



Australian Government

Department of Infrastructure, Transport,  
Regional Development and Communications

# Protecting Critical Infrastructure and Systems of National Significance regulatory reforms - Regulation Impact Statement

## Addendum in relation to Telecommunications (Carriage Service Provider – Security Information) Determination 2022 and Telecommunications (Carrier Licence Conditions – Security Information) Declaration 2022

June 2022

### Outline

On 11 December 2020 the Department of Home Affairs published a Regulation Impact Statement (RIS) attached to the Security Legislation Amendment (Critical Infrastructure) Bill 2020 (the SLACI Bill) (commenced in December 2021). This RIS addendum provides further information in regards to two instruments that ensure that the positive security obligations (PSOs) now contained in the *Security of Critical Infrastructure Act 2018* (the SOCI Act) that apply to certain critical infrastructure sectors apply also to the telecommunications sector through the *Telecommunications Act 1997* (the Tel Act).

### Overview of instruments

As part of the Australian Government's commitment to protecting the essential services that all Australians rely on, amendments were made to the SOCI Act through the SLACI Bill. In order to avoid regulatory duplication and provide clarity for industry, the Government intends for elements of the PSOs now contained in the SOCI Act for the telecommunications sector to be introduced using mechanisms under the Tel Act. The Tel Act contains a well-established regulatory framework that is familiar to industry and is embedded in how the telecommunications sector operates.

The instruments impose obligations on carriers and eligible Carriage Service Providers (CSPs) that are equivalent to two elements of the PSOs to which other sectors of the economy will be subject under the SOCI Act.

The instruments require carriers and eligible CSPs to:

- a) give the Secretary of the Department of Home Affairs (Home Affairs) operational information in relation to their assets and, where an entity other than the carrier or eligible CSP holds a direct interest in an asset owned or operated by the carrier or eligible CSP, the interest and control information of direct interest holders in the asset;
- b) give the Australian Signals Directorate (ASD) a notice of a critical cyber security incident no later than 12 hours after the carrier or eligible CSP becomes aware of the incident; and
- c) give the ASD a notice of other cyber security incidents no later than 72 hours after the carrier or eligible CSP becomes aware of the incident.

Eligible CSPs (as defined in section 127 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999*) that are not carriers would be subject to the obligations in the proposed service provider rule. Eligible CSPs include providers of standard telephone services to residential or small business customers, public mobile telecommunications services and carriage services to access the internet.

The instruments are made using the following provisions in the Tel Act:

- Section 63(1) of the Tel Act provides that the Minister may, by legislative instrument, declare that carrier licenses be made subject to such conditions as are specified in the instrument.
- Section 63(3) provides that the Minister may, by legislative instrument, declare that carrier licenses granted to specified persons during specified period be made subject to such conditions as are specified in the instrument.
- Section 99(1A) provides that the Minister may, by legislative instrument, make a determination setting out rules that apply to Carriage Service Providers (CSPs) in relation to the supply of specified carriage services – known as a Service Provider Determination.

It is important to note that the definitions used for the instruments do differ to those in the SOCI Act. The instruments are subordinate to the Tel Act and, therefore are bound by those definitions in the Tel Act due to the limitations of an instrument authorised by an Act. However, the definitions do not alter the effect or scope of the instruments in a material way to the effect or scope of the SOCI Act. As such the effect and scope, and as a result the impact on the telecommunications sector, is largely the same.

## Consultation

The Department began consultation on the instruments in February 2022. Section 64 of the Tel Act requires the Minister give each carrier licence holder a draft version of the proposed new carrier licence condition and invite them to make submissions within at least 30 days. This consultation occurred in February and March 2022. While the Minister is not required to consult service providers on the proposed service provider rule under the Tel Act, submissions on the proposed rule from eligible CSPs were also sought to align with the treatment of carriers. The consultation paper highlighted two main objectives, to seek input on the instruments, and to understand the estimated costs on the sector the new regulation would impose. The Minister has considered responses and incorporated feedback into the instruments where that feedback is within the legislative authority of an instrument and where it is consistent with the objectives of the PSOs.

A formal departmental response to this consultation will be made available on the Department's website and the Department will meet with affected parties on to discuss the contents of the response.

