

# Exposure draft on proposed changes to superfast broadband regulatory regime – ACMA comments

The ACMA welcomes the opportunity to provide comments on the exposure draft on proposed changes to the regulatory regime applying to superfast broadband. These comments are confined to the part of the exposure draft that establishes a Statutory Infrastructure Provider (SIP) regime. It is understood that under the proposed new Part 19 of the *Telecommunications Act 1997* and Part 3 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999*, the ACMA will administer this new regime as well as the levy to fund the Regional Broadband Scheme.

The ACMA offers the comments below on the proposed new Part 19 and looks forward to continued discussions with the Department on the details of implementation of the proposed regime.

## 1. Interactions between infrastructure layer obligations and retail layer obligations

The SIP regime will create a set of multi-layered obligations; i.e. obligations operating separately at the infrastructure and retail layers, but which may interact with each other. The ACMA considers it critical that such interactions are anticipated, and that new obligations are designed so that any interactions do not undermine the intention of the obligation or the integrity of the outcome for consumers.

The ACMA anticipates that there will be such an interaction between the Customer Service Guarantee (CSG) and Priority Assistance at the retail layer, and –

- > the obligations on SIPs under subsections 360W(2) and 360X(2) to include maximum periods for connection of premises and rectification of faults or service difficulties in their published terms and conditions; and
  - > obligations on SIPs specified in any standard determined by the Minister under subsection 360U(1) relating to maximum periods for connection of premises and rectification of faults or service difficulties
- at the infrastructure layer.

For example, a Retail Service Provider (RSP) that is subject to CSG obligations may experience difficulty fulfilling these obligations if the maximum periods for connection of premises or rectification of faults or service difficulties specified by a SIP under subsections 360W(2) and 360X(2) exceed the corresponding periods specified in the Customer Service Guarantee Standard. Similarly, a RSP that is subject to the Priority Assistance obligation may experience difficulty fulfilling this obligation if the maximum periods for connection of premises or rectification of faults or service difficulties specified by a SIP under subsections 360W(2) and

360X(2) exceed the corresponding periods specified in the Priority Assistance rules in Telstra's Carrier Licence Conditions or in the Priority Assistance Code.

The ACMA recommends that the effect of these interactions be clarified, and any inconsistencies removed before the commencement of the legislation.

More generally, in the event there are problems with the connection of premises, the commencement of supply of services or the rectification of faults or service difficulties related to a SIP, the ACMA observes that:

- > the cause of these problems will most commonly be found at the infrastructure layer, based on our detailed analysis of fixed internet complaints handled by the Telecommunications Industry Ombudsman (TIO)
- > concerns about such problems may be expressed by RSPs to infrastructure providers
- > concerns about such problems may also be expressed by consumers to RSPs and, if they are dissatisfied with the resolution of the problems following this contact, to the TIO.

Given this dynamic, the ACMA considers that infrastructure providers should be incentivised to connect premises, commence supply of services, or rectify faults or service difficulties within a reasonable time period. The ACMA also considers that RSPs should be incentivised to manage any such problems through their commercial relationship with the relevant infrastructure provider in as timely a manner as possible. This will minimise inconvenience and disruption to their customers. The ACMA has not formed a view at this time on what additional measures, if any, may be necessary to incentivise retail service providers to expeditiously manage such problems.

## **2. Detection of potential deficiencies with SIP connection, supply and fault rectification arrangements**

Any deficiencies or failures by one or more SIPs in respect of connecting premises, commencing supply of services or rectifying faults or service difficulties may be difficult to detect, other than by a retail service provider that is directly affected by the deficiencies or failures. Of course, any deficiencies or failures may ultimately generate complaints at the retail layer from consumers that, to the extent they are escalated to the TIO, may be represented in the TIO's complaint statistics. However, it is not certain the TIO could determine with confidence, nor would the complaint statistics clearly reveal, whether the cause of the complaints lay at the infrastructure layer.

Systemic deficiencies or failures by a SIP may be difficult to determine through consumer complaints to the TIO due to:

- > difficulties in determining that a particular consumer complaint was linked to the actions or omissions of a particular SIP rather than the actions or omissions of the RSP
- > the need to correlate actions or omissions of a particular SIP across multiple RSPs to determine it is a systemic issue rather than an isolated problem with a single RSP.

Both these factors will inevitably delay recognition of the problems as systemic, and the notification of systemic problems by the TIO to the ACMA for further action. The ACMA considers that there is a likelihood that a complaints based approach to monitoring a SIP regime will not be fit for purpose.

