

## Investigation Report: Singtel Optus Pty Ltd

<b>File No.</b>	ACMA2019/1072
<b>Carriage Service Provider</b>	Singtel Optus Pty Limited
<b>Service or Product</b>	Landline, mobile and internet services
<b>Relevant Legislation</b>	<i>Telecommunications Act 1997</i> Telecommunications (NBN Continuity of Service) Industry Standard 2018 Telecommunications Service Provider (NBN Service Migration) Determination 2018

### Findings

The Australian Communications and Media Authority (**ACMA**) finds that Singtel Optus Pty Limited (ACN 052 833 208) (**Optus**) contravened:

- > the Telecommunications Service Provider (NBN Service Migration) Determination 2018 (the **Service Migration Determination**) 1,855 times between 1 February and 30 April 2019 (the **relevant period**)
- > the Telecommunications (NBN Continuity of Service) Industry Standard 2018 (the **Service Continuity Standard**) 143 times in the relevant period.

The number of contraventions for each provision are set out in the table below.

<b>Legislation</b>	<b>Provision</b>	<b>Number of contraventions</b>	<b>Total contraventions</b>
Service Migration Determination	subsection 9(1)	550	1,855
	section 11	568	
	subsection 16(2)	566	
	subsection 16(5)	156	
	paragraph 18(a)	15	
Service Continuity Standard	subsection 23(1)	129	143
	subsection 23(4)	14	

As Optus contravened the Service Migration Determination, it also contravened subsection 101(1) of the *Telecommunications Act 1997*. Similarly, because Optus contravened the Service Continuity Standard it also contravened subsection 128(1) of the Act.

### Background

1. On 4 June 2019, the ACMA gave Optus a notice under subsection 521(2) of the Act (the **First Notice**) requiring the provision of information and documents about its compliance with the Service Continuity Standard and the Service Migration Determination (collectively the **service continuity rules**). Optus responded to the First Notice on 1 July and 18 July 2019.
2. On 4 October 2019, the ACMA opened an investigation into Optus's compliance with the service continuity rules. On that same day the ACMA gave Optus a second notice under

subsection 521(2) of the Act (the **Second Notice**). The Second Notice sought additional information about Optus's July responses.

3. On 31 October 2019, Optus responded to the Second Notice.
4. On 10 December 2019, the ACMA gave Optus its preliminary findings in the investigation. On 17 January 2020, Optus responded to the preliminary findings.

## Relevant Facts

5. Optus supplies internet, landline and mobile services to the public. As such it is a carriage service provider (**CSP**) as defined in the Act. Optus supplies internet and landline services to consumers using, among other things, an NBN ethernet product. Therefore, Optus is an NBN CSP within the meaning of the service continuity rules.
6. The Service Migration Determination is a determination made under subsection 99(1) of the Act. As a CSP and an NBN CSP, Optus must comply with the Service Migration Determination in accordance with subsection 101(1) of the Act.
7. The Service Continuity Standard is registered under Part 6 of the Act and applies to participants in the telecommunications industry, including CSPs. As a CSP who supplies NBN services, Optus must comply with the Service Continuity Standard under subsection 128(1) of the Act.
8. The information and documents Optus supplied in response to the First Notice and the Second Notice (collectively the **Notices**) relate to services supplied in the relevant period to '**relevant customers**'. Relevant customer is defined in the Notices as:
  - a consumer:*
    - (a) whose premises are in an area which has been declared ready for service by NBN Co;
    - (b) who has entered into a consumer contract with Optus for the supply of an NBN service to their premises.

