EXPLANATORY STATEMENT

Telecommunications (Consumer Protection and Service Standards) Act 1999

Telecommunications Universal Service Obligation (Standard Telephone Service—Requirements and Circumstances) Determination (No. 1) 2011 (Amendment No. 1 of 2012)

Authority

The Determination amends the Telecommunications Universal Service Obligation (Standard Telephone Service—Requirements and Circumstances) Determination (No. 1) 2011 (the STS Determination).

The STS Determination is made under subsections 9(2D) and 9(3) of the Telecommunications (Consumer Protection and Service Standards) Act 1999 (the Act). The Determination is made under those provisions of the Act and subsection 33(3) of the Acts Interpretation Act 1901.

Subsection 33(3) of the Acts Interpretation Act 1901 provides that when an Act confers a power to make an instrument, that power shall, unless the contrary intention appears, be construed as including a power exercisable to amend that instrument in a like manner and subject to like conditions (if any).

Purpose

The primary purpose of the Determination is to amend the STS Determination to provide that the obligation of the primary universal service provider (the PUSP) to supply a standard telephone service (STS) under the universal service obligation (the USO) does not arise if there is substantial damage to, or a failure of, NBN Co fibre network infrastructure, and the PUSP is reliant on that infrastructure to supply an STS to the premises. In these circumstances, the PUSP, currently Telstra Corporation Limited (Telstra), would be unable, for reasons beyond its control, to supply an STS, and would consequently either fail to comply with the STS obligation under paragraph 9(1)(a) of the Act, or have to provide additional infrastructure at its own cost or expand its existing network capacity so as to meet that obligation.

The other key purpose of the Determination is to amend the notification requirements in section 8 to:

- introduce different notification requirements where a request to supply an STS is refused due to fraud or lack of creditworthiness; and
require the PUSP to provide in its notice estimated time periods for the application of the provisional circumstances in subsection 7(4).

In May 2011, the Senate Standing Committee on Regulations and Ordinances wrote to the Minister to suggest that the Determination should be amended to address several instances of verb confusion in relation to the use of the word “premises”. The amendment corrects these grammatical errors in respect of the word ‘premises’ in the STS Determination by applying that word in the plural rather than singular form. The amendment implements an undertaking to correct the errors given by the Minister to the Committee on 5 July 2011.

Background

Paragraph 9(1)(a) of the Act provides that the USO includes the obligation to ensure that standard telephone services are reasonably accessible to all people in Australia on an equitable basis, wherever they reside or carry on business. Subsection 9(2) of the Act requires the PUSP to supply standard telephone services to people in Australia on request.

Subsection 9(2D) of the Act enables the Minister to determine, by legislative instrument, the requirements for requests for the supply of an STS, while subsection 9(3) enables the Minister to determine, by legislative instrument, the circumstances under which an obligation to supply an STS under the USO will not arise. The STS Determination commenced on 15 March 2011.

Subsection 7(1) of the STS Determination sets out certain circumstances in which an obligation to supply an STS will not arise, including for reasons relating to the credit standing of the customer (subparagraph 7(1)(a)(iv)), or where the PUSP believes the request to be fraudulent (subparagraph 7(1)(a)(v)).

Subsection 7(4) of the STS Determination sets out certain provisional circumstances under which the obligation of the PUSP to supply an STS on request will not apply for a specified period, including where the PUSP is prevented from supplying the service because of circumstances beyond its control (paragraph 7(4)(h)). The new circumstance in subsection 7(4A) is intended to apply to the failure of, or damage to, the NBN Co fibre network.

On 7 April 2009, the Australian Government announced its decision to establish a new company, NBN Co, to build and operate a superfast national broadband network. The Government’s Statement of Expectations to NBN Co of December 2010 stated that the NBN will provide up to 93 per cent of all Australian homes, schools and workplaces with access to fibre-based broadband services, with the remaining premises to have access to next generation wireless and satellite broadband services.
Consultation

The exposure draft of the Determination was released for public consultation on the Department of Broadband, Communications and the Digital Economy’s website from 9 to 19 March 2012. Stakeholders were also notified by email. Two formal submissions were received from the Telecommunications Industry Ombudsman (TIO) and the Australian Communications Consumer Action Network. The Australian Communications and Media Authority was also consulted. No objections were made with regard to the bulk of the amendments (including those in support of the primary purpose of the Determination).

