

EXPLANATORY STATEMENT

Approved by the Australian Communications and Media Authority

Telecommunications Act 1997

Telecommunications Service Provider (NBN Service Migration) Determination Variation 2020 (No. 1)

Authority

The Australian Communications and Media Authority (the **ACMA**) has determined the *Telecommunications Service Provider (NBN Service Migration) Determination Variation 2020 (No.1)* (the **instrument**) to vary the *Telecommunications Service Provider (NBN Service Migration) Determination 2018* (the **Determination**) under subsection 99(1) of the *Telecommunications Act 1997* (the **Act**), in accordance with subsection 33(3) of the *Acts Interpretation Act 1901* (the **AIA**).

Pursuant to subsection 99(1) of the Act, the ACMA may, by legislative instrument, make a determination, called a service provider determination, setting out rules that apply to service providers in relation to the supply of either or both of the following:

- (a) specified carriage services;
- (b) specified content services.

Subsection 99(3) of the Act provides, relevantly, that the ACMA must not make a service provider determination unless the determination relates to a matter specified in the regulations. The relevant enabling regulations are the *Telecommunications Regulations 2001* (the **Regulations**). Regulation 3.13 of the Regulations applies to, among other things, the supply of a standard telephone service and a carriage service that enables customers to access the internet (see sub-regulations 3.13(1)(a) and (c) respectively). Sub-regulation 3.13(2) provides that the ACMA may make a service provider determination setting out rules that apply to service providers such as carriage service providers (**CSPs**) in relation to a customer's interests as regards the supply of those services.

The Determination relates to a customer's interests regarding the supply of an NBN service which enables customers to access the internet and a standard telephone service and as such, subsection 99(3) is satisfied.

Under subsection 33(3) of the AIA, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character 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

Relevant background regarding the history and making of the Determination is set out in the Explanatory Statement to the Determination, 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 rules were designed to resolve issues in relation to consumer complaints handling across the telecommunications industry, the provision of information that would enable consumers to directly compare service offerings, service continuity, and fault rectification. They comprise the following:

- the *Telecommunications (Consumer Complaints Handling) Industry Standard 2018* (the **Complaints Handling Standard**)
- the *Telecommunications (NBN Consumer Information) Industry Standard 2018* (the **Consumer Information Standard**)

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

In January 2019, the ACMA decided to undertake 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, almost a year following their introduction:

- 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 Determination by the instrument support the above objectives. The key changes include:

- The definition of “consumer” in section 5 of the Determination 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**).
- Changes made to simplify and clarify obligations, including:
 - to the requirement to supply an interim service in section 8 and 9 so that a customer is eligible to receive an interim service where:
 - a migration has not been attempted and is not likely to be attempted within 3 working days; and
 - the customer’s legacy service has been disconnected by the legacy CSP other than for a valid reason.
 - to clarify the process and timeframes for CSPs to prepare remedial plans and technical audits in the event there is an unreasonable delay in the supply of an operational NBN service under section 16.

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

The instrument does not incorporate any document by reference.

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. In accordance with subsection 99(4) of the Act, the ACMA consulted directly with the Australian Competition and Consumer Commission (**ACCC**).

The ACMA’s review of the Determination was informed by submissions received as part of an extensive three-stage consultation process (detailed below) and the ACMA’s experience in monitoring compliance with the rules and recommendations regarding the Determination from Part A of the Consumer Safeguards Review conducted by the then Department of Communications and the Arts.

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 government, 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 industry, government and consumer advocacy groups, including the ACCC, 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, for the most part only minor suggested changes to the Determination were received during consultation.

Below is a summary of comments received during consultation about the main variations proposed to the Determination:

- Industry bodies (Communications Alliance, Optus and Telstra) supported revisions to the definition of “consumer” in the Determination to align with the revised TCP Code.
- Industry strongly opposed the revised definition of “alternative arrangement” as it was inflexible and prevented carriage service providers from working with customers to come to an arrangement and that the term “reasonably offsets” was vague and complex.
- Communications Alliance and Optus did not agree with the proposed change to the definition of “migration” in the absence of amending the definition of “valid reason” to include a broader range of disconnection scenarios.
- Stakeholders gave divided feedback in relation to the introduction of the discount in subsection 14(3) that applied where the line capability data or line capability testing indicates that the part of the network unique to the consumer is not capable of providing the applicable speed, and the customer’s plan is the lowest speed tier plan offered by the NBN CSP:
 - The TIO was supportive of the inclusion of the discount however considered that the ACMA should provide more guidance on the amount of the discount,
 - The ACCC had concerns that there may be some circumstances where the customer is not on the lowest speed tier plan offered by the NBN CSP however they may be on the lowest speed tier plan that the NBN CSP is prepared to offer the customer, including hardship plans or legacy products that are no longer available in the retail space.
 - NBN Co advised that some NBN CSPs may not have capability in their billing systems to apply discounts where the applicable line rate is not achievable. As a result, they may not be able to offer discounts to their customers and choose to release the customer from their contract instead.

