# EXPLANATORY STATEMENT

*Telecommunications (Consumer Protection and Service Standards) (Alternative Contractual Arrangements) Declaration 2019*

Issued by authority of the Minister for Communications and the Arts

## Authority

The *Telecommunications (Consumer Protection and Service Standards) (Alternative Contractual Arrangements) Declaration 2019* (**the Declaration**) is made by the Minister for Communications and the Arts (**the Minister**) under paragraphs 8J(3)(b) and 8K(3)(b) of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (**the Act**).

Subsections 8J(3) and 8K(3) of the Act requires the Minister to declare that, in his or her opinion, either:

* there are satisfactory alternative contractual arrangements relating to standard telephone services and payphones; or
* there are not satisfactory alternative contractual arrangements relating to standard telephone services and payphones

Subsections 8J(8) and 8K(8) of the Act provide that declarations under section 8J and 8K of the Act are legislative instruments.

This Declaration commences at the start of the day after it is registered on the Federal Register of Legislation.

## Purpose

The Declaration has been made for the purposes of paragraphs 8J(3)(b) and 8K(3)(b) of the Act.

## Background

The Universal Service Obligation (USO) is Australia’s base-level telecommunications consumer safeguard. Specifically, Telstra, as the Primary Universal Service Provider, must ensure that standard telephone services (STS) and payphones are reasonably accessible to all people in Australia on an equitable basis (under paragraphs 9(1)(a) and 9(1)(b) of the Act).

In June 2011, the Australian Government announced it had entered into an agreement with Telstra for the delivery of certain public interest telecommunications services which included the provision of the STS and payphones under the USO (**TUSMA Agreement**). This agreement commenced on 1 July 2012 and remains in force with neither party having given notice of termination of the agreement. The agreement has undergone amendments since its execution; however, these have not been relevant to the STS or payphones USO Modules for the purposes of the Declaration.

In 2012, the Parliament passed legislation establishing a framework for phasing out the legislated USO and replacing it with a contractual framework under the *Telecommunications Universal Service Management Agency Act 2012* and the *Telecommunications Legislation Amendment (Universal Service Reform) Act 2012*. As part of that legislative package, sections 8J and 8K in their original form were inserted into the Act to enable the progressive removal of STS and payphone USO obligations from Telstra.

Under sections 8J and 8K in their original form, the Minister was required to make declarations as to whether there were satisfactory alternative contractual arrangements relating to STS and payphone services or declare the ‘first declaration deferral period’ for the purposes of those sections. As a result, the Minister made the *Telecommunications Universal Service Obligation (First Declaration Deferral Period) Declaration 2014,* which had the effect of deferring the declaration that there were satisfactory contractual arrangements for delivery of STS and payphones. The Minister’s declaration was largely based on impending negotiations that included possible changes to the Telstra Agreement. The Minister determined that the Government could not consider lifting the regulatory requirements during the re-negotiation process due to the possibility of modifications to the delivery of the STS and payphone services.

The Telecommunications Universal Service Management Agency was abolished in 2015 and its functions were transferred to the Department of Communications (see the *Telecommunications Legislation Amendment (Deregulation) Act 2015*). At that time, sections 8J and 8K of the Act were repealed and substituted with new provisions. Those amendments simplified the operation of sections 8J and 8K, but the processes set out in those provisions remain substantially the same (see Schedule 1 to the *Telecommunications Legislation Amendment (Deregulation) Act 2015*). The re-enacted sections 8J and 8K commenced on 1 July 2015.

Under subsection 8J(1) of the Act, the Minister was required to make a declaration as to whether there were satisfactory alternative contractual arrangements in place for STS or that the 24-month period starting immediately after the declaration was made would be the ‘declaration deferral period’ for the purposes of section 8J. This declaration was required to take place during the period of 24 months that began at the commencement of section 8J. Separately, and during the same time period, under subsection 8K(1) of the Act, the Minister was required to make a similar declaration in relation to satisfactory alternative contractual arrangements for payphones.