However, the TIO objected to the inclusion of proposed amendments to subparagraphs 8(3)(c)(ii) and 8(4)(c)(ii), which provided that the PUSP would not be required to notify persons that they could complain to the TIO where the TIO lacked the jurisdiction to investigate a complaint. Following further discussion of these concerns with the TIO and other stakeholders, it was decided that these amendments would be removed from the Determination. Instead, items 20, 21 and 24 of the Determination insert notes in the STS Determination clarifying that the TIO will not investigate a complaint or facilitate its resolution where the person making the request does not have standing to make a complaint, or the TIO lacks the requisite jurisdiction.

Regulatory impact

The Office of Best Practice Regulation (OBPR) was consulted about the making of the Determination. The OBPR considered that the regulatory changes arising from the Determination are minor or machinery in nature and that no further regulatory impact statement is required. The OBPR regulatory impact statement exemption number for the Determination is ID 13429.

Statement of compatibility with human rights

This statement of compatibility is prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.

This Determination is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.

The Determination amends the STS Determination to provide that the obligation of the PUSP to supply an STS on request does not arise where there is a failure of, or damage to, NBN Co fibre network infrastructure and the PUSP is reliant on that infrastructure to supply an STS to the premises.

The Determination also amends the notification requirements to:

- introduce different notification requirements where a request to supply an STS is refused due to lack of creditworthiness or fraud; and
• require the PUSP to provide in its notice estimated time periods for the application of the provisional circumstances.

Furthermore, the Determination makes several grammatical corrections to the application of the word ‘premises’ in the STS Determination.

The Determination does not engage any of the applicable rights or freedoms, and is compatible with human rights as it does not raise any human rights issues.
Notes on Sections

Part 1 – Preliminary

**Section 1 - Name of Determination**

Section 1 provides that the name of the Determination is the *Telecommunications Universal Service Obligation (Standard Telephone Service–Requirements and Circumstances) Determination (No. 1) 2011 (Amendment No. 1 of 2012).*

**Section 2 - Commencement**

Section 2 provides that the Determination commences on the day after it is registered on the Federal Register of Legislative Instruments.

**Section 3 - Variation**

Section 3 provides that the STS Determination is amended as set out in the Schedule to the Determination.

**Schedule – Amendments**

[1] Section 3

This item inserts several definitions into section 3 of the STS Determination. These terms are used in new subsection 7(4A) of the Determination (see item 17 below). The definitions are consistent with existing Commonwealth legislation relating to the provision of telecommunications services and the rollout of the NBN.

The term *national broadband network* has the same meaning as in the *Telecommunications Act 1997 (the Telecommunications Act).*

*NBN Co* and *NBN corporation* have the same meanings that they have in the *National Broadband Network Companies Act 2011* (these definitions are also applied in the Telecommunications Act and other Commonwealth telecommunications legislation).

The definition of *NBN Co fibre network* has the same meaning as in the *Telecommunications (Migration Plan Principles) Determination 2011*.

The term *specified service* has the same meaning as used in the *Telecommunications (Customer Service Guarantee) Standard 2011 (the CSG Standard)*. A specified service includes an STS.
[2] Subsection 3(2)
[3] Paragraphs 3(2)(a), (b), (d), (e), (f) and (h)
[4] Paragraphs 3(2)(c) and (g)
[5] Paragraphs 3(2)(i) and (l)
[6] Paragraph 3(2)(j)
[7] Paragraph 3(2)(k)
[8] Paragraph 3(3)(e)
[9] Subparagraph 7(1)(a)(i)

Items 2 to 9 correct a grammatical error in respect of the use of the term ‘premises’ by applying the word as a plural rather than singular noun, and, wherever applicable, accompanying the word with a verb in the plural form.

The word ‘premises’ as applied in the STS Determination refers to property or buildings. Currently, the STS Determination only applies this word in the singular form. However, the *Macquarie English Dictionary (2009 ed.*) states ‘premise’ is to be used in the plural form only (i.e. ‘premises’) when that word refers to “(a) property the subject of conveyance, (b) a tract of land, or (c) a house or building within the grounds, etc., belonging to it”. This amendment to the application of ‘premises’ as a plural noun is also consistent with the application of that word in other Commonwealth laws (e.g. section 37 of the Telecommunications Act, which deals with properties).