- Communications Alliance strongly opposed the discount.
- Telstra did not agree to the proposed amendment under subsection 15(2) and considered it overly prescriptive and unclear and that carriage service providers should have the flexibility to refund a customer in a way that is appropriate to the customer’s circumstances. Telstra noted that there could be circumstances where the proposed drafting could be confusing to a customer, including where they had multiple accounts.
- Feedback relating to remedial plans and technical audits under subsection 16(2) was divided between industry and consumer advocacy groups:
 - ACCAN supported the proposed amendment and considered it provided a clear and consistent timeframe for action to be taken under section 23 of the Determination.
 - Industry considered the proposed amendment to be unnecessary and would require IT system amendments and refresher training to implement. Telstra recommended that the requirements for remedial plans and technical audits be removed altogether.

Following a consideration of comments received during consultation, not all proposed variations have been made. These include the following proposed revisions:

- It was decided that no change would be made to the definition of “alternative arrangement”. Instead, a note has been included under the definition of “alternative arrangement” for the purpose of clarification, providing examples of arrangements that would not amount to an alternative arrangement for the purposes of the Determination, including rescheduling an appointment or not requiring payment until the customer’s NBN service is operational. This reflects the policy intent that a customer should be provided with an alternative arrangement that offsets the harm caused to the customer as a result of the problems with the NBN service.
- The proposed change to the definition of “migration” may have caused a conflict with the way that interim services are provided. The revision was rejected in favour of proposing an amendment to sections 8 and 9 of the Determination instead.
- It was decided that no substantive amendments would be made to subsection 15(2) of the Determination. The proposed drafting was intended to provide clarity without changing the operation of this section, however feedback suggested that stakeholders were comfortable with the current drafting.

On 2 July 2020, the ACMA undertook a further targeted consultation process with the stakeholders who had responded to the December 2019 consultation.

The ACMA received 7 submissions from industry, government and consumer advocacy groups including the ACCC, the TIO and ACCAN. The feedback was generally supportive of the amendments proposed by the ACMA or was supportive of the policy agenda.

Below is a summary of comments received during consultation about the subsequent variations proposed to the Standard:

- Communications Alliance and Optus expressed concerns around the interpretation and application of sections 8 and 9 and the proposed requirement to reconnect a customer’s legacy service, however they agreed with the policy intention around providing a legacy service to a customer in circumstances where they had entered into a contract for the supply of an NBN service and subsequently their legacy service was disconnected prior to the migration being attempted.
- Submissions were divided in relation to the requirement under section 16 to prepare a remedial plan or technical audit in circumstances where there has been an unreasonable delay in the supply of an operational NBN service.

- ACCAN and the TIO were in favour of stricter controls around industry providing remedial plans to customers and requested additional obligations on the information that customers are entitled to from their CSP; whereas
- Industry welcomed the proposed change and in particular the exception to the requirement to provide a remedial plan at 23 working days where the relevant information had already been provided to the customer at an earlier date.

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 Service Provider (NBN Service Migration) Determination Variation 2020 (No. 1)*

Section 1 Name

This section provides for the instrument to be cited as the *Telecommunications Service Provider (NBN Service Migration) Determination Variation 2020 (No.1)*.

Section 2 Commencement

This section provides for the instrument to commence 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 99(1) of the *Telecommunications Act 1997* (the **Act**).

Section 4 Variations

This section provides that the *Telecommunications Service Provider (NBN Service Migration) Determination 2018* (the **Determination**) is varied in accordance with Schedule 1.

Schedule 1

This schedule sets out the variations to the Determination.

Item [1] substitutes the definition of “alternative arrangement” in section 5 of the Determination. The substituted definition includes a minor drafting amendment and also includes an amended paragraph (e) to provide that any other arrangement agreed between the NBN CSP and the consumer can be an alternative arrangement as long as the arrangement is not merely the rescheduling an appointment or not requiring payment until the customer’s NBN service is operational. This reflects the policy intent that a customer should be provided with an alternative arrangement that offsets the harm caused to the customer as a result of the problems with the NBN service.

