

Explanatory Statement

Issued by the Australian Communications and Media Authority

Telecommunications Act 1997

Telecommunications (Customer Service Guarantee) Record-Keeping Rules 2023

Authority

The Australian Communications and Media Authority (**the ACMA**) has made the *Telecommunications (Customer Service Guarantee) Record-Keeping Rules 2023* (**the Rules**) under subsection 529(1) of the *Telecommunications Act 1997* (**the Act**) and subsection 33(3) of the *Acts Interpretation Act 1901* (**the AIA**).

Subsection 529(1) of the Act allows the ACMA to make rules, known as record-keeping rules, for and in relation to requiring one or more specified carriers or carriage service providers (**CSPs**) to keep and retain records.

Under subsection 529(2A) of the Act, such record-keeping rules may also require those carriers or CSPs to prepare reports consisting of information contained in those records, and to give any or all of the reports to the ACMA under subsection 529(2B) of the Act. The rules may specify the manner and form of those reports under subsection 529(2C) of the Act and provide for the preparation of the reports periodically or as and when required by the ACMA under subsection 529(2D) of the Act. The rules may require or permit such reports to be given to the ACMA in accordance with specified software requirements and specified authentication requirements under subsection 529(2E) of the Act.

Subsection 529(4) of the Act limits the scope of the ACMA's power, such that the ACMA cannot make record-keeping rules requiring the keeping or retention of records unless the records contain, or will contain, information that is relevant to the performance of the ACMA's telecommunications functions or the exercise of the ACMA's telecommunications powers.

The Rules repeal and replace the *Telecommunications (Customer Service Guarantee) Record-Keeping Rules 2011* (**the 2011 Rules**), which were due to sunset on 1 October 2023.

Purpose and operation of the Rules

The Rules are made for the purposes of ensuring that specified carriage service providers (**CSPs**) keep the necessary records, and provide the necessary information, for the ACMA to effectively:

- monitor and enforce compliance with the benchmarks relating to customer service set by the Minister under section 117B of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (**TCPSS Act**), and
- discharge its obligation to monitor and report on industry performance as provided for in the Act and in accordance with its functions under the *Australian Communications and Media Authority Act 2005* (**ACMA Act**).

The Rules require specified CSPs to:

- keep and retain records in relation to compliance with the *Telecommunications (Customer Service Guarantee) Standard 2023* (**CSG Standard**) and the *Telecommunications (Customer Service Guarantee – Retail Performance Benchmarks) Instrument 2023* (**Benchmarks**), and
- prepare and give to the ACMA reports in the form specified in the Rules and which consist of information contained in those records.

Background

Ministerial Direction

The 2011 Rules were part of a suite of customer service guarantee (CSG) related instruments which were made in 2011. The sunset dates for these instruments, including the 2011 Rules, were aligned to 1 October 2023 by the *Legislation (Telecommunications Customer Service Guarantee Instruments) Sunset-altering Declaration 2021*, to enable a thematic review of CSG arrangements by the Department of Infrastructure, Transport, Regional Development, Communications and the Arts (**the Department**).

The Department completed the CSG thematic review in June 2023 and the Minister announced that the CSG would be remade for an interim period of three years while Government considers long-term arrangements. The *Telecommunications (Customer Service Guarantee) Direction 2023 (CSG Direction)* was made following the thematic review and directed the ACMA to make the CSG Standard in substantially the same form as the *Telecommunications (Customer Service Guarantee) Standard 2011 (the 2011 CSG Standard)*.

The CSG Standard

The CSG Standard sets out the applicable CSG performance standards for telephone users, and therefore is a key telecommunications consumer safeguard. The CSG Standard sets out the standards for connection, appointment keeping, and fault or service difficulty repair. It also specifies the compensation available to customers under the TCPSS Act when these standards are not met and sets out the circumstances in which a consumer can agree to waive their rights under the CSG Standard.

