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Richard

Dear Mr Windeyer

Telecommunications (Infringement Notice Penalties) Determination 2022

The Australian Communications and Media Authority (ACMA) welcomes the opportunity to comment on the proposed *Telecommunications (Infringement Notice Penalties) Determination 2022* (2022 Determination).

The ACMA is the primary sector-specific regulator for telecommunications in Australia, with responsibility for administering key elements of the telecommunications consumer safeguards framework (including registering industry codes, making standards and determinations, addressing issues of non-compliance), and reporting under the *Telecommunications Act 1997*, the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (TCPSS Act) and the *Telecommunications (Interception and Access) Act 1979* (TIA Act).

As the sector-specific regulator for telecommunications our strategic intent is to make this sector work in Australia's public interest. This is achieved by delivering constructive regulatory outcomes that effectively balance the needs of industry and the community. We aim to deliver public interest outcomes with the minimum regulatory burden necessary, while managing risks and protecting the interests of the community.

With regard to compliance and enforcement we adopt a graduated and strategic risk-based approach (<https://www.acma.gov.au/compliance-and-enforcement-policy>). This approach recognises that breaches of the rules established by the Acts and instruments will be dealt with effectively and efficiently. It also recognises the role of co-regulation set out in the legislation we administer and the need to engage with industry participants to promote voluntary compliance.

The ACMA is interested in the 2022 Determination consultation as the outcomes impact on the ACMA's ability to undertake our compliance and enforcement work. The ACMA considers that the inclusion of some additional penalty provisions within the 2022 Determination, in addition to those included in the consultation draft instrument, would enable the ACMA to be more effective in its enforcement of the Acts it is responsible for, as well as a number of instruments, including the:

- *Telecommunications Service Provider (Customer Identity Authentication) Determination 2022*;
- *Telecommunications (NBN Consumer Information) Industry Standard 2018*;
- *Telecommunications (NBN Continuity of Service) Industry Standard 2018*;
- *Telecommunications (Consumer Complaints Handling) Industry Standard 2018*;

- *Telecommunications Service Provider (NBN Service Migration) Determination 2018;*
- *Telecommunications Service Provider (International Mobile Roaming) Determination 2019; and*
- *Telecommunications (Service Provider – Identity Checks for Prepaid Mobile Carriage Services) Determination 2017.*

The role of infringement notices within the ACMA's toolkit should not be underestimated. They are designed to provide a timely, cost-efficient enforcement outcome and an alternative to court proceedings. The ACMA uses infringement notices in accordance with the *Telecommunications (Infringement Notices) Guidelines 2022* (<https://www.legislation.gov.au/Details/F2022L00250>).

The inclusion of additional provisions which attract increased penalties will improve the utility of infringement notices within our toolkit by ensuring that the penalties for contraventions are an appropriate deterrent, commensurate with the harm caused by non-compliance. We have set out at **Attachment A** the provisions that the ACMA suggests should be considered for inclusion in the Determination. An example where an infringement notice with an appropriate maximum penalty could be timely would include those provisions which highlight the importance of protecting consumers' personal and sensitive information.

Regulatory frameworks and settings must be contemporised so that they remain fit-for-purpose. The telecommunications landscape has changed significantly since 2012 when the instrument was last made. Telecommunications is now considered an essential service which is critical for household and small business social and economic engagement and participation. Services provided by the telecommunications sector have evolved from fixed line, voice-only services to data services, fuelled by the internet and technology developments.

For example, ACMA research in 2020 showed:

- 99 per cent of Australian adults had accessed the internet—up from 90 per cent in 2019;
- 98 per cent of Australian internet users had sent or received emails, 96 per cent browsed or researched online, and 89 per cent watched videos or accessed banking;
- 77 per cent of Australians adults had used an app to communicate via messages, voice or video calls in the past six months, up from 67 per cent in 2019;
- 72 per cent had used an app for social networking, up from 63 per cent in 2019; and
- between June 2010 and June 2019, the amount of broadband and mobile data we downloaded per quarter increased from 156,220 terabytes to 5,987,510 terabytes.¹

In terms of usage, the number of smartphone users in Australia in 2017 was around 19.9 million (81 per cent penetration level) with an estimated usage of 23.6 million users by 2026 (87 per cent penetration level).² Together with the completion of the NBN rollout the telecommunications landscape has matured.

However, recent data breaches have shown the increased level of risk involved in how consumers and businesses conduct activities day-to-day, particularly in the collection, storage and destruction of data. These breaches have also shown that

¹ ACMA, [Submission to Consumer Safeguards Review, Part C](#), p. 1.

² Statista, [No of smartphone users in Australia](#), accessed 8 December 2022.

while there are about 1,580 providers³ operating in the market the level of sophistication varies widely, even among the larger operators.

Given the maturity of the market, the ACMA considers it is important that consumers have protections which allow them to:

- clearly understand the cost, terms and conditions attached to their service;
- be treated fairly at the time of sale and throughout the lifecycle of a service or an associated product;
- have telecommunications services that are reliable and reasonably free of faults and interruptions;
- have telecommunications services supplied in an inclusive way if they are disadvantaged or in vulnerable circumstances;
- are protected from identify theft and fraud; and
- have any complaints addressed promptly and experience reasonable customer service.

We consider that it is imperative that the 2022 Determination is updated to reflect this changing landscape and that provisions attracting infringement notices as a penalty are not only seen as an addition to the ACMA's suite of powers but also act as a strong deterrent to all providers.

We support the intention behind the 2022 Determination as drafted, with one key recommendation regarding extending its scope. We consider that the previous 2012 Determination⁴ provided an effective deterrent, and incentivised good behaviour for the relevant provider. This is evidenced by the fact the ACMA has had no need to investigate these matters for the last 7 years which is an indicator the enforcement regime was an effective deterrent.

In light of this, we also recommend consideration be given to expanding the list of covered obligations to include those at **Attachment A**.

In determining the obligations to be included, we have sought to identify those provisions that:

- are relevant to disincentivising repeat non-compliance
- serve to highlight key obligations in individual regulatory instruments
- accord with the ACMA's current and emerging compliance priorities
- minimise consumer detriment that will likely arise from non-compliance.

Increasing penalties for non-compliance with regulatory obligations creates a significant financial incentive for service providers to comply. It serves to highlight the importance of key obligations as a means of protecting all consumers. We therefore consider that the remaking of the Infringement Notice Penalties Determination creates an important opportunity to modernise and improve the effectiveness of the ACMA's enforcement toolkit; by ensuring that the penalties attached to regulatory obligations are commensurate with the harm that non-compliance with them causes for consumers.

³ TIO Annual Report 2021-21, p.46.

⁴ *Telecommunications (Infringement Notice Penalties) Determination 2012*