Item [2] varies subparagraph (b)(ii) of the definition of “consumer” in section 5 of the Determination 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 [3] varies paragraph 8(c) of the Determination to provide that paragraph 8(c) will also apply where the circumstances described in paragraph 9(1)(c) exists. This amendment has the effect of ensuring that NBN CSPs are required to provide an interim service to consumers whose premises are in an area that has been declared ready for service, who have entered into a contract for a new NBN service, and whose legacy service was disconnected *in advance of migration* taking place. The requirement is intended to apply regardless of whether it is a parallel or non-parallel migration.

Item [4] substitutes subsection 9(1) of the Determination to include an additional circumstance under which a customer would be entitled to an interim service. New subparagraphs 9(1)(c)(i) and (ii) of the

Determination provide that an interim service must be supplied to a consumer's premises when the migration at the consumer's premises has not been attempted and is not likely to be attempted within 3 working days, and the consumer's legacy service has been disconnected by the legacy CSP other than for a valid reason. This subsection operates where the area in which the customer's premises is located has been declared ready for service by NBN Co in accordance with paragraph 8(a) of the Determination, and the NBN CSP and the consumer have entered into a consumer contract for the supply of an NBN service to the premises in accordance with paragraph 8(b) of the Determination.

Item [5] varies paragraph 14(3)(b) of the Determination by including the clarification that an NBN CSP is only required to advise the customer that they can move to a lower speed tier plan at a lower price if the NBN CSP offers a lower speed tier plan than the one the customer is on.

Item [6] varies subsection 15(2) of the Determination by clarifying that a refund or credit issued to the customer by the NBN CSP must be in relation to the NBN service.

Item [7] substitutes section 16 of the Determination.

A change has been made to subsection 16(2) to clarify that the relevant time period under that subsection is 23 working days. This amalgamates the three working day period referred to in paragraphs 9(a), (b) and (c) of the Determination with the 20 working days that was previously referred to in subsection 16(2) for ease of reference. A consequential amendment to the timeframe has been made at subsection (6).

Subsection 16(2) has also been varied to include paragraphs 16(2)(a) and (b) which set out the triggering events for the commencement of the 23 working day time frame. The time frame runs from the date of the NBN CSP becoming aware of either an unsuccessful migration at the consumer's premises, or a successful migration where the consumer's NBN service is not operational, respectively (collectively, the *relevant day*).

An exception to the requirement in subsection 16(2) for an NBN CSP to prepare a remedial plan has been added at subsection 16(3). The exception applies where the NBN CSP has provided the consumer with all the information in subsection 16(5) during the period of 23 working days from the NBN CSP becoming aware of an event in paragraph 2(a) or (b). Paragraph 16(3)(b) further provides that for an NBN CSP to rely on this exception, the information referred to in paragraph (a) must continue to be accurate at the end of the relevant day.

Subsection 16(5) has been amended to clarify that the information under paragraphs (a) and (b) is only required to be provided to a consumer if the consumer requests that information. NBN CSPs may still choose to proactively provide this information to consumers if they choose.

New paragraph 16(8)(b) has been included to provide a further exception to the requirement for an NBN CSP to prepare a technical audit where NBN Co has not completed the remediation steps that would be necessary for the NBN service to be operational. This recognises that an NBN CSP should not be required to prepare a technical audit in circumstances where the unreasonable delay is not within the control of the NBN CSP.

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 Service Provider (NBN Service Migration) Determination Variation 2020 (No. 1)

Overview of the instrument

The ACMA has determined the *Telecommunications Service Provider (NBN Service Migration) Determination Variation 2020 (No.1)* (the **instrument**) under subsection 99(1) of the *Telecommunications Act 1997* (the **Act**).

Subsection 99(1) of the *Telecommunication 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 either or both of specified carriage services and specified content services.

The *Telecommunications Service Provider (NBN Service Migration) Determination 2018* (the **Determination**) aims to ensure:

- that all new NBN services are tested upon migration to the new network to confirm that the service is operational;
- that all consumers that migrate to the NBN are offered options to maximise service continuity in the event of issues with connecting to the NBN or establishing an NBN service. (This is sought to be achieved by aligning the arrangements for the provision of interim and backup services with those established under the *Telecommunications (NBN Continuity of Service) Industry Standard 2018* and by providing CSPs with the ability to agree on alternative arrangements with their customers); and
- that all new services that are connected using the legacy copper network are capable of supporting the speed specified in the NBN plan sold to the customer, and where that network is not capable of supporting the specified speed, that remedies are made available to those customers.

The variations made to the Determination by the instrument are minor and designed to clarify some of the existing requirements or simplify some of the requirements on retail CSPs when migrating consumers to the NBN.

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.

Having considered the likely impact of the instrument and the nature of the applicable rights and freedoms, the ACMA has formed the view that the instrument does not raise any human rights issues.

Conclusion

The instrument is compatible with human rights as it does not raise any human rights issues.