The Benchmarks

The Benchmarks were made in substantially the same form as the *Telecommunications (Customer Service Guarantee – Retail Performance Benchmarks) Instrument (No.1) 2011* which was due to sunset on 1 October 2023.

The Benchmarks set out the minimum retail performance benchmarks that specified CSPs must comply with in relation to the CSG Standard. Under subsection 117C(2) of the TCPSS Act, a CSP must meet or exceed the minimum retail performance benchmarks.

Under section 4 of the Benchmarks, a CSP is a qualifying carriage service provider (**QSP**) for a benchmark period if, on the last day of the financial year preceding that benchmark period, the CSP supplied 100,000 CSG services or more where the CSP was obliged to comply with any one or more of the performance standards in respect of the CSP's supply of those CSG services.

The Rules

The ACMA has certain enforcement powers under the Act with respect to non-compliance by CSPs with the TCPSS Act, including where a CSP fails to meet the benchmarks. To monitor performance and take any appropriate enforcement action, the ACMA requires reliable records to be both kept and reported by industry.

Compliance with the Rules is a requirement of section 530 of the Act, and subsection 531(1) provides that a person must not make an incorrect record in purported compliance with the rules made under section 529. Carriage service providers are required by subsection 101(1) of the Act to comply with the service provider rules that apply to them, which include the rules set out in Schedule 2 to the Act (see section 98 of the Act). Clause 1 of Schedule 2 to the Act provides that a service provider must

comply with the Act. The Act prescribes the following maximum civil penalties for a contravention of subsection 101(1):

- \$10 million for a body corporate (see s.570(3)(a)); and
- \$50,000 for a person other than a body corporate (see s.570(4)(b)).

The ACMA also has available to it a range of other potential enforcement options for failure to comply with a service provider rule, including giving a formal warning (s.103 of the Act) and giving a remedial direction requiring specified action be taken towards ensuring that the provider does not, or is unlikely to, contravene the rule in the future (s.102 of the Act).

Subsection 531(2) of the Act also provides that failure to comply with subsection 531(1) of the Act is an offence with a maximum penalty of 100 penalty units.

Under the Rules, a QSP must provide performance reports for each benchmark period, which is the financial year 2023/24 and each financial year that follows. Unless otherwise agreed by the ACMA in writing, a QSP must provide reports to the ACMA within 40 working days of the end of each benchmark period.

The Rules require some of the reported information to be disaggregated into state or territory, national and community size classification (Urban, Major Rural, Minor Rural, Rural and Remote areas) in accordance with the Benchmarks definitions and obligations.

QSPs must send reports prepared under the Rules to the ACMA as specified in the Rules.

A provision-by-provision description of the Rules is set out in **Attachment A**.

The Rules are a disallowable legislative instrument for the purposes of the *Legislation Act 2003* (**the LA**).

Documents incorporated by reference

The Rules incorporate the following Acts and legislative instruments (including by adoption of definitions), or otherwise refer to them:

- the Act
- the AIA;
- the LA;
- the TCPSS Act;
- the CSG Standard;
- the Benchmarks; and
- *A New Tax System (Australian Business Number) Act 1999*.

The Acts and legislative instruments listed above may be accessed, free of charge, from the Federal Register of Legislation (www.legislation.gov.au). The Acts and instruments listed above are incorporated as in force from time to time, in accordance with section 589 of the Act.

The 2011 CSG Rules are also incorporated by reference, as in force immediately before the day on which the new CSG Standard commences, to support transitional arrangements as set out in Part 6 of the Rules. The 2011 Rules are available, free of charge, from the Federal Register of Legislation (www.legislation.gov.au).

Consultation

Before the Rules were made, the ACMA was satisfied that consultation was undertaken to the extent appropriate and reasonably practicable, in accordance with section 17 of the LA.

