



# Consultation on a Registration or Licensing Scheme for Carriage Service Providers

**ACCC Submission**

December 2023

## **Acknowledgement of country**

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Australian Competition and Consumer Commission

Land of the Ngunnawal people

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# Introduction

The Australian Competition and Consumer Commission (ACCC) welcomes the opportunity to provide comments to the Department of Infrastructure, Transport, Regional Development, Communication and the Arts' (the Department) consultation on a registration or licensing scheme for Carriage Service Providers.<sup>1</sup>

The ACCC is the economy-wide competition regulator responsible for enforcing the *Competition and Consumer Act 2010* (Cth). We protect Australian consumers by fostering competitive, efficient, fair, and informed Australian markets, including telecommunications markets.

Telecommunications services are essential. They support a vast range of access to Government services, work, business, education, health, and entertainment needs.

The telecommunications sector is very diverse, with more than 1,000 retail service providers. The majority of the service providers are telecommunications resellers that provide services to end-users using third-party owned infrastructure. This involves resellers purchasing a service from network wholesalers and on-selling this service to consumers or businesses.

There has traditionally been a low barrier to enter the telecommunications market as a reseller. Consequently, the reseller industry is fragmented and is comprised largely of small to medium entities, reflecting the relatively small capital investment required to enter this market. At the other end of the market are larger providers, with significant market share, that directly sell services to end-users.

Given the large number of participants in the market, and persistent poor conduct across the industry more generally, the ACCC considers there is both the need to introduce a registration or licensing scheme and the scope to design a scheme that can sit within the existing framework.

Such a scheme could bolster the sector, to ensure that participants who intend to provide retail telecommunications services can demonstrate their capacity to meet and comply with basic consumer safeguards and ensure that compliance with those safeguards is a condition of their ongoing participation.

We consider that a registration or licensing scheme would promote greater consumer confidence in the sector, and in the overall telecommunications consumer safeguards framework. This approach would better reflect a mature, well-functioning market, as well as the essential nature of the services being provided.

The current licensing regime for telecommunications providers only applies to carriers who own network units that deliver carriage services.<sup>2</sup> In contrast, carriage service providers (CSPs), who use licensed networks to provide telecommunications services, are not required to hold a licence or be registered in any way.

While the current regulatory regime provides for service provider rules and gives the Minister various powers (such as the ability to impose conditions on licences and to make determinations for class licensing), we consider that these are not flexible or responsive enough to address current issues in this sector. We consider that a positive upfront

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<sup>1</sup> Department of Infrastructure, Transport, Regional Development, Communications and the Arts, *Registration or Licensing Scheme for Carriage Service Providers Discussion Paper*, September 2023.

<sup>2</sup> Carrier network facilities may include transmission infrastructure, cabling, wireless networks and satellite facilities.

requirement, which applies at a minimum to CSPs operating as retailers, will provide a more direct, responsive and efficient tool to protect consumers and raise operating standards.

This submission addresses the key issues raised in the Department's consultation paper. However, we recognise that the design of the scheme will inevitably involve further considerations and the ACCC is happy to continue to contribute to this discussion.

## Objectives of a registration or licensing scheme

The ACCC has argued for some time that the existing regulatory regime for telecommunications has not delivered strong enough protections for consumers.

Too often in the sector, the incentives of industry participants to mislead or deceive consumers in order to gain market share and maximise profit have been higher than the incentives to comply with the industry's own benchmarks and rules. Additionally, the ACMA currently lacks the power to impose conditions on a CSP's participation in the telecommunications market, or to exclude a CSP from the market for serious or repeated failure to meet its obligations. A registration or licensing scheme would provide the ACMA with a toolkit of options to address CSP non-compliance, depending on the extent of the rule breach and the harm caused.

