

Telecommunications Industry Ombudsman submission to the ACMA consultation on *new rules to protect customers migrating to the National Broadband Network – Improving consumer information and ensuring service continuity and quality*

Introduction from the Ombudsman, Judi Jones

As the Telecommunications Industry Ombudsman, I welcome the ACMA's focus on ensuring consistency of pre-contractual disclosure, and measures for confirming a consumer has a service connection, or an interim or alternative service safety-net when migrating to a service delivered over the NBN.

I believe the new rules will assist providers to know what steps to take when migrating a customer to a service delivered over the NBN.

Submission content:

1. Rules should ensure all consumers receive the benefits of safeguards consistent with the Migration Assurance Framework
2. Key Facts Sheets should be comparable and user-friendly for consistency with the Migration Assurance Framework
3. Advertising of broadband speeds and consumer remedies following line testing should be consistent with the Migration Assurance Framework and the Australian Consumer Law

The new rules proposed by the ACMA include:

- *Telecommunications (NBN Consumer Information) Industry Standard 2018*;
- *Telecommunications Service Provider (NBN Line Testing) Determination 2018*;
- *Telecommunications (NBN Continuity of Service) Industry Standard 2018*.

It is important for any new ACMA rules to be:

- clear, certain and provide benefits for all residential and small business consumers equally;
- consistent with the Government's expectations in the *Migration Assurance Framework* (August 2017)¹ and to the greatest extent possible, the safeguards in the *Australian Consumer Law*.²

Applying these criteria would:

- make it simpler for providers to comply. The new rules support the proposed ACMA rule on complaints handling,³ which seeks to reduce consumer complaints and resolution timeframes by requiring providers to be responsive when addressing a consumer's problem or issue; and
- support the complaints handling role of the Telecommunications Industry Ombudsman by removing the need to undertake an assessment as to whether a particular safeguard applies to a consumer.

In the event of an inconsistency between the rules and other laws, the Telecommunications Industry Ombudsman will have regard to which safeguard offers the greatest level of protection for the consumer.

¹ Department of Communications and the Arts, *Migration Assurance Framework* (August 2017). See: <https://www.communications.gov.au/have-your-say/migration-assurance-framework>

² *Competition and Consumer Act 2010*, Schedule 2

³ ACMA, *Telecommunications (Consumer Complaints Handling) Industry Standard 2018*

Our comments on how the proposed new ACMA rules could better achieve clarity, certainty, fairness and consistency are set out below.

Part 1: Ensuring all consumers receive the benefits of the safeguards in the rules for consistency with the Migration Assurance Framework

This Part covers:

- The Government's expectations in the Migration Assurance Framework
- Achieving consistency with the Migration Assurance Framework

1.1 The Government's expectations in the Migration Assurance Framework

The *Migration Assurance Framework* sets out the Government's expectations that all residential and small business consumers:

- receive clear and timely information about how to migrate to the NBN, including disclosures about the limitations and risks of services delivered over the NBN for persons with medical alarms;⁴
- have their service tested by a provider once the provider is notified by nbn co that the customer's service is activated on the network. This is to ensure the customer's service is operational and ready for use;⁵
- have continuity of service with minimal disruption.⁶

1.2 Achieving consistency with the Migration Assurance Framework

Removing the restrictions in the definition of *consumer* across all three rules⁷ would ensure that all small business consumers, regardless of the amount they spend on telecommunications services, can receive the benefits of the proposed safeguards.

We note that small business consumers who spend more than \$20,000 can access the Telecommunications Industry Ombudsman;⁸ and receive the benefits of the safeguards in the *Australian Consumer Law*.⁹

We also note that *standard form telecommunications consumer contracts* to which the definition of *consumer* in the rules are tied, need to be consistent with the *Australian Consumer Law*.¹⁰

Making this change will achieve consistency with the Government's expectations in the *Migration Assurance Framework*; and ensure all consumers are treated equally when it comes to receiving the benefit of a safeguard under the new rules.

If this change is not made, there is a risk the new rules could create an information divide between small business consumers based on spend; and for those who spend more and do not receive the benefit of the ACMA safeguard, poorer continuity or quality of service, than those who spend less. We are of the view this could be counter-productive to the Government's expectations in the *Migration Assurance Framework* and the stated policy reasons for making the new ACMA rules.¹¹

⁴ As above for note 1, 14 - 15

⁵ As above for note 1, 15 – 16 and 29

⁶ As above for note 1, 10

⁷ ACMA, *Telecommunications (NBN Consumer Information) Industry Standard 2018*, section 5 (definition of *consumer*); ACMA, *Telecommunications Service Provider (NBN Line Testing) Determination 2018*, section 6 (definition of *consumer*); ACMA, *Telecommunications (NBN Continuity of Service) Industry Standard 2018*, section 6 (definition of *consumer*).

