EXPLANATORY STATEMENT

Telecommunications (Consumer Protection and Service Standards) Act 1999

Universal Service Subsidies (2011–12 Contestable Areas) Determination (No. 1) 2012

Issued by the authority of the Minister for Broadband, Communications and the Digital Economy

Purpose

The Universal Service Subsidies (2011–12 Contestable Areas) Determination (No. 1) 2012 (the Determination) is one of a series of legislative instruments made by the Minister for Broadband, Communications and the Digital Economy (the Minister) under subsection 16(1) of the Telecommunications (Consumer Protection and Service Standards) Act 1999 (the Act). These instruments determine the subsidy amounts available to universal service providers for the supply of standard telephone services and the supply, installation and maintenance of payphones in the 2011–12 financial year (claim period). This Determination outlines the subsidies available for the provision of services in the contestable universal service areas for this claim period.

Background

Sections 16 and 16B of the Act require the Minister to determine subsidies for the supply of services under the Universal Service Obligation (USO) in a universal service area for up to three years in advance. Section 16A of the Act requires the Minister to seek the advice of the Australian Communications and Media Authority (ACMA) prior to determining or varying the USO subsidies for a universal service area.

Subsection 16(2) of the Act requires the Minister to ensure that there is a subsidy for each universal service area in respect of each service obligation.

Under sections 9G and 12E of the Act, the Minister has determined, or is taken to have determined, universal service areas as follows:

- the contestable area, which is an area (determined under the Universal Service Areas Determination (No. 1) 2001) where the provision of the universal services referred to in paragraph 9(1)(a) of the Act (dealing with standard telephone services) is open to competition under the Contestable Service Obligation Determination (No. 1) 2001;

- the Extended Zones area, which is an area (notified in the Notice of the Primary Universal Service Provider for the Extended Zones of Australia – and published in the Gazette 25 July 2001) where the provision of the universal services referred to in paragraph 9(1)(a) and (b) of the Act is provided by Telstra Corporation Limited (Telstra) as the primary universal service provider; and
the default area, which pursuant to subsection 9G(3) of the Act, is the residual areas of Australia which are not covered by a determination made under subsection 9G(1) of the Act.

On 24 February 2012 the Minister issued the *Australian Communications and Media Authority (Advice about Universal Service Subsidies) Direction (No. 1) 2012* (the Direction) under subsection 16A(1) of the Act. The Direction came into effect on 2 March 2012. The Direction required the ACMA, in providing its advice to the Minister, to consider whether the universal service subsidies for the various universal service areas for the 2011–12 claim period should be determined at the same amount as the subsidies for the previous 2010–11 claim period.

In accordance with the Direction, the ACMA must, in providing the Minister with advice, have regard to the following four matters:

i. the objects of Part 2 of the Act;

ii. the Government’s 23 June 2011 policy announcement and subsequent release of a policy statement, *Universal Service Policy in the National Broadband Network environment*, which outlined the Government’s policy to introduce a new regulatory, funding and institutional framework for the delivery of universal service outcomes and other public interest services from 1 July 2012;

iii. a report by Paul Paterson titled *Net Cost of Meeting the Standard Telephone Service and Payphone Universal Service Obligations* (June 2011); and

iv. such other matters as the ACMA considers relevant.

Advice was sought from the ACMA in relation to the subsidies for the 2011–12 claim period only, having regard to the development of new regulatory, funding and institutional arrangements for the delivery of universal service outcomes and other public interest services from 1 July 2012.

The ACMA provided the Minister with advice in accordance with the Direction on 28 May 2012. The ACMA’s advice is that the Minister should make a determination for the total USO subsidy of $145,076,237, as proposed in the Direction, for the 2011–12 claim period. This figure is the aggregate amount of the constituent subsidies for the each of the universal service areas and in respect of each of the service obligations specified in the Direction. In relation to the contestable areas, the aggregate of the lump sum USO subsidy for each contestable area for the 2011–12 claim period is $10,412,164 for the supply of standard telephone services.

The Minister has accepted the ACMA’s advice. The Determination, and related instruments (the *Universal Service Subsidies (2011–12 Extended Zones) Determination (No. 1) 2012* and *Universal Service Subsidies (2011–12 Default Area) Determination (No. 1) 2012*) are consistent with the ACMA’s advice.