## Optus's response to the preliminary findings

9. In its response to the ACMA's preliminary findings, Optus acknowledged that while it had contravened provisions of the service continuity rules during the relevant period, it considered some of the ACMA's findings were incorrect.
10. Optus questioned the ACMA's preliminary finding that it had contravened subsection 9(1) of the Service Migration Determination in relation to 420 services that were relocated. Optus argued that the preconditions for the supply of an interim service were not met for these services as:
  - (a) the obligation to supply an interim service arises only when certain preconditions are met
  - (b) these obligations include that the migration is not a parallel migration or, where the migration is parallel, the NBN CSP and legacy CSP are different
  - (c) the concepts of parallel migration and legacy CSP are premised on the basis that the consumer has been receiving a legacy service at the premises
  - (d) in a relocation scenario, the consumer has not received a service using a legacy service at that premises immediately before migration.
11. The ACMA does not agree the obligations relating to the supply of an interim service under the Service Migration Determination are limited to circumstances where the customer had previously been receiving a legacy service at the premises. The rules apply to a migration, which is defined as the 'process of connecting premises to the NBN which connection allows for the supply of an NBN service to the consumer'. For the reasons in paragraphs 15 – 20, the obligation to supply an interim service applies in relation to those 420 customers.

12. Optus also contested the ACMA's use of Optus's contravention of section 11 to make a subsequent finding that Optus contravened paragraph 18(a) by failing to keep appropriate records. The ACMA accepts that Optus has not contravened paragraph 18(a) of the Service Migration Determination on the basis that it did not keep a record of its compliance with section 11. Therefore, the ACMA makes no findings of contravention in this final report for 413 cases specified in the preliminary investigation report where the ACMA made a preliminary finding that Optus had contravened paragraph 18(a) of the Determination because it did not keep a record of its compliance with section 11.

## Findings and Reasons

13. The ACMA is satisfied that Optus contravened the Service Migration Determination 1,855 times and the Service Continuity Standard 143 times. The reasons for the ACMA's findings are set out below.

### ***Section 9 of the Service Migration Determination: Requirement to supply an interim service***

14. Part 3 of the Service Migration Determination sets out rules about the supply of interim services to consumers who experience problems migrating to the NBN.
15. Under subsection 9(1) of the Service Migration Determination an NBN CSP must, subject to limited exceptions, supply an interim service where:
  - (a) the migration at the consumer's premises has been unsuccessful, and is unlikely to be successful within three working days of the NBN CSP becoming aware of the unsuccessful migration (**unsuccessful migration event**); or
  - (b) the migration at the consumer's premises has been successful, but an operational NBN service has not been supplied to the consumer and cannot be supplied to that consumer within three working days of the NBN CSP becoming aware that the consumer's NBN service is not operational (**non-working NBN service event**).
16. Section 8 of the Service Migration Determination sets preconditions for when this obligation applies. For this investigation the relevant preconditions are that:
  - (a) the area in which the consumer's premises is located has been declared ready for service by NBN Co (paragraph 8(a)); and
  - (b) an NBN CSP has entered into a consumer contract with the consumer for the supply of an NBN service to the premises (paragraph 8(b)); and
  - (c) the migration at the consumer's premises is not a parallel migration (paragraph 8(c)(i)).
17. Subsection 9(2) of the Service Migration Determination includes exceptions to the requirements to supply an interim service. These include where:
  - (a) the NBN CSP and the consumer agree on an alternative arrangement; or
  - (b) the consumer does not consent to the supply of an interim service and has agreed upon an alternative arrangement with the NBN CSP; or
  - (c) the NBN CSP is supplying an NBN backup service to the consumer.
18. In response to the First Notice, Optus provided information indicating that 644 relevant customers were eligible to be provided with an interim service in the relevant period. This is because:
  - (a) the preconditions in section 8 described in paragraph 16 applied in relation to these customers
  - (b) these customers had experienced an unsuccessful migration event or a non-working NBN service event and the information provided by Optus did not show that any exception in subsection 9(2) applied to these customers.
19. Under the Second Notice, the ACMA sought information to establish whether Optus had a reasonable basis for failing to supply an interim service to these 644 customers.

