

## DRAFT

### **DRAFT EXPLANATORY STATEMENT**

Issued by the Authority of the Minister for Communications

*Telecommunications Act 1997*

#### **Telecommunications (Infringement Notice Penalties) Determination 2022**

*Note: This draft explanatory statement is provided to assist stakeholders comment on a draft of the Telecommunications (Infringement Notice Penalties) Determination 2022. It has no formal status and it should not be considered definitive.*

#### Purpose

The *Telecommunications (Infringement Notice Penalties) Determination 2022* (the Determination) is made by the Minister for Communications under subsection 572G(2) of the *Telecommunications Act 1997* (the Act).

The Determination largely remakes the *Telecommunications (Infringement Notice Penalties) Determination 2012* (the 2012 Determination), with some some amendments to due to changes in wider telecommunications law and legal drafting.

The Determination is used by the Minister to specify a higher number of penalty units to be included in an infringement notice in relation to non-compliance with certain contraventions by a body corporate of the civil penalty provisions in sections 68 or 101 of the Act. Otherwise, an authorised infringement notice officer may only issue an infringement notice of 60 penalty units for a body corporate.

The Determination is used to specify higher penalty units to be included in an infringement notice in relation to non-compliance by the primary universal service provider with provisions relating to:

- performance benchmarks for repair of payphones provided under the Universal Service Obligation (USO),
- rules about the places or areas in which USO payphones are to be located, and
- compliance with any directions from the Australian Communications and Media Authority (ACMA) either to not remove a USO payphone, or to re-install a USO payphone if it has already been removed.

The Determination also specifies higher penalty units in relation to non-compliance by qualifying carriage service providers with performance benchmarks made under Customer Service Guarantee (CSG) arrangements. These benchmarks deal with connection and repair of voice services, and appointment keeping.

The Determination is a legislative instrument for the purposes of the *Legislation Act 2003* and therefore subject to the default consultation, sunseting and disallowance requirements under that Act. The Determination commences the day after it is registered.

Details of the Determination are set out in Attachment A.

DRAFT

## DRAFT

### Background

Part 31B of the Act provides a scheme under which authorised officers may issue infringement notices for contraventions of civil penalty provisions in relation to certain contraventions of:

- the Act and regulations made under the Act;
- the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (the Consumer Protection Act) and regulations made under that Act; and
- Chapter 5 of the *Telecommunications (Interception and Access) Act 1979* (the Interception Act).

The scheme is intended to provide an efficient and cost-effective enforcement mechanism as an alternative to instituting court proceedings for recovery of a pecuniary penalty. An overview of the relevant sections in Part 31B of the Act (sections 572E and 572G) is below.

Sections 68 and 101 of the Act are civil penalty provisions. Subsection 68(1) requires carriers to comply with carrier licence conditions and subsection 101(1) requires service providers (carriage service providers and content service providers) to comply with service provider rules. Subsections 68(2) and 101(2) are ancillary civil penalty provisions which prohibit aiding, abetting, counselling, procuring, inducing, being knowingly concerned in or a party to, or conspiring with others to effect, a contravention of subsection 68(1) or 101(1) (as the case may be).

Compliance with each provision of the Act (and with the Consumer Protection Act and Chapter 5 of the Interception Act) is a condition of a carrier licence and is also a service provider rule (see clause 1 of Schedule 1 to the Act and clause 1 of Schedule 2 to the Act). Certain provisions of the Act and the Consumer Protection Act are civil penalty provisions in their own right, which are not enforced by means of carrier licence conditions or service provider rules (see subsection 570(6) of the Act).

Section 572E of the Act sets out when an infringement notice may be issued under Part 31B. It provides that an authorised infringement notice officer (defined in section 7 of the Act as either the Chair of the ACMA or a member of the staff of the ACMA appointed under section 572L of the Act) may issue an infringement notice if he or she has reasonable grounds to believe that a person has contravened a particular civil penalty provision, subject to certain exceptions set out in subsections 572E(3) to (6).

Subsection 572E(3) mirrors the operation of subsection 570(6). It provides that, if conduct constitutes a contravention of a carrier licence condition or a service provider rule (that is, the conduct constitutes a contravention of section 68 or 101 of the Act) and one or more other civil penalty provisions, an infringement notice must not be given to the person in relation to the contravention of section 68 or 101, as the case may be.

However, subsections 572E(5) and (6) further provide that an infringement notice must not be issued in relation to conduct that is a contravention of section 68 or 101 as well as another provision (as specified in the subsections) unless the other provision has been declared to be a 'listed infringement notice provision' and has been a listed infringement provision for at least three months before the contravention is alleged to have taken place.