The Determination is made under subsection 16(1) of the Act. Under subsection 16(3), the Determination must specify the amount, or a method for working out the amount, of the universal service subsidy, and the circumstances in which a universal service provider for the claim period is eligible to be paid the subsidy. Subsection 16(5)
requires that the determination specify that a subsidy is only payable to a universal service provider who complies with the provider’s obligations under section 12C (relating to primary universal service providers) or section 13D (relating to competing universal service providers).

Telstra is currently the primary universal service provider for the whole of Australia in respect of the universal service obligation referred to in section 9 of the Act. There are currently no competing universal service providers.

Following passage of a package of legislation on 21 March 2012 to establish the Telecommunications Universal Service Management Agency (TUSMA) and reform universal service arrangements, from 1 July 2012, TUSMA will be responsible for the management of universal service arrangements through contract and grant agreements. The reforms also allow for universal service arrangements in Part 2 of the Act to be progressively phased out over time and replaced with alternative contractual arrangements overseen by TUSMA.

From 1 July 2012, the levy arrangements in Part 2 of the Act will be replaced by a new industry levy to be imposed by the Telecommunications (Industry Levy) Act 2012, which will provide for industry to contribute to residual costs of TUSMA, less Government funding. Part 6 of the Telecommunications Universal Service Management Agency Act 2012 concerns the assessment, collection and recovery of the new industry levy.

Despite 2011–12 being the last financial year for which the USO levy is payable under Part 2 of the Act, existing provisions that enable the ACMA to assess and collect the USO levy under Part 2 of the Act will continue to apply.

**Operation of the Legislative Instruments Act**

The Determination is a legislative instrument as defined in section 5 of the Legislative Instruments Act 2003 (the LIA). It must therefore be registered on the Federal Register of Legislative Instruments and tabled in each House of Parliament within six sitting days of that House of registration (see sections 24 and 38 of the LIA). However, as a result of regulation 8 and item 9 of Schedule 2 to the Legislative Instruments Regulations 2004, the Determination is not subject to Parliamentary disallowance.

The requirement in subsection 16(1) of the Act for a copy of the Determination to be gazetted has been satisfied by its registration on the Federal Register of Legislative Instruments (see subsection 56(1) of the LIA).

**Consultation**

The Australian Communications and Media Authority (Advice about Universal Service Subsidies) Direction (No. 1) 2012 provided that the ACMA may seek the views of affected persons as the ACMA considered appropriate before providing its advice to the Minister. On 16 March 2012, the ACMA wrote to participating persons (i.e., telecommunications carriers who pay the USO levy, or are eligible for USO levy credits) in regard to the Direction, seeking comment by 13 April 2012. Telstra made a
submission to the ACMA. Telstra considered that the proposed USO subsidy should be higher, noting that the Government has received independent advice on the net cost of the USO which has been instrumental in determining the amounts, under a contract with Telstra, which the Telecommunications Universal Service Management Agency will pay Telstra for the standard telephone service and payphone components of the USO. From 1 July 2012 TUSMA will pay Telstra $270 million per annum for these components of the USO.

The ACMA had regard to these comments before providing advice to the Minister. In considering Telstra’s submission the ACMA noted that:

- the scope of the USO delivery has been relatively the same since 2007–08; and
- the proposed USO subsidy is a short-term measure that takes into account the object of the Act that USO funding arrangements should remain specific and predictable for 2011–12.

As appropriate consultation has already been undertaken by the ACMA and the Determination is consistent with the ACMA’s advice, no further consultation has been undertaken in respect to the Determination (see paragraph 18(2)(e) of the LIA).

**Regulatory Impact Statement**

The Office of Best Practice Regulation (OBPR) was consulted about the making of the Determination. The OBPR considered that the regulatory changes arising from the Determination are minor or machinery in nature and that no further regulatory impact statement is required. The OBPR regulatory impact statement exemption number for the Determination is ID 2012/13563.
Notes on Clauses

Clause 1 – Name of Determination

Clause 1 provides for the citation of the Determination as the Universal Service Subsidies (2011–12 Contestable Areas) Determination (No. 1) 2012.

Clause 2 – Commencement

Clause 2 provides that the Determination commences on the day after it is registered on the Federal Register of Legislative Instruments.

Clause 3 – Interpretation

Clause 3 sets out the key definitions used in the Determination.

The Act under which this Determination is made is the Telecommunications (Consumer Protection and Service Standards) Act 1999.

For the purposes of the Determination, clause 3 defines the claim period as the 2011–12 financial year.

Section 9G of the Act allows the Minister to determine that a service area is a universal service area in respect of one or more universal service obligations. These areas are discussed above in the Background to this Explanatory Statement.

