**), in accordance with sections 5 and 6 of the *Telecommunications (NBN Consumer Experience Industry Standard) Direction 2017* (the **Direction**) and subsection 33(3) of the *Acts Interpretation Act 1901* (the **AIA**).

The Minister has the power under subsection 125AA(4) of the Act to direct the ACMA to:

- (a) determine a standard under subsection 125AA(1) of the Act that:
 - (i) applies to participants in a specified section of the telecommunications industry;
 - (ii) deals with one or more specified matters relating to the activities of those participants; and
- (b) do so within a specified period.

The Direction was given to the ACMA by the Minister under subsection 125AA(4) of the Act and commenced on 23 December 2017.

Subsection 5(1) of the Direction directs the ACMA to determine an industry standard under subsection 125AA(1) of the Act that complies with Divisions 2, 3 and 4 of Part 2 of the Direction.

Relevantly, section 6 of the Direction requires the ACMA to determine an industry standard relating to the provision of information and advice by carriage service providers (**CSPs**) to consumers.

Subsection 6(1) of the Direction requires the ACMA to determine an industry standard that:

- (a) applies to CSPs in relation to services supplied by those providers using the National Broadband Network (the NBN); and
- (b) deals with information and advice that CSPs should provide or make available to consumers to help consumers make informed decisions about NBN services prior to entering a contract with a CSP for the supply of those services.

Specifically, subsection 6(2) of the Direction provides that the industry standard must deal with:

- (a) minimum requirements for information and advice to be provided to consumers about services supplied using the NBN;
- (b) requirements in relation to when the information and advice about the services is to be provided; and
- (c) requirements in relation to the manner in which that information or advice is to be provided.

Subsection 125AA(5) of the Act provides that the ACMA must determine an industry standard under subsection 125AA(1) in accordance with a direction under subsection 125AA(4).

The ACMA made the *Telecommunications (NBN Consumer Information) Industry Standard 2018* (the **Standard**) consistent with the requirements in sections 5 and 6 of the Direction and it commenced on 21 September 2018.

The ACMA is also directed under subsection 5(4) of the Direction to vary an industry standard made under Part 2 of the Direction, as it considers necessary from time to time, in a like manner and subject to like conditions specified in subsection 5(1). Subsection 33(3) of the AIA relevantly provides that where an Act confers a power to make a legislative instrument, the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

Purpose and operation of the instrument

Background

Relevant background regarding the history and making of the Standard is set out in the Explanatory Statement to the Standard and the Direction, which background is also relevant to the instrument.

In mid-2018, the ACMA made several rules to improve the experience of consumers in transitioning to the NBN. These were informed by an industry information gathering exercise in 2017 and consumer research in late 2017 and early 2018. The NBN consumer experience rules were designed to resolve issues in relation to complaints handling, the provision of information that would enable consumers to directly compare service offerings, service continuity and fault rectification. They comprise the following “NBN consumer experience rules”:

- the Standard
- the *Telecommunications (Consumer Complaints Handling) Industry Standard 2018* (the **Complaints Handling Standard**)
- the *Telecommunications (NBN Continuity of Service) Industry Standard 2018* (the **Service Continuity Standard**)
- the *Telecommunications Service Provider (NBN Service Migration) Determination 2018* (the **Service Migration Determination**)
- the *Telecommunications (Consumer Complaints) Record-Keeping Rules 2018* (the **Complaints RKR**s).

In January 2019 the ACMA undertook a post-implementation review of the above instruments (the **review**), excluding the Complaints RKR (the **NBN consumer experience rules**).

The objective of the review was to ensure the rules were:

- achieving their intended outcomes, particularly in light of changes to the NBN environment; and
- operating in an efficient and effective manner.

