

EXPLANATORY STATEMENT

Approved by the Australian Communications and Media Authority

Telecommunications Act 1997

Telecommunications Service Provider (International Mobile Roaming) Determination 2019

Authority

The Australian Communications and Media Authority (**the ACMA**) has made the *Telecommunications Service Provider (International Mobile Roaming) Determination 2019* (**the Determination**) under subsections 99(1) and 125AA(1) of the *Telecommunications Act 1997* (**the Act**) and 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 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 the supply of a standard telephone service, a public mobile telecommunications service and a carriage service that enables customers to access the internet (see sub-regulation 3.13(1)(a), (b) 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 consumer's interests regarding the supply of an international mobile roaming (**IMR**) service which enables customers to access telecommunications services whilst overseas and as such, subsection 99(3) is satisfied.

Subsection 125AA(1) of the Act provides that the ACMA may, by legislative instrument, determine a standard that applies to participants in a particular section of the telecommunications industry and deal with one or more matters relating to the telecommunications activities of those participants.

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

On 23 August 2012, the Minister for Broadband, Communications and the Digital Economy made the *Australian Communications and Media Authority (International Mobile Roaming Industry Standard) Direction (No. 1) 2012* (**the Direction**). The Direction required the ACMA to determine an industry standard under subsection 125AA(1) of the Act.

In June 2013 the ACMA made the *Telecommunications (International Mobile Roaming) Industry Standard 2013* (**the IMRS**) to address acute consumer harm from bill shock incurred through using IMR services.

The IMRS requires that consumers be notified of activation of IMR services and maximum IMR charges, and be able to monitor, track and where necessary alter (including stopping) their use of IMR services when overseas to better manage their spending.

The key feature of the IMRS is a set of information obligations that require that mobile service providers give information to consumers about the costs of using IMR services. In summary, these include:

- sending notifications about IMR costs to consumers, via short message service (SMS), upon arrival at overseas destinations,
- providing price information upon activating access to IMR services, and
- making spend management tools available to consumers, together with usage updates to assist consumers to track their spending on IMR services.

On 27 June 2018, the ACMA commenced a review of the IMRS (**the Review**) as required by clause 11 of the IMRS. The Review found that IMR regulation had been effective in reducing bill shock, but the risk of consumer detriment remained, and regulation should continue. It also found that the rules in the IMRS should be updated to take into account consumers' evolving use of technology and provide greater flexibility in how providers notify their customers about IMR charges.

The Minister for Communications, Cyber Safety and the Arts has agreed to the ACMA updating the rules in the IMRS as recommended by the Review and, at the same time, moving from the current industry standard made under subsection 125AA(1) of the Act to a service provider determination made under subsection 99(1) of the Act, to make it administratively simpler to update the rules if required in the future. On 26 November 2019 the Minister made the *Telecommunications (Revocation of International Mobile Roaming Industry Standard) Direction 2019* which directed the ACMA to repeal the IMRS.

The Determination, which comes into effect on 1 July 2020, maintains the key features of the IMRS with seven key changes.

- Extending the application of the rules to IMR-enabled devices (previously 'SMS-enabled' devices), accounting for the use of IMR services that do not support SMS.
- The addition of a preferred method of notification for consumers to nominate, which may include email, (proprietary) app notification or SMS notifications.
- Increased flexibility for providers in the content of advice to consumers of maximum charging information arrangements for IMR services.
- Charging information being permitted to relate to multiple locations (typically countries). If a consumer has been sent a message that contains charging information applicable to multiple locations, the provider will not have to resend the same information if, within 14 days, the consumer travels to a new location covered by that same message.
- Setting the usage notification alert to 50% and 85% of the included value of an IMR value pack (previously sent with the 100% usage notification).
- Amending the definition of 'consumer' to align with the definition of 'consumer' in the Australian Consumer Law (as set out in Schedule 2 of the *Competition and Consumer Act 2010*) which is intended to afford IMR protections to a broader range of smaller businesses.
- Replacing 'nominal fee' with a specific reference to AUD 1.00, regarding charges related to a consumer declining the supply of IMR services.

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 following Acts are incorporated by reference or otherwise mentioned in the Determination:

- the Act;
- the *Broadcasting Services Act 1992*;
- the *Privacy Act 1988*; and
- the *Spam Act 2003*.