## DRAFT

The effect of subsections 572E(5) and (6) is that an infringement notice can be issued to a person for a contravention of section 68 or 101 if the contravention involves the contravention of another provision of the telecommunications legislation which has been declared to be a ‘listed infringement notice provision’ by the ACMA under subsection 572E(7) of the Act. The ACMA has determined a number of listed infringement notice provisions which are set out in the *Telecommunications (Listed Infringement Notice Provisions) Declaration 2022*. All of the provisions listed in Schedules 1 and 2 of the Determination are listed infringement notice provisions.

Section 572G of the Act specifies the amount of pecuniary penalty that is to be set out in an infringement notice. Subsection 572G(4) requires that the penalty to be specified in an infringement notice given to an individual must be a pecuniary penalty equal to 12 penalty units. Subsection 572G(1) requires the penalty to be specified in an infringement notice given to a body corporate must be either a pecuniary penalty equal to 60 penalty units or an amount of pecuniary penalty determined in a legislative instrument made by the Minister under Subsection 572G(2). The Determination accordingly sets out one or more kinds of contraventions of sections 68 or 101 and specifies, for each kind of contravention, a higher number of penalty units that will apply.

The infringement notice penalties specified in the Determination are fixed penalties, not maximum penalties. An authorised infringement notice officer has no discretion to specify a lower penalty amount in an infringement notice.

Pecuniary penalties are expressed in Commonwealth legislation as ‘penalty units’. At the time of commencement of the Determination, one penalty unit is equal to \$222 (see subsection 4AA(1A) of the *Crimes Act 1914*).

### *Relevant considerations in determining the penalty amounts set out in the Determination*

Part 7 of the explanatory memorandum to the *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010* (which added Part 31B to the Act) explains (at pages 249-250):

*If [an] infringement notice is given to a body corporate, and the alleged contravention is of a kind specified under...subsection 572G(2), the number of penalty units for the pecuniary penalty will be the number specified in the determination made under that subsection. Otherwise, if the penalty is not specified in the determination, the penalty is 60 penalty units.*

*It is intended that the Minister would specify the provisions to be subject to higher pecuniary penalty amounts where it is likely that the lower amount of 60 penalty units would provide insufficient deterrent for large telecommunications carriers or [carriage service providers] to comply with the provision. It is standard practice for an infringement notice amount to not exceed one-fifth of the penalty otherwise applying. The maximum civil penalty for breach of a carrier licence condition or service provider rule is \$10 million (see subsection 570(3)).*

Infringement notice schemes are typically used to deal with relatively minor contraventions where instituting court proceedings would be disproportionately costly, and where assessments concerning a contravention can be based on straightforward and objective criteria rather than complex legal distinctions. However, in the case of the infringement

## DRAFT

scheme set out in the Act, the Minister has discretion to determine higher penalties where an infringement notice is issued to a body corporate. This was included because otherwise the penalties could be an insufficient deterrent for large telecommunications carriers or carriage service providers (CSPs), with revenues in the hundreds of millions of dollars, to comply with the provision. Recipients of infringement notices can seek the withdrawal of an infringement notice by the ACMA or choose to not to pay the penalty, in which case it leaves itself open to the ACMA instituting court proceedings involving potentially higher penalties and costs.

The Determination specifies pecuniary penalties for different provisions ranging from 300 to 9,000 penalty units. The highest penalties of 3,000, 6,000 and 9,000 penalty units relate to failures to meet USO payphone repair and CSG performance benchmarks, with the amount of penalty increasing according to a set formula based on the increasing margin by which a given benchmark is not met. Based on the current value of a penalty unit (\$222), the maximum pecuniary penalty that could apply (9,000 penalty units) would be \$1,998,000 (less than one-fifth of the \$10 million civil penalty that could be pursued through the courts).

While payphones and the CSG, which applies to fixed voice services, are playing less of a practical role in the contemporary telecommunications environment with the take-up of mobiles and broadband, they still provide basic communications services for many users. For example, Telstra has over three million fixed voice services subject to the CSG and it operates around 14,700 payphones nationally, used to make tens of thousands of calls per day, including calls to the emergency call service. Telstra receives significant public funding to provide payphones and the fixed voice services to which the CSG applies under the Telstra Universal Service Obligation Performance Agreement (TUSOPA). Meeting the payphone and CSG benchmarks, which are set out in the *Telecommunications (Payphones) Determination 2022* and the *Telecommunications (Customer Service Guarantee – Retail Performance Benchmarks) Instrument (No. 1) 2011* respectively, are an important part of the TUSOPA.

