



AUSTRALIAN
SENATE

Senate Standing Committee for the
Scrutiny of Delegated Legislation

Parliament House, Canberra ACT 2600
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17 June 2021

Senator the Hon Amanda Stoker
Assistant Minister to the Attorney-General
Parliament House
CANBERRA ACT 2600

Via email: AMO.DLO@ag.gov.au

CC: The Hon Paul Fletcher MP, Minister for Communications, Urban Infrastructure,
Cities and the Arts, dlo@communications.gov.au


Dear Assistant Minister,

Legislation (Telecommunications Customer Service Guarantee Instruments) Sunset-altering Declaration 2021 [F2021L00277]

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) assesses all disallowable legislative instruments against scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instrument, and the committee seeks your advice in relation to these matters.

Adequacy of consultation

Senate standing order 23(3)(d) requires the committee to scrutinise each instrument as to whether persons likely to be affected by the instrument, including relevant experts, were adequately consulted in relation to the specific instrument.

Section 17 of the *Legislation Act 2003* (Legislation Act) requires that, prior to an instrument being made, the rule-maker must be satisfied that appropriate consultation was undertaken. In determining whether any consultation was undertaken is appropriate, the rule-maker may have regard to the extent to which the consultation ensured that persons likely to be affected by the instrument had an adequate opportunity to comment on its proposed content, as per paragraph 17(2)(b) of the Legislation Act.

The committee therefore expects explanatory statements to instruments to provide details of any consultation undertaken with persons likely to be affected by the instrument. If no consultation was undertaken with persons likely to be affected, the committee expects explanatory statement to justify why no such consultation was undertaken.

This instrument aligns the sunset dates for four instruments to 1 October 2023 in order to keep the instruments in operation until a thematic review is conducted. The four instruments subject to the sunset-altering instrument (the CSG instruments) are:

1. Telecommunications (Customer Service Guarantee – Retail Performance Benchmarks) Instrument (No. 1) 2011 (the CSG Benchmarks Instrument) [original sunset date: 1 October 2021]

2. Telecommunications (Customer Service Guarantee) Amendment Standard 2011 (No. 1) (the CSG Amendment Standard) [original sunset date: 1 October 2021]
3. Telecommunications (Customer Service Guarantee) Record-Keeping Rules 2011 (the CSG RKR) [original sunset date: 1 October 2021]
4. Telecommunications (Customer Service Guarantee) Standard 2011 (the CSG Standard) [original sunset date: 1 April 2021]

In this instance, the explanatory statement to the instrument states that the then Minister of Communications, Cyber Safety and the Arts and the Chair of ACMA, who jointly prepared and approved the sunset-altering application to the Attorney-General, had regard to relevant consultation undertaken over a number of years.

Further, the explanatory statement explains that the Department of Infrastructure, Transport, Regional Development and Communications canvassed a thematic review of the CSG Instruments with Telstra, as the CSG has the greatest impact on Telstra, and Telstra did not raise 'any significant concerns'. The explanatory statement advises that broader consultation was considered unnecessary.

However, Optus wrote to the committee on 4 June 2021 to express concern that affected stakeholders were not consulted about this sunset-altering instrument. Although I understand that Optus provided a copy of this correspondence to you, a copy is also attached to this letter for your information.

Noting the importance of ensuring that those likely to be affected by an instrument are adequately consulted in relation to it, the committee would appreciate your advice as to whether:

- **any consultation was undertaken in relation to this instrument with affected stakeholders other than Telstra, and if not**
- **the reason broader consultation with other affected parties was considered unnecessary given the instrument provides a significant extension of two years or more to four instruments of significance to the telecommunications industry.**

Parliamentary oversight - sunseting

Senate standing order 23(3)(k) requires the committee to consider whether an instrument complies with any other ground relating to the technical scrutiny of delegated legislation. This includes where an instrument defers the application of the sunseting provisions in section 50 of the *Legislation Act 2003* (Legislation Act).

Section 50 of the Legislation Act provides that all legislative instruments registered on the Federal Register of Legislation after 1 January 2005 are automatically repealed ten years after registration. The committee considers that this sunseting framework provides an important opportunity for Parliament to maintain effective and regular oversight of delegated legislative powers, and, in particular, ensure that the content of legislative instruments remains current and lawful.

The committee therefore expects that instruments which defer the sunseting date of another instrument should provide a thorough justification for doing so in the explanatory statement. The committee addressed the importance of the sunseting regime to parliamentary oversight of

delegated legislation in its 2020-2021 inquiry into the exemption of delegated legislation from parliamentary oversight.¹

In this regard, the committee notes that the explanatory statement advises that all four instruments will now sunset on 1 October 2023 (instead of 1 April 2021 or 1 October 2021) to allow for a thematic review of the CSG instruments.