References to Acts are to the Act as in force from time to time in accordance with section 10 of the AIA, and subsection 13(1) of the LA.

The Acts referenced in the Determination can be found, free of charge, on the Australian Government's Federal Register of Legislation website at <http://www.legislation.gov.au>.

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.

On 9 August 2019 the ACMA released a draft of the Determination for public consultation. The draft of the Determination was accompanied by a consultation paper setting out details of the proposed changes (between the IMRS and the draft of the Determination). Consultation closed on 9 September 2019.

The ACMA received ten submissions from industry, consumer advocacy groups, and other government and regulatory agencies. After the consultation period, all submissions were made publicly available on the ACMA website.

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

As required under subsection 99(4) of the Act, the ACMA also consulted the Australian Competition and Consumer Commission.

Regulatory impact assessment

A preliminary assessment of the proposal to make the Determination 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 likely to have a minor economic impact on business (OBPR reference number 25106).

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 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 (International Mobile Roaming) Determination 2019*

Section 1 Name

This section provides for the instrument to be cited as the *Telecommunications Service Provider (International Mobile Roaming) Determination 2019*.

Section 2 Commencement

This section provides for the instrument to commence on 1 July 2020.

The instrument is registered on the Federal Register of Legislation which may be accessed free of charge at www.legislation.gov.au.

Section 3 Authority

This section identifies the provisions of the *Telecommunications Act 1997* (**the Act**) that authorises the making of the instrument, namely subsections 99(1) and 125AA(1) of the Act.

Section 4 Definitions

This section defines a number of key terms used throughout the instrument.

A number of other expressions used in the instrument are defined in the Act.

Section 5 Repeal

This section provides that the *Telecommunications (International Mobile Roaming) Industry Standard 2013* (Registration No. F2016L00634) (**the IMRS**) is repealed.

Section 6 Application

This section sets out that the instrument applies to all carriage service providers (CSPs) supplying IMR services. This includes CSPs that provide wholesale services to other CSPs. In some cases, CSPs will have requirements under the Determination even if they do not provide IMR services directly to a customer, for instance, where there is a chain of supply through which IMR services are provided to other CSPs which are then provided to the customer.

Section 7 Customers to be offered a preferred method of communication option

Section 7 sets out obligations on CSPs supplying IMR services to allow customers to select a preferred method of communication for receiving notifications about their IMR service, allowing for a method of communication that includes SMS as well as other methods of communication for IMR devices that do not support SMS.

Subsection 7(1) sets out that CSPs must have available SMS and at least one other method of communication capable of use on an IMR-enabled device which does not support SMS as options for a customer's preferred method of communication for receiving notifications about the IMR service.

Subsection 7(2) requires that CSPs supplying an IMR service to a customer must offer SMS or, if a customer's IMR service is supplied using a plan which provides for data-only, at least one other method of communication capable of being used on an IMR-enabled device which does not support SMS as a preferred method of notification.

Subsection 7(3) provides that customers must be offered a preferred method of communication at the time of entering into a customer contract which provides for the supply of an IMR service and at the time of any variation of a customer contract to allow for the supply of an IMR service.

Subsection 7(4) sets out that the preferred method of communication offered in subsection 7(2) must be offered in relation to each IMR service of the customer allowing for customers that hold multiple IMR services to select a different preferred method of communication for each of those services.

Subsection 7(5) requires CSPs to allow customers to request a change to the preferred method of communication offered under subsection 7(2) at any time, and to action the request as soon as reasonably practicable after the customer requests the change.

Subsection 7(6) provides that if a charge may be imposed on a customer for accessing a message or notification using a preferred method of communication, the CSP must inform the customer that charges may apply to that preferred method of communication.

Subsection 7(7) requires a CSP to communicate with a customer using the customer's preferred method of communication.

Subsection 7(8) provides that if a customer does not select a preferred method of communication, the CSP must communicate with the customer using SMS, unless the customer's IMR service is supplied using a data-only plan, in which case the CSP is required to communicate with the customer using the method of communication offered by the CSP under paragraph 7(2)(b).

Section 8 Mobile network operators to send information about supply of an IMR service

Section 8 sets out obligations on a CSP who is a mobile network operator (**MNO**) to ensure customers are made aware, prior to accruing liabilities for usage, of the significantly higher charges that may be associated with IMR services compared to using domestic telecommunications services.