## Impacts

This addendum anticipates that the implementation of the instruments will have an impact consistent with what was considered as part of the SOCI Act amendments and the RIS published on the Office of Best Practice Regulation website.<sup>1</sup>

The feedback indicated that costs would be significant but no quantifiable figures were provided. As such the Department has drawn on the work that Home Affairs undertook in their own regulation impact assessments in assessing the impact of the instruments which also includes an assessment of the benefits of the regulation. This can be found on pages 30-33 of the aforementioned published RIS.

The telecommunications sector raised concerns during consultation that broad definitions contained in the instruments would increase the burden posed by reporting requirements.

The instruments have been drafted to ensure that the critical infrastructure obligations align across sectors and the obligations in the SOCI Act. These issues were raised with Home Affairs in regards to other critical infrastructure sectors and through various channels the scope of detail required and what information the Australian Government considers important was clarified.

In regards to specific feedback on the definitions:

- “essential goods or services”.
  - This will be defined for the purposes of the instrument in a note. The intent is only to capture those goods or services that are critical to the health, safety, or good order of the Australian community.
- “assets”
  - The instruments make it clear that assets only include those tangible assets that are owned or operated by a carrier, and the tangible asset is required for the delivery of a carriage service. The Department accepts that this definition may be interpreted to require a catalogue of every pole and wire. This is not the intention. In the instruments we have clarified that this doesn’t include customer premises equipment and included a provision that requests asset information to be provided at the level of systems and network units, where practicable. The Department will work with industry to clarify scope through various channels.

The Department is committed to working with industry through multiple channels to ensure that the burden of the regulation is no more than necessary to meet the Australian Government’s obligation to ensure the security of Australia’s critical infrastructure. This includes provisions to sunset the instruments 18 months after commencement, and continuing our collaboration with the telecommunications sector in regards to the broad security reforms to the Tel Act.

## Compliance

The Carrier licence conditions and the CSP rules are both subject to a compliance regime, section 68 and section 101 of the Tel Act respectively. This has a direct equivalent in sections 23 and 24 of the SOCI Act, though the penalties for non-compliance differ. The SOCI Act has a fixed civil penalty of 50 penalty units, whereas the Tel Act has a maximum civil penalty of \$10 million for each contravention if the entity is a body corporate, or \$50,000 for each contravention by a person other than a body corporate (section 570 of the Tel Act).

It is also important to note that the Federal Court decides if a contravention of a civil penalty provision under the Tel Act has occurred, and what the appropriate pecuniary penalty it deems appropriate for the contravention. In regards to civil penalties under the SOCI Act, contraventions are determined by the Secretary of Home Affairs. While the increase in civil penalties under the Tel Act means contravention carries a more severe maximum pecuniary consequence, this is balanced by the Federal Court having the discretion to leverage a pecuniary penalty it deems appropriate in the circumstance. The Department, on balance, considers that this is largely comparable to the provisions under the SOCI Act should an entity contravene the obligations contained in the instruments.

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<sup>1</sup> <https://obpr.pmc.gov.au/published-impact-analyses-and-reports/protecting-critical-infrastructure-and-systems-national>

## Future Reforms

As outlined above, the Department is engaged in broader security reforms of the Tel Act to bring further security obligations enshrined in the SOCI Act through the *Security Legislation Amendment (Critical Infrastructure Protection) Bill 2022* (SLACIP Bill) into the Tel Act. This includes the obligation to prepare and maintain an all hazards risk management program (RMP).

The Parliamentary Joint Committee on Intelligence and Security (PJCIS) released its statutory review into the operation of the Telecommunications Sector Security Reforms (TSSR) in Part 14 of the Tel Act on 7 February 2022. The Government is now in the process of preparing a response to its six recommendations.

In due course, the Department and the Department of Home Affairs will consult with industry and the community on changes to the Tel Act that have an equivalent effect to the RMP requirements of the SOCI Act. At the same time, we will also consult on other potential changes to the Tel Act and its supporting administrative arrangements to both respond to the PJCIS report and ensure the regulation of telecommunication security continues to be fit for purpose. This will include a review of the implementation of the instruments to ensure that when they are incorporated into the Tel Act that the burden of the regulation is no more than necessary to meet the Australian Government's obligation to ensure the security of Australia's critical infrastructure.

## Conclusion

Overall the Department has considered the regulation impact caused by the instruments that have been made and consider that, while there is a financial impact to be borne by the telecommunications sector, this impact consistent with the regulation impact assessment conducted by the Department of Home Affairs attached to the SLACI Bill.