⁸ *Telecommunications Industry Ombudsman Terms of Reference* (25 October 2017), clause 2.2 (definition of 'consumer')

⁹ As above for note 2, *Australian Consumer Law*, section 3

¹⁰ *Telecommunications Act 1997*, sections 479 and 483

¹¹ ACMA Consultation Paper *New rules to protect consumers migrating to the NBN – Part 2: Improving consumer and ensuring service continuity and quality* (April 2018)

Part 2: Ensuring Key Facts Sheets are comparable and user-friendly for consistency with the Migration Assurance Framework

This Part covers:

- Key Facts Sheets could be more effective if they contain all the necessary information and disclosures for services delivered over the NBN
- Designing Key Facts Sheets that are comparable

2.1 Key Facts Sheets could be more effective if they contain all the necessary information and disclosures for services delivered over the NBN (response to Qu 3, Consultation Paper)

One issue to consider is how industry obligations could be simplified and streamlined so consumers can receive information in a single document that is clear, concise, accessible and user-friendly for services delivered over the NBN.

Consumers may only find disclosures in a Key Facts Sheet useful if they can compare and select NBN plans having regard to all the key information they need.

Consumers may find it difficult to match up or cross-reference relevant information in a Key Facts Sheet with information in a Customer Information Statement (CIS) (as required by Chapter 4, *TCP Code*).¹²

For example, information that is required to be in a CIS, but not a Key Facts Sheet includes information about the product and service covered by the plan and pricing; and how to access the Telecommunications Industry Ombudsman if the consumer has an unresolved complaint.

Disclosures about technical limitations¹³ could cover the types of disclosures the ACCC recommends for truth in advertising when making broadband speed claims: for example technology specific limitations, specific network congestion in geographic or network areas, throttling.¹⁴

Having information in different documents for services delivered over the NBN could be problematic especially if one document is up to date, but the other not, and each document is provided at different stages of the consumer decision-making process.

The Key Facts Sheet could also be the document through which providers can demonstrate compliance with their disclosure requirements in *Telecommunications (Backup Power and Informed Decisions) Service Provider Determination 2014*.¹⁵

2.2 Designing Key Facts Sheets that are comparable

The consumer's understanding of the information provided may be enhanced by standardising the disclosures and layout of Key Facts Sheets.

It is typical for consumer laws to prescribe the look and feel of pre-contractual disclosure documents when they aim to warn consumers of certain risks, and help them to shop around and compare between providers in a sector.

Standardisation could ensure that the disclosures recommended by the *Migration Assurance Framework*, are clear and consistent, especially for vulnerable consumers using medical alarms.¹⁶

¹² Communications Alliance, C628:2015 *Telecommunications Consumer Protections Code* (incorporating variation no. 1/2017), clause 4.1. See: http://www.commsalliance.com.au/_data/assets/pdf_file/0005/58595/TCP-C628_2015-2017-Variation.pdf

¹³ ACMA, *Telecommunications (NBN Consumer Information) Industry Standard 2018*, section 9(b)

¹⁴ ACCC, *Broadband Speed Claims industry guidance* (August 2017), 10 – 11. See: <https://www.accc.gov.au/publications/broadband-speed-claims-industry-guidance>

¹⁵ As above for note 13, section 9(a)

¹⁶ As above for note 1

If providers are left to design their own Key Facts Sheet, there is potential for increased consumer confusion given the significant number of retail service providers.¹⁷

Another benefit of standardisation would be to ensure that Key Facts Sheet are accessible and clear. For example, there could be a requirement that all relevant disclosures fit on one A4 page without providers having to resort to using a less than 10 point font size.

The types of Key Facts Sheets credit providers must give consumers who enquire about standard home loans and credit cards under national consumer credit laws might be a useful reference point to achieve standardisation.¹⁸

Under national consumer credit laws, lenders must ensure their Key Facts Sheets:

- contain the date the Key Facts Sheet is produced and the provider's logo and name;
- contain up to date information;
- are in A4 size (but extend beyond one page);
- meet certain requirements for layout specifications regarding colour, headings and use of text boxes;
- use certain prescribed wording so the information is accessible, user-friendly and easily compared.