Subsection 8(1) outlines that the section applies where a CSP is a MNO that uses a carriage service to supply an IMR service to its customer, and where the customer has activated the IMR service on an IMR-enabled device in an overseas location.

Subsection 8(2) requires the CSP, within 10 minutes of the customer activating the IMR service and using the customer's preferred method of communication, to send one or more messages to the customer advising:

- that their device has been activated overseas;
- there may be delays in receiving usage data and alerts;
- higher charges may apply;
- of the maximum charge information applying to the customer's telecommunications product for the overseas location in which the customer has activated an IMR service on the IMR-enabled device; and
- of the method by which the customer may decline the continued supply of the IMR service at any time while travelling overseas.

Subsection 8(3) sets out that if the same maximum charge information, set out in paragraph 8(2)(b) applies in other overseas locations, the CSP may, within 10 minutes of the customer activating the IMR service and using the customer's preferred method of communication, send a message that advises the customer of the locations that that same maximum charge information also applies to.

Subsection 8(4) provides that the messages referred to in subsections 8(2) and 8(3) may be combined into one or more messages.

Subsection 8(5) sets out that the messages referred to in subsection 8(2) must be sent each time the customer activates an IMR service in an overseas location or a new overseas location, unless the customer has already received the same maximum charge location information in the preceding 14 days. In cases where a customer activates an IMR service in a new overseas location, the messages do not need to be resent if the maximum charge information sent in the initial message or messages was sent within the preceding 14 days and referred specifically to the new overseas location in the initial message or messages.

Subsection 8(6) provides that fees cannot be charged to customers by a CSP for providing messages under subsection 8(2) or (3).

Section 9 Mobile network operators who supply carriage services to another CSP to send information about supply of an IMR service

This section applies where a MNO that supplies a carriage service to another CSP (**the second provider**) which in turn uses the carriage service to supply an IMR service either to a customer of the second provider, or to another CSP that supplies an IMR service to a customer, and where the customer has activated an IMR service on an IMR-enabled device in an overseas location. This is relevant where there is a chain of supply through two or more CSPs.

Paragraph 9(2)(a) sets out the terms of a warning message that an MNO must, within 10 minutes of the customer activating an SMS enabled device in an overseas location, send to the customer. Paragraphs 9(2)(b) and 9(2)(c) set out the information that an MNO must send to the second provider, within one hour of the customer activating an IMR service.

Subsection 9(3) places an obligation on CSPs that receive information supplied under paragraph 9(2)(b) or 9(2)(c) (i.e. information about customers of the second provider who activate their device overseas) to take reasonable steps to supply the information to the customer's CSP. This provision is intended to ensure that information is passed as appropriate through the chain of supply so that it reaches the customer's CSP, and that if possible, it is redirected if mistakenly given to the wrong CSP. For example, a mobile virtual network operator (**MVNO**) that resells IMR services to another MVNO will be required to pass the information given to it under paragraphs 9(2)(b) or 9(2)(c) to the other MVNO.

Subsections 9(4) and (5) set out the frequency of messaging with respect to both warning and pricing notifications. There is no requirement to send notifications within the same location if a customer leaves and re-enters that location within a 14 day period. After the 14 day period another notification must be sent.

Subsection 9(6) provides that a fee cannot be charged to customers by a CSP for providing the SMS notification in paragraph 9(2)(a).

Section 10 Mobile virtual network operators to send information about supply of an IMR service

This section applies to a CSP who is a MVNO that supplies an IMR service to a customer.

Subsection 10(2) requires the CSP to, within 10 minutes of the customer activating the IMR service and using the customer's preferred method of communication, send one or more messages to the customer. The messages must advise of the maximum charge information that applies in relation to

the customer's telecommunication product for the overseas location in which the customer has activated the IMR service and the method by which the customer may decline the continued supply of IMR services at any time while travelling overseas.

Subsection 10(3) sets out that if the same maximum charge information, set out in paragraph 10(2)(a) applies in other overseas locations, the CSP may, within 10 minutes of the customer activating the IMR service and using the customer's preferred method of communication, send a message that advises the customer of the locations that that same maximum charge information also applies to.

Subsection 10(4) provides that the messages referred to in subsection 10(2) and subsection 10(3) may be combined into one or more messages.