The changes made to the Standard by the instrument support the above objectives. The key changes include:

- The definition of “consumer” in section 5 of the Standard has been revised to increase the threshold of the estimated annual spend that a business or non-profit organisation has with a retail CSP from \$20,000 to \$40,000. This will align the definition of “consumer” with that in the revised *Telecommunications Consumer Protections Code C628:2019* (the **TCP Code**).
- The requirements of the NBN Key Facts Sheet (**KFS**) have been revised to include references to the remedies specified in the Service Migration Determination.

The reasons for these changes are set out in the section on Consultation.

A provision-by-provision description of the instrument is set out in the notes at **Attachment A**.

The instrument is a legislative instrument for the purposes of the *Legislation Act 2003* (the **LA**).

Documents incorporated by reference

This instrument incorporates by reference the Service Migration Determination, which is a legislative instrument that can be obtained from the Federal Register of Legislation (<http://www.legislation.gov.au>). The Service Migration Determination is incorporated as in force from time to time, in accordance with section 10 of the AIA, subsection 13(1) of the LA and section 589 of the Act. See also paragraph 6(a) of the Standard.

Consultation

Before the instrument was made, the ACMA was satisfied that consultation was undertaken to the extent appropriate and reasonably practicable, in accordance with section 17 of the LA and subsection 125AA(3) of the Act.

The ACMA's review was informed by submissions received as a part of an extensive two-stage consultation process (detailed below) and the ACMA's experience in monitoring compliance with the rules.

On 8 August 2019, the ACMA released a discussion paper seeking stakeholder views about the effectiveness and efficiency of the NBN consumer experience rules.

The ACMA received seven submissions from industry and consumer advocacy groups, including the Telecommunications Industry Ombudsman (**TIO**) and the Australian Communications Consumer Action Network (**ACCAN**). After the consultation period, all non-confidential submissions were made publicly available on the ACMA website.

On 17 December 2019, the ACMA undertook a further consultation process with stakeholders and the general public on the proposed revisions to the NBN consumer experience rules (see: <https://www.acma.gov.au/consultations/2019-12/proposed-revisions-nbn-consumer-experience-rules-consultation-422019>). The ACMA also consulted with Communications Alliance Ltd (**Communications Alliance**), as required by subsection 125AA(3) of the Act. As a part of this process, the draft proposed variations to the Standard (and the other NBN consumer experience rules) were made available through the ACMA's website.

The ACMA received eight submissions from government, industry and consumer advocacy groups, including the Australian Competition and Consumer Commission, the TIO and ACCAN. After the consultation period, all non-confidential submissions were made publicly available on the ACMA website.

The ACMA considered all relevant issues raised by the submissions when making the instrument.

A broad range of feedback regarding all the NBN consumer experience rules was received in response to consultation. However, only minor suggested changes to the Standard were received during consultation. After consideration of the issues raised about the Standard, not all suggestions were adopted. The ACMA decided not to make changes to the Standard suggested in consultation submissions where the reasons cited for making the changes were not supported by evidence of a problem or were not within the narrow scope of the review.

Below is a summary of comments received during consultation about the main changes proposed to the Standard:

- Industry bodies (Communications Alliance, Optus and Telstra) supported revisions to the definition of "consumer" in the Standard to align with the revised TCP Code.
- Previously, paragraph 8(1)(d) of the Standard required a retail CSP to set out in its KFS the remedies available to consumers in circumstances where the line speed of their connection

was insufficient to meet their chosen plan. However, paragraph 8(1)(d) did not specify the remedies that must be included. There are remedies specified in the Service Migration Determination. Therefore, paragraph 8(1)(d) of the Standard has been revised to require a retail CSP to specify these remedies in its KFS. The ACMA received no objections to the proposed revision.

- Communications Alliance and Optus recommended an “implementation period” of three months to allow for the revision of procedures, published documents, changes to IT systems and websites, and staff training. Analysis of the information provided indicated that a three month implementation period would be appropriate to accommodate the practical tasks providers would need to undertake to become compliant with the revised Standard. In July 2020, Communications Alliance revised its request for an implementation period from three months to six months due to the ongoing effects of the COVID-19 pandemic on industry. . The revised definition of “consumer” will commence on 14 December 2020, to align with the commencement of that definition in all the NBN consumer experience rules. The remaining provisions of the instrument will therefore commence on 1 April 2021.