The committee notes that the Attorney-General's Department's Guide to Managing Sunsetting for Legislative Instruments (July 2020) provides that agencies should begin preparing for sunsetting at least 18 months prior to the sunset date to plan for and conduct any reviews relating to the relevant instruments. It is unclear from the explanatory statement when the decision to conduct a thematic review was made, when it will commence, and when it is expected to be completed.

In light of the above, the committee would appreciate your advice as to:

- **when the decision was made to conduct a thematic review of the CSG instruments, and the reason this review was not commenced earlier prior to the instruments' original sunset dates;**
- **when this review will commence; and**
- **the likely timeframe for this review to be completed.**

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **1 July 2021**.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to sdlc.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation

1 Senate Standing Committee for the Scrutiny of Delegated Legislation, Inquiry into the exemption of delegated legislation from parliamentary oversight, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Exemptfromoversight.

4 June 2021

Senator the Hon Concetta Fierravanti-Wells
Chair, Standing Committee for the Scrutiny of Delegated Legislation
PO Box 6100
Senate
Parliament House
Canberra ACT 2600

Dear Senator

I write to you in your capacity as Chair of the Senate Standing Committee for the Scrutiny of Delegated Legislation. I refer to the Legislation (Telecommunications Customer Service Guarantee Instruments) Sunset-altering Declaration 2021 (the Declaration) signed 18 March 2021 by the Assistant Minister to the Attorney-General.

The Declaration amended the sunset dates of Telecommunications (Customer Service Guarantee) Standard 2011 (the CSG Standard) and related legislative instruments (the CSG instruments). Further background is at Appendix A to this letter.

Optus is concerned that, as an affected stakeholder, Optus was not consulted in the making of the Declaration. Optus is also concerned that the Explanatory Statement to the Declaration does not accurately reflect issues raised in past consultations regarding the CSG instruments. Finally, Optus is concerned that the relevant rule makers appear to have not followed the recommended process for sunseting instruments set out in the *Guide to Managing Sunseting of Legislative Instruments* on the Attorney-General's Department's website.¹

Optus requests that the inaccuracies identified in the Explanatory Statement be corrected, the deficiencies in this process be addressed and that procedural fairness be afforded to Optus and other affected stakeholders.

Requirement to consult in making the Declaration

The Declaration was made under section 51A(1) of the Legislation Act 2003 (the Legislation Act). Section 17 of the Legislation Act imposes a broad obligation on rule makers to consult before making a legislative instrument.

The Explanatory Statement to the Declaration states that in preparing the application to the Assistant Minister for the Declaration, the Minister for Communications, Urban Infrastructure, Cities and the Arts and the Chair of the ACMA "had regard to relevant consultation undertaken over a number years...". The Explanatory Statement noted this included engagement with the Australian Communications Consumer Action Network (ACCAN), Regional Rural and Remote Consumer Coalition (RRRCC). The Explanatory Statement also noted that the Department of Infrastructure, Transport, Regional Development and Communications also canvassed a thematic review of the CSG instruments with Telstra. The Explanatory Statement noted that broader thematic review with relevant or affected stakeholders will occur as part of the proposed thematic review which will need to take place before the proposed new sunseting date.²

¹ <https://www.ag.gov.au/legal-system/publications/guide-managing-sunseting-legislative-instruments>

² Legislation (Telecommunications Customer Service Guarantee Instruments) Sunset-altering Declaration 2021 Explanatory Statement. Pp.2-3.

Optus wishes to express its disappointment over the lack of consultation with affected stakeholders regarding the Declaration and the inadequate policy process in relation to the sunseting of the CSG Standard and CSG instruments.

As an affected stakeholder with around a million services subject to the CSG regulations, Optus is disappointed it was not consulted prior to the Declaration being made and concerned that this represents a lack of procedural fairness to Optus.

Optus is also concerned that some of the statements in the Explanatory Statement describing consultation appear to mischaracterise consultation that has taken place, including where past submissions have been made in relation to the operation of the CSG requirements. The Explanatory Statement noted that industry has called for further review and potential reform of the CSG arrangements, but has not generally focused on their operational details to which the CSG instruments relate.³

However, Optus has raised numerous concerns about the CSG regulations, at a thematic level and from an operational perspective, during various regulatory and policy consultations over the last few years (including with the ACCC, the ACMA and the Department of Infrastructure, Transport, Regional Development and Communications). This includes:

- the ACCC's wholesale service standards inquiry (2017-2020);
- The Department's Consumer Safeguards review (2018-2020);
- The ACMA's inquiry into retail service standards and NBN rebate pass-through (2020); and
- The Department's consultation on a Statutory Infrastructure Provider determination (2021).