20. After reviewing Optus's responses to the Notices and its response to the preliminary findings, the ACMA is satisfied that Optus contravened subsection 9(1) in relation to 550 of these customers in the relevant period. This is because:
- (a) Optus's response to the Second Notice stated that it did not supply an interim service to 420 of these customers due to the service being relocated.
  - (b) Optus's response to the Second Notice stated it did not supply an interim service to 130 customers where it did not raise the matter with the customer or failed to contact the customer.
  - (c) Neither of these is an exception to the requirement to supply an interim service specified in subsection 9(2).
  - (d) The ACMA did not make any contravention finding of subsection 9(1) for the remaining customers. This is because: there was insufficient information available to reach a finding, the customer had agreed to an alternative arrangement or because the customer had been incorrectly categorised as eligible for an interim service in the response to the First Notice.

**Section 11 of the Service Migration Determination: Requirement to advise a consumer**

21. Where the requirement to supply an interim service to a consumer applies, the NBN CSP must advise the consumer of specified information about the interim service (see section 11 of the Service Migration Determination). The information includes timeframes for the supply of the service, details of the key features and limitations and any associated fees and charges. The NBN CSP must advise the consumer of this information as soon as possible after becoming aware of the unsuccessful migration event or non-working NBN service event and before obtaining the consumer's consent to the supply of the service.
22. Optus's response to the First Notice identified 16 customers who were supplied with an interim service and 644 customers eligible for the supply of an interim service who did not receive one.
23. The Second Notice required Optus to advise whether it had provided the information specified in paragraphs 11(a) and (b) of the Service Migration Determination (the **section 11 information**) to each of these 660 customers.
24. The ACMA has considered the information provided by Optus and is satisfied that Optus contravened section 11 of the Service Migration Determination in relation to 568 of these customers in the relevant period. This is because:
- (a) Optus stated that it did not provide the section 11 information in 141 cases.
  - (b) Optus stated it had not provided the section 11 information but was unable to contact the customer in seven cases. For each of these cases, Optus advised that it only made one attempt to contact the customer to discuss the service issue. The ACMA does not consider a single attempt to contact the customer about a separate matter is enough to discharge the obligation to advise the customer of the section 11 information.
  - (c) There were seven cases where Optus's first attempt to contact the customer was seven or more working days after it first became aware of the unsuccessful migration event or non-working NBN service event. The ACMA does not consider a delay of seven or more working days to contact the customer would meet the requirement to advise the customer as soon as possible after becoming aware of one of these events. Therefore, the ACMA considers that in these cases, Optus contravened section 11.
  - (d) Optus stated it 'does not attempt to contact to provide section 11 information separately but attempted contact to resolve the issue' in 413 cases. Optus did not advise whether it had provided the section 11 information during this contact despite being required to do so under the Second Notice. Therefore, the ACMA concludes that Optus did not provide section 11 information in any of these cases.
  - (e) The ACMA did not make a contravention finding of section 11 for the remaining customers. This is because there was insufficient information to make a finding or the

customer was not eligible for an interim service for one of the reasons identified at paragraph 20(d).

**Section 18 of the Service Migration Determination: Requirement to keep records**

25. Under section 18 of the Service Migration Determination an NBN CSP must keep records to demonstrate its compliance with, among other things, the requirements for supplying an interim service.
26. The ACMA has considered the information Optus provided and is satisfied that Optus contravened paragraph 18(a) of the Service Migration Determination on 15 occasions. This is because Optus's response to the Second Notice advised that it did not keep a record of whether it had provided the section 11 information for 15 customers.

**Section 16 of the Service Migration Determination and section 23 of the Service Continuity Standard: Requirements where there is an unreasonable delay in the supply of an operational NBN service**