Regulatory impact assessment

A preliminary assessment of the proposal to make the instrument was conducted by the Office of Best Practice Regulation (**OBPR**), based on information provided by the ACMA, for the purposes of determining whether a Regulation Impact Statement (**RIS**) would be required. OBPR advised that a RIS would not be required because the instrument was not expected to have more than a minor regulatory impact on businesses, community organisations or individuals (OBPR reference number 25870).

Statement of compatibility with human rights

Subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* requires the rule-maker in relation to a legislative instrument to which section 42 (disallowance) of the LA applies to cause a statement of compatibility with human rights to be prepared in respect of that legislative instrument.

The statement of compatibility set out in **Attachment B** has been prepared to meet that requirement.

Notes to the *Telecommunications (NBN Consumer Information) Industry Standard Variation 2020 (No. 1)*

Section 1 Name

This section provides for the instrument to be cited as the *Telecommunications (NBN Consumer Information) Industry Standard Variation 2020 (No. 1)* (the **instrument**).

Section 2 Commencement

This section provides for the variations set out in Schedule 1 to the instrument to commence on 1 April 2021, with the exception of the variation to the definition of consumer in section 5, which commences on 14 December 2020.

The Federal Register of Legislation may be accessed free of charge at www.legislation.gov.au.

Section 3 Authority

This section provides that the instrument is made under subsection 125AA(1) of the *Telecommunications Act 1997* (the **Act**) and in accordance with sections 5 and 6 of the *Telecommunications (NBN Consumer Experience Industry Standard) Direction 2017*.

Section 4 Variations

This section provides that the *Telecommunications (NBN Consumer Information) Industry Standard 2018* (the **Standard**) is varied in accordance with Schedule 1.

Schedule 1

This schedule sets out the variations to the Standard.

Item [1] varies subparagraph (b)(ii) of the definition of “consumer” in section 5 of the Standard so that it aligns with that in the *Telecommunications Consumer Protection Code C628:2019* (the **TCP Code**). The revision increases the estimated annual spend that a business or non-profit organisation may have with a retail CSP and still be considered a consumer from \$20,000 to \$40,000. The revised TCP Code definition of “consumer” commenced on 1 January 2020. The revised definition of “consumer” for the purposes of the Standard will align with the revised definition in the TCP Code.

Item [2] varies the definition of “typical busy period download speed” in section 5 of the Standard to clarify that download speed must be expressed as a single number.

Item [3] varies subparagraph 8(1)(b)(i) to align with the variation to the definition of “typical busy period download speed” in section 5. The variation clarifies that a key facts sheet must “state” the typical busy period download speed that the average consumer can expect to receive during the busy period. Previously, the key facts sheet was required to set out numerical information describing the typical busy period download speed that the average consumer can expect to receive during the busy period. The variation clarifies that the typical busy period download speed must be clearly stated as a single number in the key facts sheet.

Item [4] varies subparagraph 8(1)(c)(iii) by replacing the phrase “limited data speed” with “low download and upload data speeds” to use language that is clearer and consistent with terminology used elsewhere in the instrument.

Item [5] varies paragraph 8(1)(d) to include remedies provided under the *Telecommunications Service Provider (NBN Service Migration) Determination 2018* (the **Service Migration Determination**). Previously, paragraph 8(1)(d) required retail CSPs to include in a key facts sheet the remedies available to consumers if the maximum line speed of their connection is not fast enough to supply the speed tier product sold to the consumer. However, it did not specify what remedies, as a minimum, must be included. The variation requires retail CSPs to include the remedies that are specified in subsection 14(3) of the Service Migration Determination.

