

# EXPLANATORY STATEMENT

Approved by the Australian Communications and Media Authority

*Telecommunications Act 1997*

***Telecommunications (NBN Continuity of Service) Industry Standard Variation 2020 (No. 1)***

## Authority

The Australian Communications and Media Authority (the **ACMA**) has determined the *Telecommunications (NBN Continuity of Service) Industry Standard Variation 2020 (No. 1)* (the **instrument**) to vary the *Telecommunications (NBN Continuity of Service) Industry Standard 2018* (the **Standard**) under subsection 125AA(1) of the *Telecommunications Act 1997* (the **Act**), in accordance with sections 5 and 7 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 7 of the Direction requires the ACMA to determine an industry standard relating to the promoting of continuity of voice and broadband services by carriage service providers (**CSPs**) and carriers.

Subsection 7(1) of the Direction requires the ACMA to determine an industry standard that:

- (a) applies to CSPs and carriers responsible for network units that are used in the supply of services; and
- (b) deals with the provision of voice and broadband services by persons listed in paragraph 7(1)(a) of the Direction to consumers in areas where legacy services are readily able to be supplied and the areas has been declared ready for service by NBN Co Limited.

Paragraphs 7(2)(a) to (c) of the Direction provide that the industry standard must, among other things, deal with:

- (a) requirements for the supply to a consumer of a legacy service that is a voice service, a broadband service, or both, to their premises using a legacy network, where it is not possible to obtain a working voice or broadband service using the NBN, including requirements for the supply of such services in the following circumstances:

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- (i) where the migration of a legacy service to the NBN has been unsuccessful, and is unlikely to be successful within a reasonable period of time; and
  - (ii) where the migration of a legacy service to the NBN has been successful, but a voice service or broadband service cannot be supplied to a particular consumer on the NBN for an unreasonable period of time, and it remains readily feasible to supply legacy services to those premises;
- (b) processes for the reconnection of legacy services if required in accordance with a requirement for the purposes of paragraph (2)(a), including timeframes for completion of those processes;
  - (c) requirements for persons listed in paragraph (1)(a) of the Direction to nominate a contact point for coordination activities in relation to reconnection of legacy services, including requirements regarding who that nomination must be communicated to, and in what manner.

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 Standard consistent with the requirements in sections 5 and 7 of the Direction and it commenced in two phases:

- (a) Part 1 and section 26 commenced on 23 July 2018; and
- (b) the remaining provisions 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.

The instrument relies upon subsection 5(4) of the Direction and subsection 33(3) of the AIA to vary the Standard, as considered necessary by the ACMA, in a like manner and subject to the conditions imposed under sections 5 and 7 of the Direction.

### **Purpose and operation of the instrument**

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

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 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**).
  - Changes made to the requirement to supply a legacy service in section 10 and 11 so that a customer is eligible to receive a legacy 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 in circumstances other than those set out in subsection 7(3).
  - 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 23.

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 and subsection 125AA(3) of the Act.

The ACMA’s review of the Standard was informed by submissions received as part of an extensive three-stage consultation process (detailed below), the ACMA’s experience in monitoring compliance with the rules, and recommendations regarding the Standard 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 Australian Competition and Consumer Commission (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 the NBN consumer experience rules was received in response to consultation.

Below is a summary of comments received during consultation about the main variations 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.
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- Feedback relating to remedial plans and technical audits under section 23 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 Standard.
  - 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, the ACMA amended the draft instrument, including as follows:

- A definition of “alternative arrangement” has been included in the Standard, to provide clarity for that term. The definition of “alternative arrangement” in the instrument correlates with the definition in the Service Migration Determination except that the Service Migration Determination deals with alternative arrangements in the context of the provision of an interim service, whereas, in the instrument, it deals with arrangements in the context of the supply of a legacy service. A note has been included providing examples of arrangements that would not amount to an alternative arrangement for the purposes of the Standard, including rescheduling an appointment or not requiring payment until the customer's NBN service is operational.
- It was decided that no amendments would be made to section 21 of the Standard. 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 stakeholders who had responded to the December 2019 consultation. The ACMA also consulted with Communications Alliance, as required by subsection 125AA(3) of the Act.