Subsequently, the Minister made the *Telecommunications Universal Service Obligation (Declaration Deferral Period) Declaration 2017*, which had the effect of deferring the declaration that there were satisfactory contractual arrangements for delivery of STS and payphones for 24 months, i.e. at least until the end of the ‘declaration deferral period’. The Minister’s declaration was due to the Government’s consideration of future USO policy and reform, including the Telstra Agreement, based on recommendations from the Productivity Commission (**PC**) inquiry report into the future of the USO, finalised in June 2017. Like the Declaration made in 2014 under the original requirements of sections 8J and 8K, the Minister determined that USO regulation could not be lifted while reform, policy and contract issues needed to be resolved.

Similar to the circumstances in 2014 and 2017, the Minister is not able to make a declaration that there are satisfactory alternative contractual arrangements in relation to both STS and payphones unless certain criteria are satisfied. These include that the Telstra Agreement remains in force, and that the Minister is satisfied that Telstra is likely to substantially comply with the agreement if this part of USO regulation is removed. In deciding whether Telstra is likely to substantially comply with the agreement, the Minister must have regard to a range of non-exhaustive criteria including: Telstra’s record of compliance with relevant contractual obligations and the nature of those obligations; Telstra’s compliance with its regulatory obligations (including Part 2 of the Act and Part 5 of the Act,), and any other matters the Minister considers relevant (subsections 8J(4) and 8K(4)).

The Minister has decided to declare that there are not satisfactory alternative contract arrangements relating to STS and payphones.

In reaching this decision, the Minister has had regard to the PC inquiry final report and the Government’s response to it, which stated that while the government would commence work to establish a future Universal Service Guarantee (USG) , no changes would be made to existing USO arrangements until requirements for coverage, cost-effectiveness and consumer safeguards were met.

Since then, the Government has worked to develop a USG, providing all Australian premises with access to broadband as well as voice services. In December 2018, the Government announced that the USG would retain the current USO arrangements for voice services. The Government also indicated it would continue to work with consumers and industry to identify better ways to deliver the USG in the long term.

In the circumstances, the best course of action is to keep both the regulatory and contractual USO arrangements in place.

In accordance with subsections 8J(3) and 8K(3) of the TCPSS Act, there is no option for further deferral of a consideration of the satisfactory nature or otherwise of contractual USO arrangements as a basis for repealing regulation. Accordingly, the effect of the Declaration is that USO regulatory obligations in relation to STS and payphones will continue.

## A Statement of Compatibility with Human Rights is at Attachment B.

## Consultation

In accordance with section 17 of the *Legislation Act 2003*, consultation on the Declaration was undertaken with the Australian Communications and Media Authority.

The Office of Best Practice Regulation (OBPR) was consulted about the making of the Declaration. The OBPR considered that the regulatory changes arising from the Declaration are machinery in nature and that no Regulation Impact Statement is required. The OBPR regulation impact statement exemption number for the Declaration is ID 25061.

**Other details**

Details of the declaration are set out at **Attachment A**.A Statement of Compatibility with Human Rights for the purposes of Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* is set out in **Attachment B**.

**Attachment A**

**Details of the *Telecommunications (Consumer Protection and Service Standards) (Alternative Contractual Arrangements) Declaration 2019***

**Section 1 – Name**

Section 1 provides that the name of the Declaration is the *Telecommunications (Consumer Protection and Service Standards)(Alternative Contractual Arrangements) Declaration 2019*.

**Section 2 – Commencement**

Section 2 of the Declaration provides that the Declaration commences the day after it is registered on the Federal Register of Legislation.

**Section 3 – Authority**

Section 3 of the Declaration provides that the Declaration is made under paragraphs 8J(3)(b) and 8K(3)(b) of the Act.

**Section 4 – Definitions**

Section 4 of the Declaration defines Act to mean the *Telecommunications (Consumer Protection and Service Standards) Act 1999*. It is noted that subsection 13(1) of the *Legislation Act 2003* applies to other expressions used in the Declaration.

**Section 5 – Declaration**

Section 5 of the Declaration provides that, in the Minister’s opinion, there are not satisfactory alternative contractual arrangements relating to either standard telephone services or payphones.