Subsection 10(5) sets out that the messages referred to in subsection 10(2) must be sent each time the customer activates an IMR service in an overseas location or a new overseas location, unless the customer has already received the same maximum charge location information in the preceding 14 days. In cases where a customer activates an IMR service in a new overseas location, the messages do not need to be resent if the maximum charge information sent in the initial message or messages was sent within the preceding 14 days and the initial message or messages referred specifically to the new overseas location.

Subsection 10(6) provides that fees cannot be charged to customers by a CSP for sending the messages under subsection 10(2) or (3).

Section 11 CSPs to otherwise send maximum charge information

Subsection 11(1) imposes a general requirement on all CSPs to take all reasonable steps to provide such information as is reasonably required to enable each other CSP in a chain of supply of IMR services to an end-user to provide up to date maximum charge information to their customers. This provision recognises that the cost of supply of IMR services to a customer is linked to the supply of services to the customer's CSP. Subsection 11(1) makes it clear that all information necessary to work out the maximum charge information that will apply to a customer must be supplied to the customer's CSP.

Subsection 11(2) imposes a general requirement on all CSPs to provide maximum charge information in relation to any overseas location within 24 hours of receiving a request from a customer for that information.

Subsection 11(3) provides that a CSP must not charge a fee for the provision of the information in subsection 11(2).

Section 12 CSPs to make available method to decline an IMR service

Section 12 requires CSPs to permit customers to decline continued provision of IMR services, at any time, while overseas.

Subsection 12(1) requires that CSPs make available at least one method for declining the continued supply of IMR services at any time while travelling overseas.

Subsection 12(2) provides that where a customer declines the continued supply of IMR services the CSP must ensure that the supply of IMR services to the customer ceases as soon as practicable, and in any event within 24 hours.

It is expected that CSPs will cease IMR services as soon as they become aware that a customer has declined the continued supply of IMR services.

Subsection 12(3) sets a maximum AUD 1.00 charge for telephone calls made to decline the use of IMR services by phone to an Australian number.

Subsection 12(4) provides that a CSP may not charge the customer for declining the continued supply of IMR services by accessing the CSP's website.

Subsection 12(5) sets a maximum AUD 1.00 charge for any other method (other than by phone or the CSP's website) used by a customer to decline the use of IMR services.

Subsection 12(6) requires the method provided by a CSP under subsection (1) to be easily accessible to its customers.

Section 13 CSPs to make available spend management tools for an IMR service

Section 13 requires a CSP that supplies an IMR service to offer and inform customers about the spend management tool(s) that allows the customer to monitor their use of IMR services and the charges that have been incurred.

Subsection 13(1) requires that CSPs provide customers with advice about the spend management tools available in relation to IMR services immediately prior to entering into a customer contract which provides for the supply of IMR services. This advice must also be provided upon any variation to a customer contract to allow for the supply of IMR services, and must include information about the spend management tools available including whether a charge may be imposed on a customer for accessing a spend management tool.

It is intended that a CSP make the spend management tools available to a customer without charge. However, if a customer is able to access the spend management tools by using data on their digital device, the customer must be informed that access to the spend management tools in that manner may be subject to data charges.

Subsection 13(2) requires that CSPs that supply IMR services to customers make available at least one spend management tool to their customers that provides an estimate of their usage of IMR services. The spend management tool must also provide advice to the customer, where there is a delay in the CSP receiving usage information, about the delay and the approximate length of the delay, and allow the customer:

- in the case of a post-paid service, to obtain the latest available information about the customer's usage of the IMR service and the charges incurred that have not yet been billed to the customer;
- in all other cases, to obtain the latest available information about the customer's usage of the IMR service, and the charges that have been incurred.

Subsection 13(3) sets out additional spend management tools that must be supplied by CSPs to their customers (these may be provided in the same tool that is required by subsection 13(2)). Paragraphs 13(3)(a) to (c) specify different requirements for three different classes of product that a customer may be using, namely a post-paid service, an included value pack and an automatic pre-pay service. The requirements in all cases result in notifications to a customer upon reaching certain spending thresholds.

Subsection 13(4) provides that a CSP that supplies an IMR service to a customer may make available methods for customers to elect to decline to receive the notifications described in paragraphs (13)(3)(a), (b) and (c).