It is possible the ACMA may initiate monitoring of SIPs' performance in respect of connection of premises, commencement of supply of services, and rectification of faults and service difficulties.

Such monitoring, if the ACMA assesses that it would be necessary, would assist in evidencing the possible need for standards, benchmarks or rules to be made by the Minister under sections 360U and 360V. However, the ACMA notes that in the absence of any benchmarks, it is likely the only reference point for any performance monitoring would be the maximum periods for connection of premises, commencement of supply of services and rectification of faults and service difficulties that each SIP is required to include in its terms and conditions under subsections 360W(2) and 360X(2).

### **3. Handling of complaints by RSPs to SIPs**

Paragraph 360U(1)(a) permits the Minister to determine standards in relation to the terms and conditions of supply of services by a SIP to a RSP. In a similar way, paragraphs 360V(1)(a) and 360V(1)(b) enable the Minister to determine rules regarding handling of complaints by retail service providers to SIPs. In essence, the ACMA believes any such complaints would have the nature of commercial disputes about the supply of wholesale services. In both cases, it is not clear how provisions of such standards and rules relating to terms and conditions and complaints by RSPs will interact with nbn's Special Access Undertaking and Wholesale Broadband Agreement, the ACCC's planned Superfast Broadband Access Service Final Access Determination (applying to non-NBN SIPs) or, more generally, with Part XIC of the *Competition & Consumer Act 2010*. Given these existing arrangements, the ACMA considers that an additional rule making power regarding the handling of complaints may not be required.

### **4. Register of SIPs and service areas**

For the purpose of maintaining the SIP register that is established under section 360Z, the ACMA recommends that, to minimise opportunities for errors and to keep administrative overheads to a minimum, details of service areas contained in declarations made by SIPs (and recorded in the register) should be in a specified form. For example, it may be appropriate to specify that standard coordinate and mapping conventions are followed in supplying details of service areas.

The ACMA considers it would be sensible to also apply this specification to nominated service areas—which are derived from the carrier licence condition declarations made by the Minister in 2013 and 2014 in respect of OptiComm, Pivit, NT Technology Services and Places Victoria, rather than from declarations made by SIPs themselves\*—so that nominated service areas may be recorded and mapped in the same way as all other service areas.

The ACMA also recommends that, to minimise risks to third parties relying on information recorded in the register, SIPs be obliged to provide accurate information in their declarations.

### **5. Service continuity**

The ACMA has observed, over a number of years, periodic problems caused to customers of RSPs when the RSP experiences financial difficulties. In the worst cases, customers' services may be terminated when a RSP goes out of business, sometimes with little notice and no opportunity to make alternative arrangements. Given that "Telecommunications is essential to any modern economy" (the opening statement in the Productivity Commission's December 2016 draft report on the Universal Service Obligation), it is arguably not acceptable that consumers

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\* The carrier licence condition declarations presently specify service areas via boundary line markings on aerial photos that are incorporated within the declarations, rather than by specifying Geocentric Datum of Australia coordinates.

and small businesses are left with no telecommunications service for any substantial amount of time.

To facilitate responses to future incidents of this nature, the ACMA recommends that consideration be given to incentivising SIPs to support the provision of service continuity to end users in situations where a RSP ceases to provide a service. This could involve standard processes to facilitate the transfer of the providers' customers to another RSP.

## **6. Drafting**

The construction of the proposed new Part 19 is complex, especially in relation to the different types of declaration of service areas. The ACMA considers there is scope for some simplification of these provisions.

## **7. ACMA resources**

It is assumed that compliance monitoring and other administration of any standards, benchmarks or rules determined by the Minister under sections 360U and 360V would replace and be approximately equivalent to effort involved in compliance monitoring and other administration of present-day performance standards. If this assumption is not correct, the ACMA would require additional resources to undertake the new work.

Additionally, in the event the ACMA assesses that it is necessary to undertake monitoring of SIPs' performance in respect of connection of premises, commencement of supply of services, and rectification of faults and service difficulties (referred to in point 2 above), it is anticipated that additional resources will be required to undertake this activity.

Establishment of the register required under section 360Z will require a capital investment; the ACMA anticipates this can be met through existing capital funding. Resources will also be necessary for ongoing administration of the register. Including ongoing resources required to fulfil the ACMA's role with respect to the proposed industry charge associated with the Regional Broadband Scheme, the ACMA anticipates a total of an additional 1.5 ASL will be required.

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