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 that further round of consultation:

- Communications Alliance and Optus expressed some concerns around the interpretation of section 11 and how it interacts with sections 8 and 9 of the Service Migration Determination. 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 23 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 information in that plan 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 (NBN Continuity of Service) Industry Standard Variation 2020 (No. 1)***

**Section 1 Name**

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

**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](http://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 7 of the *Telecommunications (NBN Consumer Experience Industry Standard) Direction 2017*.

**Section 4 Variations**

This section provides that the *Telecommunications (NBN Continuity of Service) 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 the definitions under section 5 of the Standard by inserting a definition for “alternative arrangement”. The definition of alternative arrangement in the instrument correlates with the drafting in the Service Migration Determination except that the Service Migration Determination deals with alternative arrangements in the context of the provision of an interim service, whereas, in the instrument, it deals with arrangements in the context of the supply of a legacy service. The definition includes a list of arrangements that may be agreed between the NBN CSP and the consumer. Paragraph (d) provides 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 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 carriage service provider (**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]** substitutes subsection 11(1) of the Standard to add a new circumstance under which a customer would be entitled to have their legacy service reconnected. New subparagraphs 11(1)(c)(i) and (ii) of the Standard provide that a legacy 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 in circumstances other than those set out in subsection 7(3) of the Standard, unless an exception in subsection 11(2) of the Standard applies. This subsection operates where the area in which the consumer's premises is located has been declared ready for service by NBN Co in accordance with paragraph 10(a) of the Standard, 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 10(b) of the Standard.

**Item [4]** makes a minor amendment to the note to subsection 11(2) to include a reference to the new subsection 11(1)(c) (see item [3]).

**Item [5]** makes a minor amendment to subsection 14(1) to include a reference to the new subsection 11(1)(c) (see item [3]).

**Item [6]** makes a minor amendment to subsection 14(2) to include a reference to the new subsection 11(1)(c) (see item [3]).

**Item [7]** makes a minor amendment to subsection 14(4) to include a reference to the new subsection 11(1)(c) (see item [3]).

**Item [8]** substitutes section 23 of the Standard.

A change has been made to subsection 23(1) to clarify that the relevant time period under that paragraph is 23 working days. This amalgamates the three working day period referred to in paragraphs 11(1)(a), (b) and (c) with the 20 working days that was previously referred to in subsection 23(1) for ease of reference. A consequential amendment to the timeframe has been made at subsection (5).

Subsection 23(1) has also been varied to include paragraphs 23(1)(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 (the **relevant day**).

An exception to the requirement in subsection 23(1) for an NBN CSP to prepare a remedial plan has been added at subsection 23(2). The exception applies where the NBN CSP has provided the consumer with all the information in subsection 23(4) during the period of 23 working days from the NBN CSP becoming aware of an event in paragraphs 23(1)(a) or (b). Paragraph 23(2)(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 23(4) 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.

A minor amendment to subsection 23(7) has been included to provide an 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.

Subsection 23(8) has been amended to provide that NBN CSPs must keep records and make records available to the ACMA to demonstrate compliance with new subsections (1), (2), (3) and (5).



## **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 Continuity of Service) Industry Standard Variation 2020 (No. 1)***

#### ***Overview of the instrument***

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 that deals with one or more matters relating to the telecommunications activities of those participants.

The Standard imposes requirements on NBN CSPs and NBN Co to take all reasonable steps within their control to manage the migration of a consumer's legacy service to an NBN service in a way that minimises disruption to the continuous supply of carriage services to the consumer.

The Standard also imposes requirements on certain NBN CSPs and legacy CSPs to supply a consumer with a legacy service that is a voice service, a broadband service, or both, to their premises using a legacy network, or with an interim service where a consumer consents, in certain circumstances where it is not possible to obtain a working voice or broadband service using the NBN.

The variations made to the Standard 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 requiring further discussion.

#### ***Conclusion***

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