**EXPLANATORY STATEMENT**

Approved by the Australian Communications and Media Authority

*Telecommunications (Consumer Protection and Service Standards) Act 1999*

***Telecommunications (Emergency Call Service) Amendment Determination 2020 (No. 1)***

**Authority**

The Australian Communications and Media Authority (the ACMA) has made the *Telecommunications (Emergency Call Service) Amendment Determination 2020 (No. 1)* (the Amendment Determination) under subsection 147(1) of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (the Act) and subsection 33(3) of the *Acts Interpretation Act 1901* (the AIA).

Subsection 147(1) of the Act requires the ACMA to make a determination imposing requirements on carriers, carriage service providers (CSPs) and emergency call persons (ECPs) in relation to emergency call services.

Subsection 33(3) of the AIA relevantly provides that where an Act confers a power to make an instrument of a legislative 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 Amendment Determination**

The Amendment Determination amends the *Telecommunications (Emergency Call Service) Determination 2019* (the Determination) which imposes requirements on carriers, CSPs and the ECPs in relation to emergency call services, in accordance with subsection 147(1) of the Act.

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the Committee) wrote to the ACMA on 20 December 2019 in relation to the following two matters:

* the use of ‘no-invalidity clauses’ at subsections 31(9) and 50(9) of the Determination; and
* provisions which incorporated by reference (or otherwise referred to) documents that were not publicly available.

In relation to the first matter, each of subsections 31(9) and 50(9) provided that a failure on the part of the ACMA to give notice of a particular decision on reconsideration in accordance with the prescribed requirements did not affect the validity of the decision. The Committee queried why those no-invalidity clauses were necessary, noting the importance of the independent review of administrative decisions.

In relation to the second matter, the documents that were incorporated by reference (or otherwise referred to) and not publicly available were:

1. the written arrangements mentioned in section 53 of the Determination;
2. the information agreement between the ECPs as mentioned in sections 55 and 56 of the Determination; and
3. the communications protocol mentioned in section 57 of the Determination.

The explanatory statement for the Determination indicated that those documents were not publicly available due to various public policy considerations. The Committee queried how the explanatory statement complies with paragraph 15J(2)(c) of the *Legislation Act 2003* (the LA) which requires (among other things) that an explanatory statement to an instrument that incorporates documents by reference must indicate how the incorporated documents may be obtained.

On 15 January 2020 the ACMA undertook to amend the Determination to address the matters raised by the Committee by:

* repealing subsections 31(9) and 50(9) of the Determination to remove the ‘no-invalidity clauses’; and
* amending the Determination to remove the references to documents that were not publicly available.

The repeal of subsections 31(9) and 50(9) of the Determination removes the ‘no-invalidity clauses’ without affecting the substantive operation of the merits review provisions in relation to particular decisions made by the ACMA on reconsideration.

Other amendments involve the repeal and replacement of sections 38 and 53 and Division 3.5 (which contained sections 55 to 57) of the Determination. Those amendments remove the references to documents that were not publicly available and impose new obligations that are intended to achieve the same regulatory outcomes.

The remaining amendments relate to consequential and other minor changes to the Determination.

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

The Amendment Determination is a disallowable legislative instrument for the purposes of the LA.

**Documents incorporated by reference**

The Amendment Determination does not incorporate any documents by reference.

**Consultation**

Before the Amendment Determination was made, the ACMA consulted representatives of specific groups (namely carriers, CSPs, ECPs, emergency service organisations (ESOs) and consumers of standard telephone services) and the Secretary of the then Department of Communications and the Arts in accordance with subsections 147(9) and (9A) of the Act. The ACMA was also satisfied that appropriate and reasonably practicable consultation was undertaken in accordance with section 17 of the LA.

The ACMA published a consultation paper and a draft of the Amendment Determination on its website on 24 January 2020 inviting comment. The ACMA also informed key stakeholders on 24 January 2020 and the Secretary on 29 January 2020 of the consultation package.

The ACMA received submissions from the Australian Communications Consumer Action Network (ACCAN), Telstra, the Australian Mobile Telecommunications Association (AMTA)/Communications Alliance and Optus. In addition, the ACMA received comments from the Secretary, the National Emergency Communications Working Group – Australia/New Zealand and the Office of the Australian Information Commissioner.

The feedback from consultation generally supported the proposed amendments.