Section 9 of the Act provides a definition of the universal service obligation and the relevant service obligations which it incorporates. Clause 3 defines relevant service obligations, for the purposes of the Determination, to mean:

(a) the obligation referred to in paragraph 9(1)(a) of the Act (dealing with standard telephone services); and
(b) the obligation referred to in paragraph 9(1)(b) of the Act (dealing with payphones).

As set out in subsections 9(2) and 9(2A) of the Act, the fulfilment of the universal service obligation includes:

(a) the supply of standard telephone services to people in Australia on request; and
(b) the supply, installation and maintenance of payphones in Australia.

A standard telephone service is defined in section 6 of the Act as a carriage service used for the purpose of voice telephony (or an equivalent for end-users with a disability) that passes the connectivity test set out in subsection 6(2). Clause 3 provides that, for the purposes of the Determination, a standard telephone service includes an alternative telecommunications service (ATS) which is supplied in accordance with an approved ATS marketing plan (as defined in subsection 12P(2) of the Act) in fulfilment of the obligation under paragraph 9(1)(a) of the Act (dealing with standard telephone services).
Clause 4 – Universal service subsidies

Section 16 of the Act requires the Minister to determine in writing one or more universal service subsidies for the claim period. The Minister is also required to ensure that subsidies are set:

(a) for each relevant service obligation;
(b) for each universal service area; and
(c) before the end of each relevant claim period.

Clause 4 provides that, subject to eligibility circumstances set out in clause 5 of the Determination, the universal service subsidy amounts specified in the Schedule determine the universal service subsidy for the contestable areas in respect of the relevant service obligations for the 2011–12 claim period.

Clause 5 – Circumstances in which subsidies are payable

Clause 5 outlines the circumstances and conditions under which contestable universal service subsidies will be paid to primary and competing universal service providers.

Generally, a universal service provider is eligible to be paid the universal service subsidies specified in the Schedule, if the provider:

(a) was the end-user’s prime service deliverer for the claim period – that is, the universal service provider that supplies the retail standard telephone service to the end-user;
(b) complies with the obligations set out in sections 12C or 13D of the Act – whichever is applicable (see below); and
(c) has supplied the standard telephone service continuously to an end-user for not less than 90 calendar days. (This paragraph is only relevant where a competing universal service provider exists in the relevant universal service area).

Section 12C and 13D of the Act set out, respectively, the obligations of a primary universal service provider (currently Telstra) and competing universal service providers in regard to their relevant service obligations and service areas, requiring the primary or competing universal service provider to take all reasonable steps to:

(a) fulfil that service obligation so far as it relates to that area; and
(b) comply with the provider’s approved policy statement; and
(c) comply with the approved standard marketing plan and the approved ATS marketing plan (if any) of the provider that covers that area in respect of that service obligation.

In addition to the general conditions outlined above, paragraph 5(c) limits the number of services per place for which subsidies are payable. An end-user’s universal service provider is only eligible to subsidies specified in the Schedule for one standard telephone service that it supplies to:
(a) an end-user’s place of residence; or
(b) an end-user’s place of business.

If an end-user’s residence and place of business are co-located, the universal service provider is eligible to claim a subsidy for one standard telephone service supplied to the ‘residential customer’ and one to the ‘business customer’. However, the end-user’s universal service provider must be able to satisfy the ACMA that the provider had reasonable grounds for believing the co-located business was a bona fide business (paragraph 5(d)).

For the purposes of paragraph 5(c), if a customer receives a service from a single provider, that provider is considered to be the end-user’s universal service provider. If a customer receives services from two or more separate providers, the customer must nominate (in a manner acceptable to the ACMA) which provider is the end-user’s universal service provider.

Following consultation with the Minister, the ACMA may, under paragraph 5(f), also determine in writing other circumstances in which a subsidy specified in the Schedule is payable to a universal service provider for a contestable area in respect of the relevant service obligation for the claim period. An example of such a circumstance provided in the Determination is when an end-user receives a second service solely or principally for the purpose of connecting to a recognised distance education service for primary or secondary education.

Paragraph 5(h) provides that where a universal service provider claims a subsidy in relation to a circumstance described in clause 5, the provider must be able to satisfy the ACMA (if the ACMA so requests) that the service was supplied in accordance with the circumstances set out in that clause.

Schedule – Universal Service Subsidies

The Schedule sets out the lump sum universal service subsidies for the contestable areas for the 2011–12 financial year with respect to the service obligation set out in paragraphs 9(1)(a) of the Act (dealing with standard telephone services).