[10] Paragraph 7(1)(b)

These items amend the reference in paragraph 7(1)(b) to the subsection 8(3) notification requirements by also including a reference to the notification requirements relating to the circumstances in subparagraphs 7(1)(a)(iv) and (v). These new notification requirements are described at item 21.

[12] Paragraph 7(4)(f)
[13] Subparagraphs 7(4)(j)(i) and (ii)
[15] Paragraph 7(4)(m)

Like items 2 to 9, items 12 to 15 correct a grammatical error in respect of the use of the term ‘premises’ by applying the word as a plural rather than singular noun.

[16] Subparagraph 7(4)(m)(ii)
[17] After subsection 7(4)

These items amend the STS Determination by inserting new subsection 7(4A) to provide that, for the purposes of subsection 9(2E) of the Act, an obligation for the PUSP to supply an STS on request will not arise for any period during which there has been substantial damage to, or failure of, the NBN Co fibre network infrastructure that is beyond the PUSP’s control.
Paragraph 7(4)(h) of the STS Determination exempts the PUSP from the STS obligation in circumstances where the PUSP is prevented from supplying an STS because of matters or events that are beyond its control (e.g. mass service disruption as a result of a natural disaster). The circumstances giving rise to this exemption include matters or events that would also exempt the PUSP from compliance with service standards under section 21 of the CSG Standard.

Subsection 21(3) of the CSG Standard currently provides that this exemption does not apply to the extent that the PUSP’s failure to comply with service standards is due to the act of another carriage provider and that other provider is not exempt from the application of the service standards. NBN corporations, as wholesale rather than retail service providers, will not be subject to the section 21 exemption in the CSG Standard. Consequently, where the act or omission of an NBN corporation gives rise to damage to, or the failure of, the NBN infrastructure needed to supply an STS, the PUSP will be unable to rely on the circumstance in paragraph 7(4)(h). In this situation, the PUSP would be required to provide phone services (including, potentially, infrastructure) at its own cost in order to meet its STS obligation, despite having no responsibility for, or control over, that damage or failure.

The new subsection 7(4A) provides in relation to paragraph 7(4)(h) of the STS Determination that subsection 21(3) of the CSG Standard does not apply where an NBN corporation is “another carriage service provider”. Also, that circumstances beyond the control of the PUSP for the purposes of subsection 21(2) of the CSG Standard may include damage to, or failure of, the NBN Co fibre network that causes mass outages of a specified service and restricts connection to the service or the rectification of a fault or service difficulty.

[18] Subsection 8(1)
[19] Subsection 8(3)

These items amend the references to the notification requirements for the circumstances set out in paragraph 7(1)(a) of the STS Determination by also including references to the additional notification requirements in new subsections 8(3A), (3B) and (3C) (see item 21).

[20] Subparagraph 8(3)(c)(ii)

This item inserts a note at the end of subparagraph 8(3)(c)(ii) clarifying that the TIO will not investigate, or facilitate the resolution of, a complaint following a request for reconsideration where:

- the person making the request lacks the necessary standing to complain to the TIO; or
- the TIO does not have the jurisdiction to investigate or facilitate the resolution of the complaint.
For example, a carriage service provider that requests an STS for the purposes of subparagraph 7(1)(a)(vii) of the STS Determination (i.e. a request made by a carriage service provider other than the PUSP) would not have standing to complain to the TIO in accordance with the TIO’s Constitution.

[21] **After paragraph 8(3)(d)**

This item inserts three new subsections that set out the separate notification requirements applying to the existing circumstances in subparagraphs 7(1)(a)(iv) and (v) of the STS Determination. These two circumstances provide that there is no obligation to supply an STS to a person on request where:

- the service provider supplying the relevant STS would be exempt from complying with the guaranteed maximum connection periods in Division 2 of Part 2 of the CSG Standard because of that person’s lack of creditworthiness (subparagraph 7(1)(a)(iv)); and/or
- the PUSP believes, on reasonable grounds, that the request is fraudulent (subparagraph 7(1)(a)(v)).

**Notification requirements if the PUSP decides that the lack of creditworthiness circumstance (subparagraph 7(1)(a)(iv)) applies to the request**

The notification requirements in new subsections 8(3A) and (3B) apply to the circumstance in subparagraph 7(1)(a)(iv) (lack of creditworthiness), and set out the requirements for two separate notices to be provided to the person requesting an STS.