27. Section 16 of the Service Migration Determination and section 23 of the Service Continuity Standard set out the steps an NBN CSP must take where there is a delay in the supply of an operational NBN service.
28. Section 16 of the Service Migration Determination applies where section 8 of that Determination applies.
29. Section 23 of the Service Continuity Standard applies where a relevant customer experiences an unsuccessful migration event or non-working NBN service event and section 16 of the Determination does not apply.
30. Under subsection 16(2) of the Service Migration Determination and subsection 23(1) of the Service Continuity Standard if a service is not operational 20 working days after an unsuccessful migration or non-working NBN service event, the NBN CSP must, within 2 working days, prepare a plan (a **remedial plan**) to get the NBN service working as soon as possible. Under subsection 16(3) of the Service Migration Determination and subsection 23(2) of the Service Continuity Standard the NBN CSP must send the remedial plan to the consumer within 2 working days of its being prepared.
31. If a service is still not operational a further 20 working days after the period mentioned in paragraph 30, under subsection 16(5) of the Service Migration Determination and subsection 23(4) of the Service Continuity Standard (as applicable), the NBN CSP must arrange for a technical audit to be completed within 10 working days.
32. An NBN CSP does not need to prepare a remedial plan or arrange for a technical audit to be completed where the service is not operational due to an issue on the customer's side of the network boundary.<sup>1</sup>
33. Optus's response to the Notices indicated 752 NBN services were non-operational after the 20-working day trigger for remedial plans and 179 NBN services were non-operational after the 40-working day trigger for technical audits. The ACMA has considered the information Optus provided for these 931 services and is satisfied that, in the relevant period, Optus contravened the rules in relation to 865 of these services.
34. In making this finding the ACMA notes:
  - (a) Optus's response to the First Notice stated that it had not prepared any remedial plans or technical audits during the relevant period
  - (b) all 931 NBN services referred to in paragraph 33 were for relevant customers who had experienced an unsuccessful migration event or non-working NBN service event, and either the 20-working day or 40-working day trigger occurred during the relevant period.

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<sup>1</sup> See subsection 16(7) of the Service Migration Determination and subsection 23(6) of the Service Continuity Standard.

35. Of the 752 NBN services that were non-operational after the 20-working day trigger for remedial plans:
- (a) Optus contravened subsection 16(2) of the Service Migration Determination 566 times. This is because 566 services were not parallel migrations, so section 8 of the Service Migration Determination, and consequently subsection 16(2) of that Determination applied to these services.
  - (b) Optus contravened subsection 23(1) of the Service Continuity Standard 129 times. This is because the Service Migration Determination did not apply to 129 services, that were parallel migrations where Optus was also the legacy CSP. Therefore subsection 23(1) of the Service Continuity Standard applied.
  - (c) For the remaining 57 services, the ACMA makes no finding of contravention of subsection 16(2) of the Service Migration Determination or subsection 23(1) of the Service Continuity Standard. This is because Optus was unable to identify whether the migration was parallel or non-parallel for these services and therefore, the ACMA cannot identify which instrument applies to these services.
36. Of the 179 cases that were non-operational after the 40-working day trigger for technical audits:
- (a) Optus contravened subsection 16(5) of the Service Migration Determination 156 times. This is because 156 services were not parallel migrations, so section 8 of the Service Migration Determination, and consequently subsection 16(5) of the Service Migration Determination applied to these services.
  - (b) Optus contravened subsection 23(4) of the Service Continuity Standard 14 times. This is because the Service Migration Determination did not apply to 14 services that were parallel migrations where Optus was also the legacy CSP. Therefore, subsection 23(4) of the Service Continuity Standard applied to these services.
  - (c) For the remaining nine services, the ACMA makes no finding of contravention of subsection 16(5) of the Service Migration Determination or subsection 23(4) of the Service Continuity Standard. This is because Optus was unable to identify whether the migration was parallel or non-parallel for these services and therefore, the ACMA cannot identify which instrument would apply to these services.

***Contraventions of subsections 101(1) and 128(1) of the Act***

37. Under subsection 101(1) of the Act, Optus must comply with the Service Migration Determination. Under subsection 128(1) of the Act, Optus must comply with the Service Continuity Standard.
38. Optus has not complied with applicable requirements of the Service Migration Determination and the Service Continuity Standard as set out above. Therefore, the ACMA is satisfied that Optus has contravened:
- (a) subsection 101(1) of the Act 1,855 times in the relevant period because it did not comply with the Service Migration Determination.
  - (b) subsection 128(1) of the Act 143 times in the relevant period because it did not comply with the Service Continuity Standard.