Further, in the absence of a requirement for CSPs to be registered or licensed, there is currently no single consolidated list of all market participants. Without such visibility, the regulator is unable to track industry compliance or monitor market structure. The absence of a comprehensive list also hampers the ACMA's ability to educate the sector regarding their obligations as essential service providers. This absence has similar implications for the ACCC's ability to undertake education and compliance activities, such as informing CSPs about current and emerging regulatory issues, e.g. the prevalent and ongoing issue of scams activities which are often perpetrated using telecommunications services.

Given this, the ACCC considers that a registration or licensing scheme should:

- apply standards to CSPs to ensure that they meet a minimum threshold appropriate to the sellers of essential services
- assist to prevent certain operators from re-entering the market or phoenixing
- assist CSPs to understand their regulatory obligations, and incentivise them to comply with those obligations
- ensure that eligible CSPs are (at a minimum) members of, and comply with, the Telecommunications Industry Ombudsman (TIO) scheme, and enable action to be taken in the event of non-compliance with the scheme
- allow for the consolidation of a fulsome list of CSPs
- provide the ACMA with a range of tools to deal with CSPs including the impositions of conditions on licences or registrations, leading to, in the most egregious instances, the potential for removal of the right to operate. This would ensure that meeting regulatory obligations is not seen as a compliance risk, but rather as an operating risk.

In relation to our final point, these tools should provide the ACMA, as the industry regulator, with flexibility to respond quickly to emerging issues and breaches. For instance, the COVID-19 health pandemic required some essential industry sectors to implement measures to safeguard consumers for the duration of any health orders. Without this, the framework may not achieve the stronger safeguards that are needed.

We note that the Department's consultation paper has asked whether issues with transparency and enforcement outweigh potential issues of barrier to market entry or competition impacts, such that the creation of a registration or licensing scheme is warranted. In light of the fact that there are currently 1,500 'eligible CSPs' and a much larger number of general CSPs in the current Australian telecommunications market,<sup>3</sup> the ACCC does not hold concerns about the potential competition impacts of the introduction of the proposed registration or licensing scheme. In fact, we consider that the increased transparency which a registration or licensing scheme could promote competition, including through improved consumer confidence in a market populated by credible and compliant CSPs.

We further emphasise that telecommunications services are essential services, and that checks and balances for entry to the telecommunications market is entirely appropriate and consistent with other essential services markets.

## Design considerations for a registration or licensing scheme

Currently, anyone can supply retail telecommunications services. Minimum standards for entry will ensure all that participants can demonstrate their capacity to supply services under the telecommunications regulatory framework to end-users.

We consider that the scope of any registration or licensing scheme should be targeted at retail providers, that is, those CSPs who largely supply services to small business or consumers. This is because we see the greatest harm arising to this segment of the market.

A requirement to demonstrate financial capacity is a feature of many registration and authorisation schemes. For example, in energy, retailers must first meet certain criteria before being 'authorised' to supply gas or electricity. These criteria include a suitability criterion, financial capacity, and organisational and technical capacity.

### **Suitability criterion**

A suitability criterion is critical to ensure that telecommunications, as an essential service, is only provided by 'suitable' entities. We consider that anyone seeking to supply retail telecommunications services must demonstrate that they are a 'fit and proper' person. This assessment will be an important component to a CSP demonstrating a willingness and readiness to comply with the telecommunications regulatory regime.

Fitness and propriety can be assessed by having regard to previous commercial dealings, and whether there has been any improper conduct in previous business dealings. This

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<sup>3</sup> Department of Infrastructure, Transport, Regional Development, Communications and the Arts, *Registration or Licensing Scheme for Carriage Service Providers Discussion Paper*, September 2023.

assessment also relies on having attributes of good character: diligence, honesty, integrity, and judgement as can be seen in other industry registration or authorisation schemes.

We note that, while there are many smaller providers that contribute positively to competition within the market, we have identified a small number of providers that operate outside of the regulatory purview and have engaged in conduct that recklessly harms consumers. These sorts of actions undermine the sector more generally. These types of matters can also be difficult to remedy, and can often be resource intensive for the TIO, ACMA and/or the ACCC to investigate and enforce.

