



22 January 2021

The Hon Christian Porter MP
Attorney-General
Parliament House
CANBERRA ACT 2600

Via email: attorney@ag.gov.au

CC: DLO@ag.gov.au

Dear Attorney-General,

Legislation (Deferral of Sunsetting—Telecommunications Universal Service Obligation (Standard Telephone Service—Requirements and Circumstances) Determination) Certificate 2020 [F2020L01301]

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.

Compliance with Legislation Act 2003

Adequacy of explanatory materials

Senate standing order 23(3)(a) requires the committee to scrutinise each instrument as to whether it is in accordance with its enabling Act and otherwise complies with all legislative requirements. These include the requirements prescribed by the *Legislation Act 2003* (Legislation Act) that relate to the deferral of sunsetting. In addition, Senate standing order 23(3)(g) requires the committee to scrutinise each instrument as to whether the explanatory statement is sufficiently comprehensive as to gain a clear understanding of the instrument, including how any legislative pre-conditions have been satisfied.

The Legislation (Deferral of Sunsetting—Telecommunications Universal Service Obligation (Standard Telephone Service—Requirements and Circumstances) Determination) Certificate 2020 (the instrument) defers the sunsetting of the Telecommunications Universal Service Obligation (Standard Telephone Service—Requirements and Circumstances) Determination (No. 1) 2011 (the determination) for an additional two years.

The instrument's explanatory statement explains that the reason for the deferral of sunsetting is that the policy content of the determination is still required. It also notes that deferring the sunset date will ensure that the determination will not need to be remade in its current form, nor will it need to be repealed in two years' time when the measures end.

Subparagraph 51(1)(b)(i) of the *Legislation Act 2003* provides that the sunsetting date of an instrument may be deferred where the Attorney-General is satisfied that, on written application

by the rule maker, the instrument would be likely to cease to be in force within 24 months after the sunseting date. The committee notes that the explanatory statement, including the statement of reasons for the issue of the deferral certificate required by subsection 51(5) of the Legislation Act, suggests that the requirements of subparagraph 51(1)(b)(i) of the *Legislation Act 2003* are met in relation to this instrument. However, the committee considers that that explanatory statement does not sufficiently explain how or why it is considered likely that the determination will cease within 24 months after the sunseting date.

In light of these concerns, the committee requests your advice as to how the deferral of the sunseting of the determination meets the requirements of subparagraph 51(1)(b)(i) of the *Legislation Act 2003*.

Consultation with persons affected

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

In this instance, the explanatory statement to the instrument states that no consultation was undertaken. The explanatory statement notes that the Minister for Communications, Cyber Safety and the Arts (the rule-maker) advised you of the reasons in support of issuing the deferral certificate and explains that 'the Certificate is consistent with the policy intent of the sunseting arrangements and does not significantly alter existing arrangements. Accordingly, further consultation was unnecessary'. However, the committee is concerned that persons likely to be affected by the instrument, including members of the general public, do not appear to have been consulted in relation to the instrument. In this regard, without further advice, the committee does not consider that the provision of reasons for deferring sunseting amounts to adequate consultation.

The committee therefore requests your further advice as to why it was considered that consultation with persons likely to be affected by the instrument was not required.

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 **5 February 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



The Hon Christian Porter MP

Attorney-General
Minister for Industrial Relations
Leader of the House

MC21-002366

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
Parliament House
CANBERRA ACT 2600
sdlc.sen@aph.gov.au

Dear Chair

Thank you for your letter of 22 January 2021 regarding the *Legislation (Deferral of Sunsetting—Telecommunications Universal Service Obligation (Standard Telephone Service—Requirements and Circumstances) Determination) Certificate 2020* (the Certificate)

The Committee has requested further advice as to:

- how the deferral of the sunsetting determination meets the requirements of subparagraph 51(1)(b)(i) of the *Legislation Act 2003*; and
- why it was considered that consultation with persons likely to be affected by the instrument was not required.

Requirements of subparagraph 51(1)(b)(i) of the Legislation Act 2003

Under subparagraph 51(1)(b)(i) of the *Legislation Act*, I may issue a certificate deferring the sunsetting date of an instrument by six, 12, 18 or 24 months, where I am satisfied that the instrument would be likely to cease to be in force within 24 months after its sunsetting day.

The Certificate extends the operation of the *Telecommunications Universal Service Obligation (Standard Telephone Service—Requirements and Circumstances) Determination (No. 1) 2011* (the Determination) for a further 24 months beyond its original sunsetting date of 1 April 2021.

