

The logo for Optus, consisting of the word "OPTUS" in a bold, teal, sans-serif font.

Submission in response to
DITRDCA Discussion Paper

**Registration or licensing
scheme for carriage
service providers**

Public Version

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INTRODUCTION

1. Optus welcomes the opportunity to provide feedback on the Department of Infrastructure, Transport, Regional Development, Communications and the Arts (DITRDCA) Discussion Paper (the Discussion Paper) on registration or licensing scheme for Carriage Service Providers (CSPs).
2. Optus supports a proposal for a CSP register and considers that the design of such arrangements should be informed by the overarching objective of a CSP Register – to assist the ACMA with enforcement action. Therefore, Optus supports a light touch approach, with information required for registration being that which the ACMA would need to contact a CSP for compliance.
3. Optus supports all CSPs being required to register and for there to be penalties or consequences if CSPs fail to do so, particularly where registration requirements are simple information requirements.
4. Optus considers that any processes for deregistration should be subject to procedural fairness considerations and include avenues for review, as deregistration, if available, should only be considered where there is serious, deliberate and repeated misconduct. Given the implications of deregistration, it should not be left to administrative discretion but the result of a Court Order.
5. In our opinion, a CSP registration scheme will address many, if not all, of the criticisms that some advocates levy at the long-standing telecommunications co-regulatory approach. The main criticism often relates to difficulties around enforcement of obligations – this will be addressed by CSP registration.
6. The co-regulatory approach in the telecommunications industry has proven successful in addressing new issues and reducing complaints. Optus supports maintaining the operation, purpose and escalating enforcement framework for industry codes in its current form. Importantly, we expect that a CSP registration scheme will address the perceived short-comings of a co-regulatory approach, and thereby remove the need for any review of this approach.

PROPOSED SCHEME

7. The Discussion Paper seeks feedback on a proposal for a registration or licensing scheme for CSPs to assist ACMA enforcement. Design considerations for the scheme include whether a light touch approach should be taken, taking into account the following aspects:
 - (a) What sort of information should be required for registration;
 - (b) Which CSPs should be required to register
 - (c) Whether registration should be integrated with other regulatory processes; and
 - (d) What sort of mechanisms should be in place to ensure a CSP's registration information is correct and remains up to date.
8. The Discussion Paper also considers what approaches could be taken and factors considered in excluding CSPs from the market.

A registration scheme would assist ACMA enforcement

9. Optus supports CSP registration to assist the ACMA in enforcement of telecommunications regulations and relevant Industry Codes and considers a light-touch approach should be taken.
10. Arguments made by some that Industry Codes are 'voluntary' in nature are inaccurate. Industry Codes can be, and are enforced by the ACMA – failure to comply with Industry Codes is not without consequence. However, the issue in many cases may be that the ACMA does not have a comprehensive list of CSPs and does not always know against which party to investigate and pursue enforcement action.
11. A register should be capable of ensuring the ACMA has the necessary information to pursue enforcement action against a CSP.
12. In the first instance, Optus considers that a CSP register should be implemented. A licensing scheme is likely to involve greater complexity (similar to carrier licensing) and should only be considered if the CSP registration scheme does not assist the ACMA in pursuing enforcement action, having been given an appropriate period of time to take effect (for example, three years).
13. In terms of mechanisms to ensure registration, Optus does not consider it appropriate for the onus to be on wholesalers or network providers to periodically confirm a CSP's registration. Ensuring CSPs register would be best incentivised by penalties for non-registration. Further, placing CSP compliance obligations on wholesale or network provider would be inconsistent with the Telecommunications Act and associated regulations that place direct obligations on CSPs.

Information requirements should be light-touch

14. Optus supports a light touch approach to a licensing scheme to minimise the complexity and regulatory burden associated with any such scheme.
15. Optus also supports requirements that allow easy identification of the legal entity of the CSP and the appropriate contact details for correspondence. This is all that is needed to support the objective of a CSP register to assist the ACMA in its compliance actions.
16. Optus notes that information related to executives, management and ownership of a CSP may require regular updating (particularly if a CSP is a listed company) and therefore impose a greater burden and complexity if such information is required. It is not clear that such information is necessary to support the stated objective of assisting the ACMA with enforcement action. Further, this information is readily available from corporate registrations held by ASIC. Including this information in ACMA registration would appear to be unnecessary regulatory duplication.
17. The Discussion Paper notes that information that would support the ACMA in making a quick and objective assessment of a CSP includes:
 - (a) Whether a CSP's directors have been associated with breaches of safeguards made by other corporations and/or in other sectors; and
 - (b) Whether the CSP's directors are on a list of persons disqualified from managing corporations by the ACCC or ASIC.
18. In relation to (a), it is unclear what is meant by 'associated with' or what safeguards or potentially other regulations/laws in other sectors are being referred to here. Optus

assumes this relates to the ability of the ACCC and ASIC to seek a Court Order banning a person from managing a company for contraventions of the Australian Consumer Law.