Some submissions suggested further changes. ACCAN proposed that the new section 53 (access to the integrated public number database (IPND) by the ECP for 000 and 112) and the new section 55 (communication and welfare checks – disruption to the emergency call service) be revised to specify the actions that need to be taken by the ECP and to impose strict timeframes for such actions. The ACMA did not accept those suggested changes. In relation to the new section 53, the ACMA considers that it is appropriate to require the ECP for 000 and 112 to take ‘all reasonable steps’ to ensure that the IPND Manager gives it access to all the information it requires to respond to an emergency call ‘as soon as practicable’ after the call is received as it recognises that the ECP is reliant on the cooperation of the IPND Manager for access to that information. In relation to the new section 55, the ACMA considers that it is appropriate to require the ECP for 000 and 112 to conduct a welfare check on an end-user ‘as soon as possible’ after a disruption occurs, and to inform certain entities of a disruption ‘as soon as practicable’ after the disruption occurs. This ensures that action is taken promptly but recognises that the timing of such action is dependent on the circumstances (e.g the volume of emergency calls impacted).

Telstra proposed that the ECP for 000 and 112 inform a carrier, CSP or ESO of a disruption if it reasonably believes they are likely to be ‘materially and adversely affected’ by the disruption. The ACMA did not accept that suggested change. The ACMA considers that it is appropriate to apply a lower threshold requiring the ECP to inform such entities of a disruption if it reasonably believes that they are affected by the disruption. This is because those entities engage at an operational level in respect of the answering, transfer and other handling of emergency calls. Telstra also suggested some minor drafting changes to section 53 which the ACMA accepted.

AMTA/Communications Alliance and Optus noted that the ECP for 000 and 112 is not required to conduct a welfare check on an end-user where the call made has a default CLI (within the meaning of section 6 of the Determination) and requested that a similar exemption be granted to CSPs under section 28 of the Determination. The ACMA is working with industry on some technical issues associated with calls which present with a default CLI and will consider further amending the Determination, if appropriate, following that work.

**Regulatory impact assessment**

A preliminary assessment of the proposal to make the Determination was provided to the Office of Best Practice Regulation (OBPR) to determine whether a regulation impact statement (RIS) was required. OBPR advised that no RIS was required for the proposal, but if there were any subsequent changes made the ACMA should self-assess those changes (OBPR reference number: 24941).

The ACMA self-assessed the amendments that were proposed to be made by the Amendment Determination and concluded that no RIS was required.

OBPR indicated that its previous advice also applies to those proposed amendments and confirmed that therefore no RIS was required.

**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 with human rights at **Attachment B** has been prepared to meet that requirement.

**Attachment A**

***Notes to the Telecommunications (Emergency Call Service) Amendment Determination 2020 (No. 1)***

**Section 1 Name**

This section provides for the Amendment Determination to be cited as the *Telecommunications (Emergency Call Service) Amendment Determination 2020 (No. 1).*

**Section 2 Commencement**

This section provides that the Amendment Determination commences at the start of the day after the day it is registered on the Federal Register of Legislation.

**Section 3 Authority**

This section identifies subsection 147(1) of the Act as the provision that authorises the making of the Amendment Determination.

**Section 4 Amendments**

This section provides that the Determination is amended as set out in the applicable items in Schedule 1 to the Amendment Determination.

**Schedule 1 Amendments**

***Telecommunications (Emergency Call Service) Determination 2019 [F2019L01509]***

**Item 1 – Section 5 (note at the end)**

This item amends the note at the end of section 5 which makes reference to provisions requiring carriers, CSPs and ECPs to have mechanisms in place to help achieve the objects of the Determination. The item omits the words ‘have mechanisms in place to’ so that the note refers directly to the regulatory outcomes that are to be achieved by those provisions, rather than the ‘mechanisms’ for their achievement.

**Item 2 – Section 6 (definition of *information agreement*)**

This item repeals the definition of ‘information agreement’ in section 6. This definition is no longer necessary because of the amendment made by item 8.

**Item 3 – Section 6 (definition of *new information agreement*)**

This item repeals the definition of ‘new information agreement’ in section 6. This definition is no longer necessary because of the amendment made by item 8.

**Item 4 – Subsection 31(9)**

This item repeals the no-invalidity clause at subsection 31(9).

Subsection 31(9) provided that a failure on the part of the ACMA to give notice of a decision on reconsideration under subsection 31(7) in accordance with the prescribed requirements in subsection 31(8) did not affect the validity of the decision.

This amendment is made to address the issue raised by the Committee about the use of no-invalidity clauses without affecting the substantive operation of the merits review provision at subsection 31(10).

**Item 5 – Section 38**

This item repeals section 38 and replaces it with a new provision in relation to a requirement to use a ‘common system’ (as defined in section 6) and to provide assistance.

A new subsection 38(1) imposes an obligation on the ECPs to, as far as practicable, use the common system to answer an emergency call and transfer the emergency call to the appropriate ESO.