The Determination sets out the conditions for a reasonable request for a standard telephone service under the Universal Service Obligation (USO), which is a statutory requirement under the *Telecommunications (Consumer Protection and Service Standards) Act 1999*. In December 2018, the Government announced the USO would be subsumed by a wider Universal Guarantee (USG), which covers broadband as well as voice services. The Government also committed to retain the USO until there were robust and proven alternatives, while undertaking to explore better ways to deliver the USG over time. Considerable work on USO reform has been undertaken and further work is ongoing with Telstra and the industry more broadly.

In making the application the then Minister for Communications, Cyber Safety and the Arts advised that he was seeking the deferral so that current work to reform the USO could proceed without distraction. He further advised that he sought the deferral on the basis that the Determination would likely cease to be in force by 1 April 2023 as he would either remake or repeal the Determination within that timeframe.

Accordingly, I considered that a 24 month deferral of sunseting date of the Determination would allow sufficient time for a decision to be made on whether to remake the Determination as part of the USO or repeal the determination. In addition, I was satisfied that the application met the requirements of subparagraph 51(1)(b)(i) of the Legislation Act, that the Determination would be likely to cease to be in force within 24 months after the sunseting day. This is consistent with the policy intent of the sunseting regime, to ensure that legislative instruments should be kept up to date and only remain in force so long as they are needed.

Consultation with persons affected

Certificates of deferral are machinery in nature and enable legislative instruments that would otherwise sunset to remain in force for a further, but strictly limited, period of time. Deferrals are most commonly used to enable an effective review of whether the deferred instrument continues to be fit for purpose in the current legal environment and whether it will continue to be fit for purpose taking into account anticipated policy or legislative changes.

I understand that the proposed deferral of the Determination was raised with Telstra (as the current universal service obligation provider) before the deferral, and subsequently with the Australian Communications Consumer Action Network (ACCAN), the peak consumer group in the sector. I am advised that no concerns were raised by these bodies.

As the deferral certificate is machinery in nature, I consider that further consultation is unnecessary. This will minimise the administrative burden on stakeholders associated with additional consultation in relation to the deferral. Of course any replacement determination would be subject to parliamentary oversight, including whether adequate consultation occurred with persons likely to be affected by the determination.

In addition, the operation and possible reform of the USO has been the subject of extensive consideration and public consultation since 2015. This includes the 2015 Regional Telecommunications Review, a 2016-17 review by the Productivity Commission, work by then Department of Communications and the Arts in 2017-18 and the 2018 Regional Telecommunications Review. This work culminated in December 2018, when the Government announced that the USO would be subsumed into a wider USG.

The Government also indicated in December 2018 it would continue to work with consumers and industry on ways to improve the new USG over time. This ongoing work involves frequent engagement with ACCAN and other members of the Regional, Rural and Remote Consumer Coalition. It is clear from this engagement they continue to support the current USO, of which the Determination is a key element. While there continues to be industry interest in USO reform, this goes to larger questions of efficient delivery rather than what constitutes a 'reasonable request' for a USO service. The Determination itself has not attracted significant comment in its last 10 years of operation.

Thank you again for bringing the Committee's concerns to my attention, and I trust this information is of assistance. As the Determination is administered by the Minister for Communications, Urban Infrastructure, Cities and the Arts, I have copied him in to this response.

Yours sincerely

The Hon Christian Porter MP

Attorney-General

Minister for Industrial Relations

Leader of the House

CC. The Hon Paul Fletcher MP, Minister for Communications, Urban Infrastructure,
Cities and the Arts



AUSTRALIAN
SENATE

**Senate Standing Committee for the
Scrutiny of Delegated Legislation**

Parliament House, Canberra ACT 2600
02 6277 3066 | sdlc.sen@aph.gov.au
www.aph.gov.au/senate_sdlc

18 February 2021

The Hon Christian Porter MP
Attorney-General
Parliament House
CANBERRA ACT 2600

Via email: Christian.Porter.MP@aph.gov.au
CC: attorney@ag.gov.au; DLO@ag.gov.au


Dear Attorney-General,

Legislation (Deferral of Sunsetting—Telecommunications Universal Service Obligation (Standard Telephone Service—Requirements and Circumstances) Determination) Certificate 2020 [F2020L01301]

Thank you for your response of 4 February 2021 to the Senate Standing Committee for the Scrutiny of Delegated Legislation in relation to the above instrument.

The committee considered your response at its private meeting on 17 February 2021. On the basis of your advice that you are satisfied that the requirements of subparagraph 51(1)(b)(i) of the *Legislation Act 2003* are met, and the further information provided on consultation, the committee has concluded its examination of the instrument.

In light of this, the committee has resolved to withdraw the disallowance notice in place on the instrument.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

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