If entry to this market was subject to a set of minimum standards of suitability, which reflect the essential nature of telecommunications services, this may provide a level of deterrence against providers who intend to breach the rules to maximise profit.

Such a criterion could address some of the issues which have been identified regarding 'rogue' providers.

## **Financial capacity**

We note that energy retailers typically manage significant financial risk in order to provide consumers with predictable bills while managing volatile wholesale markets. Consequently, the AER's authorisation scheme includes rules around financial capacity. Given that authorisation is a point-in-time assessment, the AER imposes ongoing prudential assessments of energy retailers to ensure that they have sufficient financial capacity to operate in wholesale energy markets.

This kind of financial threshold is unnecessary for telecommunications retailers, given the way in which telecommunications reseller or wholesale services are sold. Notwithstanding, we consider that the design of any telecommunications registration or authorisation scheme should take into account how retail CSPs are supplying services.

At a minimum, CSP retailers should be required to commit to meeting any financial orders or compensation directed to be paid by external dispute resolution bodies such as the TIO as part of their operation within the sector.

## **Organisational and technical capacity**

We consider that businesses should be required to demonstrate similar operational and technical capacity to seek registration as a CSP.

This is consistent with other essential services, including energy where the AER's authorisation scheme requires that businesses seeking to operate as energy retailers demonstrate they have the organisational and technical capacity to do so. This includes, among other things:

- proof of ability to comply with regulatory obligations
- details of the business' compliance strategy
- details of the relevant market experience of key staff or executives
- details of any third-party arrangements, including with consultants or businesses who have relevant market experience.

## **Integration with other obligations**

Eligible CSPs are currently required to be a member of, and comply with, the TIO scheme. We consider that a significant benefit of a registration or authorisation scheme is that it will require that, at a minimum, all relevant CSPs are members of, and comply with, the TIO scheme, which would enable action to be taken in the event of non-compliance.

# Enforcement of a registration or licensing scheme

A registration or licensing scheme should provide the ACMA with a broad range of tools, including imposing licence-type conditions, banning powers, or, ultimately, revocation of the right to operate in the market in serious or particularly egregious matters.

If the ACMA is able to impose conditions on a CSP, on a short-term or long-term basis, either at the time of registration or at a later time, e.g. due to compliance or enforcement issues or after a review, this will introduce significant incentives for CSPs to comply with the broader regulatory framework for telecommunications.

Further, being able to remove a rogue provider that is creating an operating risk from the sector will be more effective in preventing consumer harm and can send a strong deterrent message to other providers than the imposition of penalties.

We note that to remove a provider's ability to operate in the industry is the strongest action a regulator can take against a regulated entity. It would only be warranted in cases where the provider's conduct was designed to intentionally harm the market or consumers, or in cases of repeated serious misconduct. While likely to be rarely required, at present this option is not available to the ACMA, but the introduction of a registration or licensing scheme would allow this action to be taken when necessary.

This type of framework could also complement obligations within, or action taken under, other aspects of the consumer safeguards framework. For instance, a market participant could be required to provide evidence of its membership of the TIO as a condition of entry to the sector, or a licence-type condition requiring a stronger compliance system could be imposed by the ACMA where a participant is found to have breached the ACL on multiple occasions.

## **Financial implications of the implementation of a registration or licensing scheme**

It is important that the costs of establishing a new framework be weighed against the lower regulatory and compliance costs that would likely follow after it is established. Taking enforcement action through a Court process can be time consuming, resource intensive and costly, both for the regulator and the provider. Further, any increase in direct regulation by the ACMA would require additional resources to meet increased compliance and enforcement costs.

However, a registration or licensing scheme of the type being proposed would also make available to the ACMA a broader range of targeted remedies as an alternative to Court

proceedings. This could result in a stronger emphasis on compliance, and less on enforcement, leading to lower costs over the longer-term.