Department CSG Thematic Review

As noted above, the Department completed a thematic review of CSG arrangements in June 2023. The CSG Direction was made following the thematic review, to provide for CSG arrangements to continue for an interim period of three years, while Government considers long-term arrangements.

The Department undertook a 6-week public consultation on the CSG arrangements from 17 February to 27 March 2023. The thematic review received 14 submissions from industry, consumer and government groups and individuals. As a result of the consultative process, the Minister decided to issue the CSG Direction to the ACMA to remake the sunseting CSG Standard instrument for a period of three years, with necessary updates and minor amendments. During that period, further consideration by the Department of the long-term future of the CSG and how consumers can best be protected is to take place.

The Department announced the outcomes of the thematic review on 7 June 2023. The public consultation and outcome is available online at <http://www.infrastructure.gov.au/have-your-say/thematic-review-customer-service-guarantee-csg>.

ACMA targeted CSG Standard consultation

The ACMA conducted targeted consultation between 28 July and 4 August 2023 with Telstra, Optus and the Australian Communications Consumer Action Network (ACCAN) on the suitability of the proposed CSG Standard to meet the Direction.

Based on the prescriptive nature of the Direction, and the public consultation undertaken as part of the thematic review by the Department, a targeted consultation on the CSG Standard was considered suitable.

The ACMA's targeted consultation indicated general acceptance of the three-year proposal for the CSG Standard.

ACMA targeted consultation on the Rules

The ACMA conducted a targeted consultation with the same three stakeholders as the CSG Standard – Telstra, Optus and ACCAN – on the proposal to make the Rules in substantially the same form as the 2011 CSG Rules. The consultation took place between 4 September and 19 September 2023.

None of the stakeholders consulted opposed the proposal.

ACCAN was supportive of the proposal but also stated a desire to expand the data collected and reported about CSG performance. In the circumstances, the ACMA considered it preferable to prioritise ensuring the Rules requiring record-keeping were maintained continuously without sunseting and to subsequently consider potential substantive changes.

Telstra suggested that the requirement for hard copy annual reports to be provided by registered post or by hand was no longer current or facilitative for QSPs or the ACMA. This requirement was removed from section 17 of the Rules, such that annual reports can be provided by email in an electronic form as agreed by the ACMA.

Optus stated it had no concerns with the minor changes to the Rules.

Regulatory impact assessment

The ACMA considered whether a regulatory impact analysis process was required by undertaking a preliminary assessment. Based on this preliminary assessment the Office of Impact Analysis (**OIA**) determined that the proposal to make the Rules is minor or machinery in nature and has therefore verified that no further regulatory impact analysis is required – OIA reference number OIA23-04988.

Statement of compatibility with human rights

Subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* requires the rule-maker in relation to a legislative instrument to which section 42 (disallowance) of the LA applies to cause a statement of compatibility with human rights to be prepared in respect of that legislative instrument.

The statement of compatibility set out below has been prepared to meet that requirement.

Overview of the Rules

The Rules repeal and replace the 2011 Rules. The 2011 Rules were due to sunset on 1 October 2023. The anticipated outcome is to maintain the capability of the ACMA to monitor and enforce compliance with the Benchmarks, and therefore the ongoing effective and efficient operation of the CSG performance standards in the CSG Standard.

Human rights implications

The ACMA has assessed whether the Rules are compatible with human rights, being the rights and freedoms recognised or declared by the international instruments listed in subsection 3(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* as they apply to Australia.

Having considered the likely impact of the Rules and the nature of the applicable rights and freedoms, the ACMA has formed the view that the Rules do not engage any of those rights or freedoms.

Conclusion

The Rules are compatible with human rights as they do not raise any human rights issues.

Notes to the *Telecommunications (Customer Service Guarantee) Record-Keeping Rules 2023*

Part 1 Preliminary

Section 1 Name

This section provides for the Rules to be cited as the *Telecommunications (Customer Service Guarantee) Record-Keeping Rules 2023*.