We note additional assistance beyond a Key Facts Sheet may be needed to assist certain types of vulnerable consumers migrate to the NBN.¹⁹

Confusion about the information provided in the fact sheets could contribute to new enquiries and complaints being made both to the service provider and to the Telecommunications Industry Ombudsman, which is counter to the ACMA's policy objective of reducing complaints about services delivered over the NBN.

Part 3: Ensuring consistency with the Migration Assurance Framework and the Australian Consumer Law for advertising of broadband speeds and consumer remedies following line testing

This Part covers:

- Ensuring advertising of consumer plans aligns with Australian Consumer Law obligations
- Ensuring all consumers receive the benefit of continuity of service
- Ensuring all consumers receive the benefit of line testing

3.1 Ensuring advertising of consumer plans aligns with Australian Consumer Law obligations

The rules about the advertising of consumer plans should be aligned with a provider's obligations under the *Australian Consumer Law*. The ACCC recently issued guidance for providers on how they can comply with the *Australian Consumer Law* when making broadband speed claims.²⁰

An example of non-alignment is the advertising requirements in the ACMA rule applies to residential consumers and small business consumers (including not-for-profit organisations)

¹⁷ As at June 2017, there were a total number of 1,518 carriage service providers who were members of the Telecommunications Industry Ombudsman: ACMA, *Communications Report 2016 – 2017*, 33

¹⁸ On 25 July 2011, the *National Consumer Credit Protection Amendment (Home Loans and Credit Cards) Act 2011* introduced new requirements for lenders give a consumer a Key Facts Sheet in a standardised layout for consumer comparison of home loans and credit card contracts: *National Consumer Credit Protection Act 2009*, ss 133A – 157; 133BB – 133BD; *National Consumer Credit Protection Regulations 2010*, regulations 28LB and 28LFA, and Schedules 5 and 6; see also ASIC's MoneySmart example Key Facts Sheets: <https://www.moneysmart.gov.au/media/558873/key-facts-sheet-fixed.pdf>; and <https://www.moneysmart.gov.au/media/558874/key-facts-sheet-variable.pdf>

¹⁹ For example, consumers with a disability, cognitive or sensory impairment, older consumers, those with limited English proficiency: as above for note 1, 59-60

²⁰ As above for note 14

alike²¹. The peak busy period for residential consumers (i.e. between 7 – 11pm) applies to small business consumers even though the ACCC recommends that advertising of peak busy periods for small business be between standard business hours.²²

We note the ACCC also recommends retail service providers disclose other factors in their advertising and plans that are known to affect broadband speeds, so as to comply with the Australian Consumer Law when making broadband speed claims.²³

3.2 Continuity of service

Continuity of service should apply equally to all types of consumers so they receive the benefits of the safeguard.²⁴

The requirements for service continuity appear to require a provider to whom a consumer has switched, to provide a legacy service when the consumer cannot be immediately migrated to the NBN.²⁵ This is even if the provider is not the provider of the legacy service.

Under the ACMA rule, only if the consumer rejects reinstatement of their legacy service, can the provider offer an alternative service (e.g. a mobile service).²⁶

This raises a question as to whether this might act as a disincentive for providers to take on customers who switch from another provider.

3.3 Line testing

The obligations to line test could be:

- extended to cover all consumers who will connect to a service delivered over the NBN; and
- standardised so it is clear what providers must do to perform an acceptable line test.

Changes in the rule could bring the ACMA rule into alignment with the Government's expectations in the *Migration Assurance Framework* and the ACCC's requirements that providers have systems in place to diagnose and test broadband speed.²⁷

The ACMA rules set out specific line tests providers must undertake, but the requirements do not cover all types of NBN technology in the multi-technology mix.

For example:

- the requirement to test line capability does not cover HFC technology;²⁸
- the requirement to undertake a line speed test on the request of a customer, does not apply to a voice NBN service.²⁹

The ACMA rule could also include a definition of *line speed test* so it is clear what standard of compliance is required (e.g. the technology the ACCC is applying as part of its broadband speed monitoring program be the accepted standard for a test).

²¹ As above for note 13, sections 5 (definition of *consumer*) and 11

²² As above for note 14, 8

²³ As above for note 14, 10 - 11

²⁴ ACMA, *Telecommunications (NBN Continuity of Service) Industry Standard 2018*, section 8

²⁵ As above for note 24, section 8(2)-(3)

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²⁷ As above for note 14, 15 – 16;

²⁸ ACMA, *Telecommunications Service Provider (NBN Line Testing) Determination 2018*, section 9

²⁹ As above for note 29, section 11