Subsection 13(5) outlines that a CSP must not allow customers to decline to receive the notifications in paragraphs 13(3)(a), (b) and (c) by accepting a term or condition of a standard form customer contract or accepting default terms and conditions associated with the purchase of an included value pack.

Subsection 13(6) requires that if a customer declines to receive the notifications described in paragraphs 13(3)(a), (b) and (c), the CSP must send an acknowledgement to the customer, using the customer's preferred method of communication advising the customer that the customer may request to receive the notifications again at any time; and implement any such request as soon as is reasonably practicable, at no cost to the customer.

Subsection 13(7) obliges CSPs that make available methods for customers to decline to receive the notification in paragraphs 13(3)(a),(b) and (c) to also make available methods for customers to quickly and easily establish whether they have currently elected to decline to receive those notifications.

Subsection 13(8) states that the requirement under paragraph 13(3)(b) does not apply where a customer is using an included value pack that is part of an included value plan of a kind that was made available by the CSP prior to 1 March 2012.

Subsection 13(9) requires that CSPs inform customers with an included value pack of the maximum charge information that will apply if the customer continues to use IMR services after the exhaustion of their included value pack. This information must be supplied when the customer is given the notification required to be given to them under paragraph 13(3)(b) when the customer reaches 50% and 85% of the included value of their included value pack.

Subsection 13(10) outlines that CSPs must send the notifications set out in subsection 13(3) using the customer's preferred method of communication.

Subsection 13(11) requires a CSP to take all reasonable steps to supply such information that is required to enable each other CSP to supply to its customers the spend management tool(s) described in subsections 13(2) and 13(3).

Subsection 13(12) sets out that the spend management tool(s) required by subsections 13(2) and (3) must be easy for the customer to access and made available without charge.

Schedule 1 – Repeal

This Schedule operates with section 5 to repeal the IMRS with effect from 1 July 2020.

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 (International Mobile Roaming) Determination 2019

Overview of the instrument

The *Telecommunications Service Provider (International Mobile Roaming) Determination 2019* (**the instrument**) is administered by the Australian Communications and Media Authority (ACMA). The instrument requires suppliers of international mobile roaming (IMR) services to send alerts to customers on the pricing of those services.

The instrument introduces certain requirements for carriage service providers (CSPs) that supply IMR services. The instrument establishes rules that seek to provide customers supplied with IMR services with easily understood information about the charges for these services, and facilitate the customer's ability to manage the use of those services whilst they are overseas. The instrument also includes additional measures to enable customers supplied with IMR services to monitor their usage of IMR services and the associated cost.

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 engages the right to privacy in Article 17 of the *International Covenant on Civil and Political Rights* (**the ICCPR**).

Article 17 of the ICCPR provides:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

Article 17 of the ICCPR protects the right to freedom from unlawful or arbitrary interference with privacy. Certain provisions in the instrument could be considered to limit the right to privacy. However, the right to privacy is not an absolute right and a limitation is not incompatible with the right itself.

Subsections 9(2), 9(3), 11(1) and 13(11) of the instrument require that information relating to IMR services supplied to customers be passed between carriage service providers. Disclosing personal information may amount to an interference with privacy. In order for the interference not to be arbitrary, any interference with privacy must be in accordance with the aims and objectives of the ICCPR and should be reasonable in the particular circumstances. Reasonableness, in this context, may incorporate notions of proportionality, appropriateness and necessity.

Under the instrument, the disclosure of personal information is intended to ensure that the customer's carriage service provider is given current information about the customer's use of IMR services. This is to ensure that the customer can benefit from the provisions of the instrument that require they be informed of the costs associated with using IMR services on arrival overseas, and that they be provided with spend management tools. Customers are also likely to be aware that their personal information may be passed on at the time that they elect their preferred method of communication for receiving notifications about IMR services. In addition, most CSPs are subject to the *Privacy Act 1988* in relation to the personal information they handle. The provisions in the instrument are intended to ensure that a customer is provided with information about their own usage history and potential liability for charges, so that they may take informed action for their own better protection.

To the extent that the measures in the instrument affect privacy, they are lawful, reasonable, non-arbitrary and permissibly limit the right to privacy in Article 17 of the ICCPR.

Conclusion

The instrument is compatible with human rights because, to the extent that it may limit the right to privacy, the limitations it creates are reasonable, necessary and proportionate.