Item [6] varies paragraph 8(2)(a) in the same way as subparagraph 8(1)(b)(i) to clarify that speed must be displayed as a single number, not a range.

Item [7] varies paragraph 9(a) to simplify the drafting by clarifying that “in most cases” NBN services will not function during a power failure.

Item [8] varies subsection 10(b) to correct a minor typographical omission by inserting “to” after “(b)”.

Item [9] varies subsection 11(1) to simplify the drafting by rewording the lead-in text to “Where its advertising material relates to an NBN consumer plan for a fixed line NBN connection, a retail service provider must:”. Consequentially, the phrase “where its advertising material relates to an NBN consumer plan for a fixed line NBN connection” has been deleted from paragraphs 11(1)(a) and (b). The variation to paragraph 11(1)(c) clarifies that a key facts sheet must “state” the typical busy period download speed as a single number in a font size that is at least as large as the speed tier information and pricing information about the NBN consumer plan.

Statement of compatibility with human rights

Prepared by the Australian Communications and Media Authority under subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011*

Telecommunications (NBN Consumer Information) Industry Standard Variation 2020 (No. 1)

Overview of the instrument

The ACMA has determined the *Telecommunications (NBN Consumer Information) Industry Standard Variation 2020 (No. 1)* (the **instrument**) under subsection 125AA(1) of the *Telecommunications Act 1997* (the **Act**). The purpose of the instrument is to vary the *Telecommunications (NBN Consumer Information) Industry Standard 2018* (the **Standard**).

Subsection 125AA(1) of the *Telecommunication Act 1997* (the **Act**) provides that the Australian Communications and Media Authority (the **ACMA**) may, by legislative instrument, determine an industry standard setting out rules that deal with one or more matters relating to a participant in a particular section of the telecommunications industry to which the standard applies. Subsection 125AA(5) of the Act provides that the ACMA must not determine a standard unless it does so after receiving written direction from the Minister.

The Standard sets out a regulatory framework for the provision of information and advice to consumers by retail carriage service providers (**retail CSPs**) regarding services supplied using the National Broadband Network (the **NBN**).

Relevantly, the Standard requires a retail CSP to include a range of information about NBN services it provides to consumers in a document called a “key facts sheet”. The variations made by the instrument are minor and designed to clarify some of the existing requirements or simplify some of the requirements on retail CSPs to provide information to consumers in the key facts sheet.

Human rights implications

The ACMA has assessed whether the instrument is compatible with human rights, being the rights and freedoms recognised or declared by the international instruments listed in subsection 3(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* as they apply to Australia.

In the Statement of Compatibility with Human Rights for the Standard, the ACMA formed the view that the Standard engaged the right to freedom of expression in Article 19(2) of the *International Covenant on Civil and Political Rights*, which states:

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

The ACMA considers that the instrument also engages the right to freedom of expression, in so far as that right includes the right to receive information about NBN services. Relevantly, the variations that the instrument makes to the Standard relate to the obligations imposed on retail CSPs to provide certain information and advice to consumers about their NBN services.

The minor variations to the obligations in the Standard clarify some of the requirements that are designed to help consumers to make informed decisions about NBN services prior to entering into a contract. The most substantial variation to the Standard is the expansion of the definition of “consumer” to include small businesses which entered into a contract with a retail CSP with a value of no greater than \$40,000 (increasing from \$20,000). This variation creates consistency with the definition of consumer under the *Telecommunications Consumer Protection Code C628:2019* and requires retail CSPs to provide information about their NBN services to a wider class of consumers.

Like the Standard, the instrument is directed at promoting the rights of consumers to receive information about NBN services and therefore the variations do not cause any limitation or interference with the right to freedom of expression in an unlawful or arbitrary manner.

Conclusion

The instrument is compatible with human rights because it promotes the right to freedom of expression, in so far as that right encompasses the receipt of information relevant to NBN services which consumers may seek to purchase.