The initial notice must be sent to the person within 10 business days of the PUSP deciding that the lack of creditworthiness circumstance applies to that person. The notice can be sent to persons that have only requested an STS, and to persons requesting the supply of an STS as part of a bundle of services (e.g. along with a request for mobile, broadband or pay television services). This initial notice must, under new subsection 8(3A), include a statement setting out:

- the PUSP’s decision not to provide a service to the person making the request based on that person’s credit history, or any other relevant grounds; and
- the entitlement of that person to request that the PUSP reconsider its decision not to supply a service.

If the person making the request then requests a reconsideration by the PUSP of its decision not to supply a service, and the PUSP still decides that the circumstance in subparagraph 7(1)(a)(iv) applies to that person, the PUSP must, within 10 business days of making that decision, send to that person a second written statement setting out the following:

- the PUSP’s decision that the obligation to supply an STS does not apply to the person’s request;
- the grounds on which the PUSP has based its judgment, including the personal credit history of the person making the request and any other relevant grounds;
the entitlement of the person making the request to dispute that the circumstance applies to the request by requesting that the PUSP reconsider whether the grounds for refusing to supply an STS exist or are a proper basis for the decision, or by complaining to the TIO following such a request; and

how the person making the request can contact the PUSP and the TIO.

Notification requirements if the PUSP decides that the fraud circumstance (subparagraph 7(1)(a)(v)) applies to the request

Where the PUSP has decided that the fraud circumstance in subparagraph 7(1)(a)(v) of the STS Determination applies to a person’s request, new subsection 8(3C) requires that only one written statement needs to be sent to that person. The requirements for this statement are the same as those applying to the statements that the PUSP is required to provide under subsection 8(3) and new subsection 8(3B) except that:

1. the statement does not need to specify the precise circumstance (i.e. fraud) that the PUSP has decided applies to the person’s request for an STS. The PUSP is only required to state in its notice that it has decided that the obligation to supply an STS does not apply to the request; and

2. the notice must state that the PUSP, in making that decision, relied on the information provided to it by the person requesting an STS.

These revised notification requirements for the fraud circumstance are intended to ensure that any fraud inquiry being undertaken in relation to a person requesting an STS is not potentially undermined by the PUSP having to make that person aware at a preliminary stage that they are being investigated for fraud, or by the PUSP having to provide the person with the detailed grounds for such an investigation.

This item also inserts a note at end of new subsections (3B) and (3C) clarifying that the TIO will not investigate, or facilitate the resolution of a complaint, if the TIO does not have the jurisdiction.

[22] Paragraph 8(4)(a)

Paragraph 8(4)(a) of the STS Determination requires that the PUSP notify a person requesting an STS that the PUSP is not obliged to supply an STS because one or more of the circumstances set out in subsection 7(4) applies to that request. This item amends that paragraph by clarifying that the obligation to supply an STS will arise only for a period. This amendment recognises the provisional nature of the circumstances set out in subsection 7(4).

[23] After paragraph 8(4)(b)

This item amends section 8 of the STS Determination to provide that the PUSP, in notifying a person requesting an STS that one or more of the circumstances in subsection 7(4) applies to the request, must also provide, where practicable, the estimated period of time for which each of the circumstances applies. This amendment will ensure that if the supply of an STS is refused on the basis of a provisional circumstance in subsection 7(4), an indication is given of how long a person will be unable to access that service.
[24] **Subparagraph 8(4)(c)(ii)**

Like items 20 and 21, this item inserts a note at end of subparagraph 8(4)(c)(ii) clarifying that the TIO will not investigate, or facilitate the resolution of a certain complaint, if the TIO does not have the jurisdiction.

[25] **After subsection 8(4)**

This item inserts subsection 8(5) into the STS Determination. It sets out the matters that the PUSP must have regard to when estimating the duration of time for which each provisional circumstance applies to the request. The considerations include the effect of the provisional circumstance on the PUSP’s ability to comply with the request and, to the extent practicable, the resources that the PUSP would have to commit to mitigate the consequences and minimise the duration of any grounds identified by the provider as the basis for the claimed circumstance.

The obligation in subsection 8(5) is similar to the requirements set out in subsection 23(3) of the CSG Standard, and has been included to ensure that the circumstances set out in subsection 7(4) of the STS Determination, being provisional circumstances, are not open-ended.