19. However, in such circumstances, if a person was already subject to a Court Order prohibiting them from managing a company, they would be in breach of the Court Order if they were a Director of a CSP. It is unclear how the person could be a Director of a CSP without breaching their Court Order. As such, there would appear to be a limited role for the ACMA in such circumstances.
20. It's not clear whether DITRDCA considers that contravening telecommunications-specific legislation and regulations should result in a Director being subject to a Court Order banning them from managing a company. This is a somewhat separate issue to whether a CSP can be listed on a CSP register. Again, if the person was subject to a Court Order banning them from being a Director, they would not be able to manage a CSP because of that reason, not because the ACMA did not register the CSP.
21. Optus would welcome clarification from DITRDCA on the circumstances contemplated here, noting that Court Orders banning someone from being a Director are considered appropriate for particularly serious and deliberate misconduct.

CSPs subject to regulation should be required to register

22. The Discussion Paper seeks feedback on the scope of CSPs that should be required to register as part of any CSP register requirements. DITRDCA has queried whether it should be 'eligible CSPs' as required by the TIO scheme.
23. Optus considers that if the purpose of a CSP Register is to assist the ACMA in enforcement action then it would be beneficial for all CSPs that could be subject to enforcement action to be required to register on the CSP register. In other words, all CSPs should be required to register and it should be an offence to provide carriage services to the public without being registered.

Excluding CSPs should be a last resort and guided by procedural fairness

24. The Discussion Paper considers matters the ACMA could consider if contemplating deregistering a CSP. These include:
 - (a) A CSP's history of compliance;
 - (b) The impact of any regulatory decision on the CSP's customers;
 - (c) The need to prevent actual or potential consumer harm; and
 - (d) Whether alternatives to deregistration could achieve the same outcome.
25. Optus agrees that deregistration should be a last resort – it has the same impact on a business as cancelling a carrier licence has on a carrier. Deregistration should be considered for serious, deliberate and repeated misconduct.
26. The telecommunications industry is a highly regulated industry and the ACMA often takes action against CSPs for strict non-compliance with technical requirements even where the CSP's actual actions do not harm or provide a better outcome for consumers. Given the material impact of deregistration, it should not be left to the administrative discretion to determine if a CSP should be deregistered.

27. Given the seriousness of deregistration it is worth considering whether such a decision should be made by a Court. At the very least there must be procedural fairness provided to the CSP and avenues for full merits review of any administrative decision.
28. In addition, it is worthwhile considering whether non-compliance with all industry Codes and laws could result in deregistration, or whether such a consequence is reserved for non-compliance with certain laws. For example, Industry Codes can duplicate obligations of laws (such as the Australian Consumer law) that could already have significant consequences such as significant financial penalties or Court Orders banning someone from being a Director. Given the detailed and prescriptive nature of some obligations in Industry Codes and regulations – such as, using the equivalent of 11 point Times New Roman font size, instead of the equivalent of 12 point Times New Roman font size – it does not seem proportionate for deregistration to be a possible outcome.

Registration will support co-regulation

29. The co-regulatory approach in the telecommunications industry has proven successful in addressing new issues and reducing complaints. However, in recent times it has been subject to some criticism by some advocates.
30. Criticisms of the co-regulatory approach have included that enforcement is difficult and that compliance with Industry Codes – a cornerstone of the co-regulatory approach – is merely voluntary. Optus does not agree with these statements. First, an understanding of the Telecommunications Act clearly shows that compliance with codes is not voluntary and there are consequences for failing to comply with an industry code.
31. A CSP Register will go some way to addressing concerns about co-regulation and enhance the co-regulatory approach by supporting enforcement of Industry Codes and other regulations.
32. Ultimately, this will enhance the co-regulatory framework, as it maintains the benefits of a co-regulatory regime – such as the flexibility provided by Industry Codes – while supporting enforcement. This strikes the right balance in strengthening the co-regulatory framework, while continuing to achieve the original purpose of co-regulation. Optus considers the co-regulatory framework will then be better placed for the future operation of the industry.