The 2012 Determination also set out higher pecuniary penalties in relation to the *Telecommunications Service Provider (Mobile Premium Services) Determination 2010 (No. 1)* and the *Telecommunications Service Provider (Mobile Premium Services) Determination 2010 (No. 2)*. However, following a review by the ACMA<sup>1</sup>, those two instruments sunset, or ceased, on 1 April 2021.

### Consultation

Note: This section will be finalised subject to stakeholder views.

### Regulatory impact

Note: The need for a regulatory impact statement will be confirmed with the Office of Best Practice Regulation (OBPR) following stakeholder consultation and before any final determination is made.

### Statement of compatibility with human rights

A statement of compatibility with human rights for the purposes of Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* is set out at Attachment B.

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<sup>1</sup> [www.acma.gov.au/consultations/2020-11/sunset-review-mps-determinations-consultation-362020](http://www.acma.gov.au/consultations/2020-11/sunset-review-mps-determinations-consultation-362020)

**Details of the Telecommunications (Infringement Notice Penalties)  
Determination 2022**

**1 Name**

The name of the Determination is the *Telecommunications (Infringement Notice Penalties) Determination 2022*.

**2 Commencement**

The Determination commences on the day after it is registered on the Federal Register of Legislative Instruments.

**3 Authority**

The Determination is made under subsection 572G(2) of the *Telecommunications Act 1997*.

**4 Interpretation**

Section 4 sets out the definitions of certain terms that are used in the Determination.

**5 Schedules**

Section 5 provides that each instrument that is specified in a Schedule to the Determination is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to the Determination has effect according to its terms.

**6 Contraventions and related penalties**

Section 6 relates to the tables set out in Schedule 1 and Schedule 2 of the Determination. Subsection 6(1) provides that for each kind of contravention of section 68 of the Act set out at an item in column 1 of the table, the associated number of penalty units for that item in column 2 of the table is specified as the penalty amount for that kind of contravention of section 68. Subsection 6(2) provides that for each kind of contravention of section 101 of the Act set out at an item in column 1 of the table, the associated number of penalty units for that item in column 2 of the table is specified as the penalty amount for that kind of contravention of section 101.

**Schedule 1 - Contraventions and penalties (section 68)**

Schedule 1 contains a table that specifies penalty amounts for certain kinds of contraventions of section 68 of the Act. Section 68 of the Act is a civil penalty provision. Section 68 sets out that carrier must not contravene a condition of the carrier licence held by the carrier. Standard carrier licence conditions are set out in Schedule 1 to the Act and the Minister may make further conditions through declarations made under section 63 of the Act. Clause 1 of Schedule 1 to the Act provides that a carrier must comply with the Act, the Consumer Protection Act and the Interception Act.

Items 1 to 3 of Schedule 1 specify graduated penalty amounts for contraventions of subsection 12EE(9) of the Consumer Protection Act. Subsection 12EE(9) requires a primary universal service provider to meet or exceed any minimum benchmarks that are set out in an

## DRAFT

instrument made under subsection 12EE(6). Part 3 of the *Telecommunications (Payphones) Determination 2022* contains minimum benchmarks for the purpose of subsection 12EE(6). Presently there are three benchmarks: a 90% annual benchmark for repair of payphones in urban areas; a 90% annual benchmark for repair of payphones in rural areas; and an 80% benchmark for repair of payphones in remote areas.

The graduated penalty amounts for contraventions of subsection 12EE(9) operate so that if a primary universal service provider fails to meet a minimum benchmark by less than two percentage points, the penalty amount specified in the infringement notice will be equal to 3,000 penalty units (currently \$666,000) (see item 1 of Schedule 1). If a primary universal service provider fails to meet a minimum benchmark by more than two but less than five percentage points, the penalty amount specified in the infringement notice will be equal to 6,000 penalty units (currently \$1,332,000) (see item 2 of Schedule 1). If a primary universal service provider fails to meet a minimum benchmark by five percentage points or more, the penalty amount specified in the infringement notice will be equal to 9,000 penalty units (currently \$1,998,000) (see item 3 of Schedule 1).

Providing graduated penalty amounts for contraventions of this provision is intended to encourage a primary universal service provider to comply fully with the benchmarks or, if this is not possible, to strive to minimise the extent of the non-compliance, with the penalty calibrated to the increasing non-compliance and potential harm.

Item 4 of Schedule 1 specifies that the penalty amount for a contravention of subsection 12EF(2) of the Consumer Protection Act is equal to 600 penalty units (currently \$133,200). Subsection 12EF(2) requires a primary universal service provider to comply with a determination made by the Minister under subsection 12EF(1), which sets out rules to be complied with in relation to the places or areas in which payphones are to be located. Currently, Part 4 of the *Telecommunications (Payphones) Determination 2022* sets out the relevant rules.