Section 2 Commencement

This section provides for the Rules to commence at the start of the day after the day they are registered on the Federal Register of Legislation.

The Federal Register of Legislation may be accessed free of charge at www.legislation.gov.au.

Section 3 Authority

This section specifies the provision that authorises the making of the Rules, namely section 529 of the *Telecommunications Act 1997* (the Act).

Section 4 Repeal of the *Telecommunications (Customer Service Guarantee) Record-Keeping Rules 2011*

This section provides that the previous record-keeping rules instrument, the *Telecommunications (Customer Service Guarantee) Record-Keeping Rules 2011* (Registration No. F2011L01997) is repealed.

Section 5 Repeal of this instrument

This section provides for the repeal of the Rules on the same day as the repeal of the *Telecommunications (Customer Service Guarantee) Standard 2023*. That day is presently scheduled to be 31 August 2026.

Section 6 Definitions

This section defines key terms used in the Rules. Unless the contrary intention appears, certain specified expressions used in the Rules have the meanings given to them in the Act, the Benchmarks or the CSG Standard.

Section 7 Qualifying carriage service providers

This section defines a qualifying carriage service provider for a benchmark period (QSP), using a definition which corresponds with section 4 of the Benchmarks, being a carriage service provider that supplied 100,000 or more CSG services on the last day of the financial year preceding that benchmark period where it was obliged to comply with CSG performance standards.

Section 8 References to other instruments

This section has the effect that in the instrument, unless the contrary intention appears:

- a reference to any other legislative instrument is a reference to that other legislative instrument as in force from time to time; and

- a reference to any other kind of instrument or writing is a reference to that other instrument or writing as in force from time to time.

Part 2 Keeping of Records

This Part deals with the recording by a QSP of its performance against certain Benchmarks requirements. As the Benchmarks only contain benchmarks in relation to CSG services, QSPs will have to ensure that their record-keeping systems are capable of differentiating between requests that relate to CSG services and requests that relate to enhanced call handling features (as defined in the CSG Standard).

Section 9 Records relating to the number of CSG services supplied

This section deals with the recording by a QSP of the total number of CSG services that it supplied on the last day of each financial year preceding a benchmark period. This information will be relevant to establishing whether a carriage service provider is a QSP under the definition at section 6 of the Rules and section 4 of the Benchmarks.

Section 10 Records relating to in-place connection requests

This section sets out the record-keeping requirements for a request by a customer to a QSP for a CSG service to be connected at a site that has an in-place connection.

Amongst other record-keeping requirements, if there is a failure to comply with the CSG Standard regarding such a request which is wholly or partly due to the acts or omissions of another CSP, certain information regarding that failure must be recorded.

Section 11 Records relating to new connection requests

This section sets out the record-keeping requirements regarding a request by a customer to a QSP for a CSG service to be connected at a site that does not have an in-place connection.

Amongst other record-keeping requirements, if there is a failure to comply with the CSG Standard regarding such a request which is wholly or partly due to the acts or omissions of another CSP, certain information regarding that failure must be recorded.

Section 12 Records for CSG services required to be connected in guaranteed maximum connection period specified in subsection 11(2) of the CSG Standard

Section 12 requires a QSP to keep records where CSG services are required to be connected in the guaranteed maximum connection period specified in subsection 11(2) of the CSG Standard.

Section 13 Records relating to reports of faults or service difficulties

This section sets out the record-keeping requirements regarding a fault or service difficulty report made by a customer to a QSP.

Amongst other record-keeping requirements, if there is a failure to comply with the CSG Standard regarding such a report which is wholly or partly due to the acts or omissions of another CSP, certain information regarding that failure must be recorded.

This section defines a “fault or service difficulty report” so as not to include enhanced call handling features, which are excluded under subsection 9(3) of the Benchmarks.

Section 14 Records relating to the keeping of appointments

This section sets out the record-keeping requirements regarding a connection or rectification appointment involving a QSP. This term “connection or rectification appointment” is defined for the purposes of this section.