**Attachment B**

## Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

*Telecommunications (Consumer Protection and Service Standards) (Alternative Contractual Arrangements) Declaration 2019*

The Declaration 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 Declaration is made by the Minister for Communications and the Arts under subsections 8J(3)(b) and 8K(3)(b) of the *Telecommunications (Consumer Protection and Service Standards) Act 1999*.

**Overview of the Declaration**

The *Telecommunications (Consumer Protection and Service Standards)(Alternative Contractual Arrangements) Declaration 2019* (Declaration) retains the regulatory operation of a telecommunications consumer safeguard framework, the Universal Service Obligation (USO).

In combination with other requirements under the TCPSS Act, the USO requires Telstra, as the primary universal service provider, to make available standard telephone services (STS) and payphones, to all people throughout Australia wherever they reside or carry on business.

On 23 June 2011, Definitive Agreements were signed between the Australian Government, Telstra and NBN Co Limited to enable the construction and operation of the National Broadband Network (NBN). Included in the Definitive Agreements was the Telecommunications Universal Service Management Agency Agreement (TUSMA Agreement), a contract signed between the Australian Government and Telstra to provide for contractual delivery of the STS and payphones under the USO to operate in parallel with Telstra’s regulatory obligations.

In 2012, amendments to the TCPSS Act came into effect under the *Telecommunications Legislation Amendment (Universal Service Reform) Act 2012* that enabled the removal, by Ministerial declaration, of the regulatory requirements for the STS and payphones under the USO. Declarations with respect to the STS and payphones are made under sections 8J and 8K of the TCPSS Act, respectively. Removal of regulatory USO requirements is based on a Ministerial judgement that the contractual arrangements either are, or are not, satisfactory to provide consumer protection. If the decision is that contractual arrangements are satisfactory, the regulatory USO can be repealed. If contractual arrangements are deemed not satisfactory, regulatory requirements are retained.

In 2015, the passage of the *Telecommunications Legislation Amendment (Deregulation) Act 2015* modified aspects of sections 8J and 8K; however, the substantive requirements remained the same. In addition, the TUSMA Agreement was renamed the Telstra USO Performance Agreement (TUSOP Agreement); however, no substantive changes were made to its intent or operation.

The original rationale for possible removal of USO regulation reflected the phased nature of the rollout of the NBN as a national, open access, wholesale-only telecommunications network. In combination with the structural separation of Telstra to remove its wholesale arm, the progressive rollout of the NBN would increasingly remove Telstra’s ability to provide universal telecommunications services on its Public Switched Telephone Network (PSTN) as the PSTN was switched off in the NBN fixed-line footprint. Accordingly, it was considered that retail level regulatory obligations could be able to be phased out, leaving USO delivery to be achieved solely under a contractual arrangement.

Prior to the current Declaration process, there have been two previous occasions (in 2014 and 2017) in which the Minister determined that contractual arrangements were not satisfactory under sections 8J and 8K, effectively deferring the opportunity to lift USO regulation on each occasion. Principally, this was due to government consideration of current and future USO requirements flowing from recommendations of a review of the USO completed by the Productivity Commission (PC) in June 2017.

On this occasion, it is deemed that satisfactory contractual arrangements are still not present given the PC’s views and the Government’s decision that it needs to continue the USO in its current form under its new USG, while it continues to work with consumers and industry on better ways to deliver the USG over the long term.

Effectively, the status quo of joint, parallel operation of the regulatory and contractual USO regimes will continue. No further consideration of the satisfactory nature or otherwise of contractual USO arrangements as a basis for repealing regulation is possible under sections 8J and 8K of the TCPSS Act.

**Human rights implications**

The USO is a consumer protection that is analogous to a rights-based doctrine in conception and application. It is designed to provide a basic minimum of protection of a service that is deemed to be fundamental to the inclusion and participation of individuals in their social, communal and professional lives in an equitable and non-discriminatory manner.

However, the rights provided by the USO are not elements of any of the seven core International Covenants or Conventions to which Australia is a signatory.

Accordingly, the Declaration does not engage any of the applicable rights or freedoms under the international human rights system.

**Conclusion**

The Declaration is compatible with human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*, as it does not raise any human rights issues.