A new subsection 38(2) imposes an obligation on the ECP for 000 and 112 to share access to the common system with the ECP for 106 and to give it such assistance as is required to ensure that:

* it has access to the most precise location information available when a call-taker receives a call to the emergency service number 106;
* the call-taker is able to give that information to the appropriate ESO in the course of relaying the call to the ESO; and
* if, after the ESO has dealt with the call, the ESO asks it for information about the call (including the name of the CSP who supplied the emergency telephone service on which the call was made), it is able to give the information to the ESO.

This obligation is intended to achieve the same regulatory objectives as any new information agreement between ECPs was required to achieve under the old Division 3.5 (see item 8).

**Item 6 – Subsection 50(9)**

This item repeals the no-invalidity clause at subsection 50(9).

Subsection 50(9) provided that a failure on the part of the ACMA to give notice of a decision on reconsideration under subsection 50(7) in accordance with the prescribed requirements in subsection 50(8) did not affect the validity of the decision.

This amendment is made to address the issue raised by the Committee about the use of no-invalidity clauses without affecting the substantive operation of the merits review provision at subsection 50(10).

**Item 7 – Section 53**

This item repeals section 53 and replaces it with a new provision in relation to access to the IPND by the ECP for 000 and 112.

The new section 53 imposes an obligation on the ECP for 000 and 112 to take all reasonable steps to ensure that:

* the IPND Manager gives it access to all of the IPND information that it requires to respond to an emergency call, as soon as practicable after the call is received; and
* the IPND Manager will inform it of a revision or correction to the customer location information in the IPND within 24 hours of the IPND Manager being notified of such a revision or correction.

The old section 53 required the ECP for 000 and 112 to make written arrangements with the IPND Manager to ensure that all information in the IPND was available to the ECP as soon as practicable.

The new section 53 removes the obligation to make written arrangements (which were not publicly available) and replaces it with a new obligation that is intended to achieve the same regulatory outcome.

This amendment is made to address the issue raised by the Committee about provisions in the Determination which incorporated by reference (or otherwise referred to) documents that were not publicly available.

**Item 8 – Division 3.5**

This item repeals Division 3.5 and replaces it with a new Division 3.5 (containing a new section 55) in relation to communication and welfare checks.

The new section 55 applies to the ECP for 000 and 112 if there has been a disruption to the emergency call service. The ECP for 000 and 112 must, as soon as possible after the disruption occurs, conduct a welfare check (within the meaning of section 6) of an end-user who has made a call to the emergency service number 000 or 112. This requirement does not apply if the call has been made using a public payphone, is a Caller No Response Call (within the meaning of section 6) or has a default CLI (within the meaning of section 6). If the ECP for 000 and 112 reasonably believes that a carrier, CSP or ESO is affected by a disruption, the ECP must, as soon as practicable after the disruption occurs, inform the carrier, CSP or ESO of the disruption. If the ECP for 000 and 112 reasonably believes that the disruption is likely to materially and adversely affect its ability to provide the emergency call service, it must, as soon as practicable after the disruption occurs, inform members of the public whose ability to access the emergency call service is affected by the disruption, the ACMA, the Department and the Home Affairs Department of the disruption.

The old Division 3.5 required, among other things:

* the ECP for 000 and 112 and the ECP for 106 to remain parties to, and remain bound by, the information agreement dated 13 November 2019 or to enter into a new information agreement that required specified objectives to be achieved; and
* the ECP for 000 and 112 to have in place a communications protocol containing certain minimum requirements which must be complied with in the event of a ‘disruption to the emergency call service’ (as defined in section 6).

The new Division 3.5 removes the obligation in relation to the information agreement and the communications protocol (which were not publicly available) and replaces it with a new obligation that, in combination with the new section 38 (see item 5), is intended to achieve the same regulatory outcome.

This amendment is made to address the issue raised by the Committee in relation to provisions in the Determination which incorporated by reference (or otherwise referred to) documents that were not publicly available.

**Item 9 – Section 59**

This item amends section 59 to omit the text ‘described in the information agreement or a new information agreement’. That text is no longer necessary because of the amendment made by item 8.

**Attachment B**

**Statement of compatibility with human rights**

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

***Telecommunications (Emergency Call Service) Amendment Determination 2020 (No. 1)***

***Overview of the instrument***

The purpose of the *Telecommunications (Emergency Call Service) Amendment Determination 2020 (No. 1)* (the Amendment Determination) is to address technical issues with the *Telecommunications (Emergency Call Service) Determination 2019* (the Determination) that were raised by the Senate Standing Committee for the Scrutiny of Delegated Legislation (the Committee). Those issues related to:

* the use of ‘no-invalidity clauses’ at subsections 31(9) and 50(9) of the Determination; and
* provisions which incorporated by reference (or otherwise referred to) documents that were not publicly available.