Amongst other record-keeping requirements, if there is a failure to comply with the CSG Standard regarding such an appointment which is wholly or partly due to the acts or omissions of another CSP, certain information regarding that failure must be recorded.

Part 3 Retention of Records

Section 15 Period for retention of records

A QSP that is required to keep records under Part 2 must retain those records for a period of two years from the end of the relevant benchmark period.

Part 4 Reporting

Section 16 Requirement to prepare compliance reports

This section sets out the reporting requirements which a QSP must follow.

The information to be included in the compliance reports is contained in Schedule 1, and the required format is set out in Schedule 2.

Section 17 Requirement to give compliance reports to the ACMA

This section sets out the timing and method for a QSP to give a compliance report to the ACMA. QSPs are required to give compliance reports to the ACMA no later than 40 working days after the end of the relevant benchmark period or such later time as allowed by the ACMA. The compliance reports must be sent by email to an address advised by the ACMA on its website. A compliance report may be delivered in an electronic format agreed to by the ACMA in writing.

Part 5 Audit

Section 18 Auditing of compliance with these Rules

This section provides that if the ACMA forms a view on reasonable grounds that an audit is necessary, it may write to a qualifying carriage service provider to require it to engage an auditor to conduct an audit of the provider’s compliance with the Rules. If the ACMA forms a view on reasonable grounds that the initial audit is inadequate, it may require a follow-up audit.

Section 19 Audit terms of reference

A carriage service provider that has received an audit notice is required to provide draft terms of reference for the audit to the ACMA for approval.

The ACMA may require the provider to make changes to the draft terms of reference. If the revised terms do not give effect to the changes required by the ACMA and are rejected, the ACMA may specify the terms of reference for the audit.

This section describes the approval process as well as certain matters that must be included in the terms of reference and the objectives of the audit, including the preparation of compliance reports and record-keeping.

Section 20 Nomination of auditor

Under this section, a carriage service provider that has received an audit notice is required to notify its choice of auditor to the ACMA for approval.

The ACMA may approve or reject the choice of auditor. If rejected, the provider must notify a new chosen auditor to the ACMA for approval. If the ACMA does not approve the new chosen auditor, it may require the provider to contract a specified auditor or to choose an auditor from a specified group of auditors.

This section describes the approval process as well as certain steps that the provider must take to ensure that the auditor complies with the terms of reference and can form an opinion in line with the objectives in subsection 19(7).

Section 21 Requirement to provide an audit report to the ACMA

Section 21 requires an audited provider to give an audit report received from the auditor to the ACMA within 14 days, or longer if agreed to in writing by the ACMA.

It also requires the carriage service provider to take all necessary steps to ensure the audit report includes an audit plan, a memorandum stating how the scope and objectives have been applied and an expression of an opinion on compliance report preparation and record-keeping compliance.

Part 6 Transitional

Section 22 Retention of records

This section preserves the obligation under the 2011 Rules to retain, for a minimum period, records which were required to be kept under Part 2 of the 2011 Rules.

For example, if a record would have been required to be retained until 1 October 2025 in accordance with Part 3 of the 2011 Rules, this section requires that record be kept until 1 October 2025 to meet the minimum 2-year retention period.

Section 23 Audit

This section extends the reference in subsection 18(2) to ‘these rules’ to include the 2011 Rules, and the reference in subsection 18(3) to ‘subsection 17(1) of these rules’ to include subsection 14(1) of the 2011 Rules. This is to allow for the scope of an audit under Part 5 to extend to compliance with the requirements under the 2011 Rules.

Schedule 1 Information to be included in a compliance report

Schedule 1 sets out the information to be included in a compliance report prepared under Part 4.

Schedule 2 Form of Compliance Report

This schedule specifies the format of a compliance report prepared under Part 4 in tables, and provides instructions for completion.