These submissions were public (although may contain confidential aspects) and are just some of the processes in which concerns about the CSG instruments have been made.

Further, in January 2021 Optus wrote directly to the ACMA raising concerns over operational aspects of the CSG requirements, including that NBN Co fails to make necessary information available to RSPs in order for RSPs to fulfil their information requirements under the CSG Standard when there is a mass service disruption. The ACMA has not taken any further steps to address this operational issue.

If the Explanatory Statement purports to reflect the issues raised by industry regarding CSG in other review processes, then Optus considers the Explanatory Statement should be amended to accurately reflect that there have been both thematic and operational concerns previously raised by industry.

Proper policy process for sunseting instruments should be followed

Optus is also concerned there has been a failure to follow proper processes in the lead up to the sunseting of the CSG instruments. The CSG Standard was due to sunset 1 April 2021 and the CSG instruments were due to sunset 1 October 2021. These dates are not so disparate that a detailed review could not have been conducted in 2020 as intended by the *Guide to Managing Sunseting of Legislative Instruments* (July 2020) (the Guide).

Sunset dates were introduced to promote regular review to ensure regulation remained fit for purpose. Section 49 of the Legislation Act specifically sets out that the purpose of the

³ Legislation (Telecommunications Customer Service Guarantee Instruments) Sunset-altering Declaration 2021 Explanatory Statement. P. 3.



Part dealing with sunseting of instruments (Part 4) is to “ensure that legislative instruments are kept up to date and only remain in force for so long as they are needed.”

The Guide sets out processes that agencies should follow up to 18 months ahead of an instrument sunseting, including, conducting an initial assessment, reaching a preliminary view whether the instrument needs to continue in some form, and, if so, initiating a comprehensive review.

Optus is not aware of any such assessments being done at this time. Optus is also not aware of any reason or circumstances that would have prevented the conducting of such a review prior to the 2021 sunset dates. If sunset dates needed to be aligned, it is unclear why the sunset date of the CSG Standard (1 April 2021) was not aligned to the sunset dates of the CSG instruments (1 October 2021) and a review carried out prior to this time.

Poor policy processes, such as failing to undertake required reviews, risk failing to identify or address regulation that is no longer fit for purpose. Regulation that is not fit for purpose will not achieve its intended purpose and is not likely to have benefits outweighing the costs imposed. As the CSG was designed for and implemented in a vertically integrated industry, the rollout of the NBN (declared completed by the Minister) means that these arrangements are beyond their use by date.

Optus requests that the inaccuracies identified in the Explanatory Statement be corrected, the deficiencies in this process be addressed and that procedural fairness be afforded to Optus and other affected stakeholders.

We would be happy to make ourselves available to discuss this issue further with you.

Yours sincerely,

Andrew Sheridan
VP Regulatory and Public Affairs

*Cc'd: Assistant Minister to the Attorney-General
Minister for Communications, Urban Infrastructure, Cities and the Arts
Chair, Australian Communications and Media Authority*

Appendix A

Background

The Legislation (Telecommunications Customer Service Guarantee Instruments) Sunset-altering Declaration 2021 (the Declaration) alters the sunset dates of the following legislative instruments:

- Telecommunications (Customer Service Guarantee) Standard 2011 (the CSG Standard);
- Telecommunications (Customer Service Guarantee) Record-Keeping Rules 2011;
- Telecommunications (Customer Service Guarantee) Amendment Standard 2011 (No. 1)
- and the Telecommunications (Customer Service Guarantee – Retail Performance Benchmarks) Instrument (No. 1) 2011 (the CSG instruments).

The CSG Standard had been due to sunset 1 April 2021 and the CSG instruments were due to sunset 1 October 2021. The Declaration has the effect of extending and aligning the sunset dates of the CSG Standard and the CSG instruments to 1 October 2023.

The Declaration was registered on the Federal Register of Legislative Instruments on 22 March 2021 and tabled in the House of Representatives on 23 March 2021.

Operation of the CSG Standard and the CSG instruments

The CSG Standard requires carriage service providers to meet certain retail performance standards (regarding appointments, connections and fault rectification) for the supply of standard telephone services and the CSG instruments contain performance benchmarks and record keeping and reporting requirements.

Where performance standards are not met, a CSP must pay compensation to a customer. Even where CSPs seek performance standard waivers from customers, specific requirements must be followed and records must be kept.

Previously Optus has not sought to waive customers' CSG rights for legacy or nbn services. As at 30 June 2020 (the last reporting period), Optus had almost 1.1 million services that have CSG obligations attached to them.