The Amendment Determination:

* repeals subsections 31(9) and 50(9) of the Determination to remove the ‘no-invalidity clauses’; and
* repeals and replaces sections 38 and 53 and Division 3.5 of the Determination to remove references to documents that were not publicly available and to impose new obligations that are intended to achieve the same regulatory outcomes.

The Amendment Determination also makes some consequential and other minor changes to the Determination.

***Human rights implications***

Having considered the likely impact of the Amendment Determination and the nature of the applicable rights and freedoms, the ACMA has formed the view that the Amendment Determination engages:

* the right to privacy in Article 17 of the *International Covenant on Civil and Political Rights* (the ICCPR);
* the right to privacy for people with disabilities in Article 22 of the *Convention on the Rights of Persons with Disabilities* (the CRPD); and
* the right to accessibility for people with disabilities in Article 9 of the CRPD.

*Right to privacy*

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 protection of the law against such interference or attacks.

Article 22 of the CRPD provides:

1.      No person with disabilities, regardless of place of residence or living arrangements, shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence or other types of communication or to unlawful attacks on his or her honour and reputation. Persons with disabilities have the right to the protection of the law against such interference or attacks.

2.    States Parties shall protect the privacy of personal, health and rehabilitation information of persons with disabilities on an equal basis with others.

The Amendment Determination amends provisions that relate to the handling of personal information by emergency call persons (ECPs) and emergency service organisations (ESOs), particularly:

* access to, and use of, a common system by ECPs to answer emergency calls, to transfer emergency calls to the appropriate ESOs and to conduct welfare checks on end-users who have made emergency calls in certain circumstances; and
* access to and use of information in the integrated public number database by the ECP for 000 and 112 to respond to emergency calls.

While the provisions as made and as amended may be viewed as limiting the right to privacy, the limitations are authorised by law and are not arbitrary.

The ACMA is required by section 147 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* to make a determination imposing requirements on ECPs and other persons in relation to emergency call services having regard to specified objectives including:

* the objective that an ECP should, for end-users of a standard telephone service who are provided with access to an emergency call service operated by the ECP, receive and handle calls made by those end-users to the relevant emergency service number, and (if appropriate) transfer such calls to an appropriate ESO and give information in relation to such calls to an appropriate ESO;
* the objective that, as far as practicable, a common system is used to transfer calls made to an emergency service number to an ESO, and give information in relation to such calls to an ESO; and
* the objective that calls made to an emergency service number are transferred to an appropriate emergency service organisation with the minimum of delay.

The provisions are aimed at achieving those legitimate objectives to ensure that end-users who have made a call to an emergency service number receive appropriate assistance in a time-critical and life-threatening situation. Access to personal information by ECPs and ESOs is limited to what is required to respond to a emergency call as soon as practicable after it is received and to enable welfare checks of end-users to be conducted in certain circumstances. The provisions are strictly confined to the handling of personal information for those purposes and there are protections contained in the *Telecommunications Act 1997* and the *Privacy Act 1988* against any unauthorised use or disclosure of such information. Any limitation on the right to privacy is therefore reasonable, necessary and proportionate.

*Right to accessibility*

Article 9 of the CRPD provides:

1.    To enable persons with disabilities to live independently and participate fully in all aspects of life, States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas. These measures, which shall include the identification and elimination of obstacles and barriers to accessibility, shall apply to, inter alia:

…

(b) Information, communications and other services, including electronic services and emergency services.

The Amendment Determination amends provisions which promote the right to accessibility for people with a disability by ensuring that emergency calls to 106 (a dedicated number for access to the emergency call service for people who are deaf, speech or hearing-impaired) are handled in the same manner as emergency calls to 000 and 112. The provisions as amended require:

* an ECP (including the ECP for 106) to use a common system to answer emergency calls and to transfer emergency calls to the appropriate ESOs; and
* the ECP for 000 and 112 to share access to the common system with the ECP for 106 and to give it such assistance as is required to ensure that:
  + it has access to the most precise location information available when a call-taker receives a call to the emergency service number 106;
  + the call-taker is able to give that information to the appropriate ESO in the course of relaying the call to the ESO; and
  + if, after the ESO has dealt with the call, the ESO asks it for information about the call (including the name of the CSP who supplied the emergency telephone service on which the call was made), it is able to give the information to the ESO.

***Conclusion***

This Amendment Determination is compatible with human rights. While it amends provisions that may be viewed as limiting the right to privacy, they are authorised by law and are not arbitrary. Any limitation on the right to privacy is reasonable, necessary and proportionate to achieve legitimate objectives relating to the emergency call service. The Amendment Determination also amends provisions which promote the right to accessibility for people with a disability by ensuring that emergency calls to 106 are handled in the same way as other emergency calls.