Item 5 of Schedule 1 specifies that the penalty amount for a contravention of subsection 12EI(6) of the Consumer Protection Act is equal to 900 penalty units (currently \$199,800). Subsection 12EI(6) requires a primary universal service provider to comply with a direction under subsection 12EI(2) or (3). Subsections 12EI(2) and (3) give the ACMA the power to issue written directions to a primary universal service provider in relation to the removal of payphones from particular locations. ACMA may make directions under 12EI either to not remove a payphone, or to re-install a payphone if it has already been removed.

### **Schedule 2 - Contraventions and penalties (section 101)**

Schedule 2 contains a table that specifies penalty amounts for certain kinds of contraventions of section 101 of the Act. Section 101 of the Act is a civil penalty provision. Section 101 of the Act requires carriage service providers and content service providers to comply with relevant service provider rules. Standard service provider rules are set out in Schedule 2 to the Act and the ACMA or the Minister can make further rules through service provider determinations section 99 of the Act. Clause 1 of Schedule 2 to the Act provides that a service provider must comply with the Act, the Consumer Protection Act and the Interception Act.

Items 1 to 5 of Schedule 2 contain the same provisions as set out in items 1 to 5 of Schedule 1. Telstra, as the current primary universal service provider, has historically held a carrier licence. However, the inclusion of these provisions in both Schedule 1 and 2 provides

**DRAFT**

cover should a universal service provider's non-compliance be attributable to its operation as a CSP rather than a carrier. It also provides cover should a primary universal provider's corporate structure change and it fulfils its payphone obligation solely as a CSP.

Items 6 to 8 of Schedule 2 specify graduated penalty amounts for contraventions of subsection 117C(2) of the Consumer Protection Act. Subsection 117C(2) requires a carriage service provider (to which a Ministerial instrument made under section 117B applies) to meet or exceed the minimum benchmarks set out in that instrument. The *Telecommunications (Customer Service Guarantee – Retail Performance Benchmarks) Instrument (No. 1) 2011* is made under section 117B. Part 2 of this instrument sets out the relevant minimum benchmarks. Qualifying carriage service providers (with more than 100,000 CSG services) are generally required to meet or exceed performance benchmarks, currently set at 90% for:

- in-place connections,
- new connections (in urban, major rural, minor rural and remote areas),
- fault repairs (in urban, major rural, minor rural and remote areas), and
- appointment keeping.

The graduated penalty amounts here operate in the same way and for the same reasons as set out for the graduated penalty amounts described above for items 1 to 3 of Schedule 1.

## Statement of Compatibility with Human Rights

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

### **Telecommunications (Infringement Notice Penalties) Determination 2022**

#### ***Overview***

The *Telecommunications (Infringement Notice Penalties) Determination 2022* (the Determination) is made by the Minister for Communications under subsection 572G(2) of the *Telecommunications Act 1997* (the Act).

The purpose of the Determination is to specify a higher number of penalty units that apply to certain kinds of contraventions by a body corporate of the civil penalty provisions in sections 68 or 101 of the Act. Generally, in relation to such contraventions, an authorised infringement notice officer of the Australian Communications and Media Authority (the ACMA) may issue an infringement notice. By default, an ACMA authorised infringement notice officer may only issue an infringement notice for 60 penalty units to a body corporate.

#### ***Human rights implications***

An authorised infringement notice officer of the ACMA may, if they have reasonable grounds to believe that a person has contravened a particular civil penalty provision give the person an infringement notice relating to the alleged contravention(s). The ACMA's overall approach to the use of infringement notices is set out in the *Telecommunications (Infringement Notices) Guidelines 2022*.<sup>2</sup>

This Determination provides, in relation to specific provisions, higher pecuniary penalty amounts that are to be specified in relation to infringement notices issued by the ACMA to body corporates. There is no requirement to pay the penalty specified in an infringement notice. If the recipient of an infringement notice does not pay the penalty specified in the notice, the ACMA may commence court proceedings in relation to the alleged contravention.

No human rights issues were raised during the consultation process. The Determination does not engage any of the applicable rights or freedoms, and is compatible with the rights and freedoms recognised or declared by the international instruments listed in subsection 3(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* as they apply to Australia.

#### ***Conclusion***

The Determination is compatible with human rights as it does not raise any human rights issues.

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<sup>2</sup> [www.legislation.gov.au/Details/F2022L00250](http://www.legislation.gov.au/Details/F2022L00250)