

EXPLANATORY STATEMENT

Telecommunications Act 1997

Telecommunications (Infringement Notice Penalties) Determination 2012

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

Purpose

The Telecommunications (Infringement Notice Penalties) Determination 2012 (the Determination) is made by the Minister for Broadband, Communications and the Digital Economy (the Minister) under subsection 572G(2) of the *Telecommunications Act 1997* (the Act). The Determination is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The purpose of the Determination is to specify the number of penalty units that apply to certain kinds of contraventions by a body corporate of sections 68 and 101 of the Act in relation to which an authorised infringement notice officer of the Australian Communications and Media Authority (the ACMA) may issue an infringement notice.

The sections in the Determination are individually discussed in the ‘Notes on Sections’, below.

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

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), and 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.

Further, subsections 572E(5) and (6) provide that an infringement notice must not be issued in relation to conduct that is a contravention of section 68 or 101 and 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.

The effect of subsections 572E(5) and (6) is that an infringement notice can only 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. Currently, the listed infringement notice provisions are set out in the *Telecommunications (Listed Infringement Notice Provisions) Declaration 2011*. All the provisions listed in Schedules 1 and 2 of the Determination are listed infringement notice provisions.

Section 572G

Section 572G provides the amount of the penalty that is to be set out in an infringement notice. The penalty payable depends upon whether or not the contravention is by a body corporate or a person other than a body corporate.

Under subsection 572G(2), the Minister may make a legislative instrument (that is, the Determination) which sets out one or more kinds of contraventions of sections 68 or 101 and specifies, for each kind of contravention, the number of penalty units that will apply. The penalty amounts specified in the Determination only apply to contraventions by a body corporate.

The infringement notice penalties specified in the Determination are fixed penalties, not maximum penalties. Accordingly, 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 \$110 (see subsection 4AA(1) 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 why:

- the Minister has been given the power under subsection 572G(2) to specify infringement notice penalty amounts that are different from the penalty amount of 60 penalty units (currently \$6,600) for a body corporate, set out in paragraph 572E(1)(b); and
- the maximum penalty amount that the Minister can specify under the subsection is set at 18,000 penalty units (currently \$1,980,000).

The explanatory memorandum relevantly provides (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 (currently \$6,600).

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)). Accordingly, the maximum penalty that may be determined for a particular contravention is limited to 18,000 penalty units.

In accordance with the Commonwealth guidelines for infringement notice schemes (see Chapter 6 of *A Guide to Framing Commonwealth Offences, Infringement Notice Penalties and Enforcement Powers* (September 2011), published by the Attorney-General's Department), infringement notices are normally used to deal with less serious and less factually complex breaches of a given provision, where instituting court proceedings would be disproportionately costly.

Accordingly, the infringement notice penalty amounts specified in the Determination are set at a level that is appropriate for less serious contraventions of the relevant provisions.

Consultation

On 5 September 2011, the Minister published a consultation paper entitled *Consultation paper – Determination of penalties for infringement notices issued under the*

Telecommunications Act 1997, which invited submissions from interested persons on a draft version of the Determination.

In response to submissions, the Minister decided to make some changes to the draft version of the Determination, including introducing graduated penalty amounts for contraventions of subsections 12EE(9) and 117C(2) of the Consumer Protection Act.

The Determination has been made in consultation with the Attorney-General's Department and the ACMA, and the penalty amounts specified in the Determination have been determined with regard to the Commonwealth guidelines on infringement notices contained in Chapter 6 of *A Guide to Framing Commonwealth Offences, Infringement Notice Penalties and Enforcement Powers* (September 2011), published by the Attorney-General's Department.

Regulatory impact

The Office of Best Practice Regulation (the OBPR) has formed the opinion that the regulatory changes arising from the Determination are minor or machinery in nature and that no further regulatory impact analysis is required. The OBPR regulatory impact statement exemption number is ID 13222.

Statement of compatibility with human rights

This statement of compatibility is prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

The Determination sets out the pecuniary penalty amounts that are to be specified in infringement notices issued by the ACMA to persons who contravene certain telecommunications regulatory provisions. There is no compulsion 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.

The Determination is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act*. It does not engage any of the applicable rights or freedoms and does not raise any human rights issues.

Notes on Sections

Section 1 provides that the name of the Determination is the Telecommunications (Infringement Notice Penalties) Determination 2012.

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

Section 3 sets out the definitions of certain terms that are used in the Determination.

Section 4 relates to the table set out in Schedule 1 of the Determination and 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.

Section 5 relates to the table set out in Schedule 2 of the Determination and 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 contains a table that specifies penalty amounts for certain kinds of contraventions of section 68 of the Act.

Items [1] to [3] 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 instrument made under subsection 12EE(6). The Minister has set these minimum benchmarks in Part 3 of the *Telecommunications Universal Service Obligation (Payphone Performance Benchmarks) Instrument (No. 1) 2011*.

The graduated penalty amounts for contraventions of subsection 12EE(9) operate so that, for example, 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 \$330,000) (see Item [1]). By contrast, 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 \$990,000) (see Item [3]).

Providing graduated penalty amounts for contraventions of this provision is intended to ensure that the penalty amount is calibrated to the seriousness of the contravention, and to encourage a primary universal service provider that knows it will fail to reach a minimum benchmark to nevertheless strive to minimise the extent of that failure.

Item [4] specifies that the penalty amount for a contravention of subsection 12EF(2) of the Consumer Protection Act is equal to 600 penalty units (currently \$66,000). 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, the

Telecommunications Universal Service Obligation (Location of Payphones) Determination 2011 sets out the relevant rules.

Item [5] specifies that the penalty amount for a contravention of subsection 12EI(6) of the Consumer Protection Act is equal to 900 penalty units (currently \$99,000). 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.

Schedule 2 contains a table that specifies penalty amounts for certain kinds of contraventions of section 101 of the Act.

Items [1] to [3] 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 instrument made under subsection 12EE(6). The Minister has set these minimum benchmarks in Part 3 of the *Telecommunications Universal Service Obligation (Payphone Performance Benchmarks) Instrument (No. 1) 2011*.

The graduated penalty amounts operate in the same way as the graduated penalty amounts described above for Items [1] to [3] of Schedule 1.

Item [4] specifies that the penalty amount for a contravention of subsection 12EF(2) of the Consumer Protection Act is equal to 600 penalty units (currently \$66,000). 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, the *Telecommunications Universal Service Obligation (Location of Payphones) Determination 2011* sets out the relevant rules.

Item [5] specifies that the penalty amount for a contravention of subsection 12EI(6) of the Consumer Protection Act is equal to 900 penalty units (currently \$99,000). 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.

Items [6] to [8] 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. Currently, Part 2 of the *Telecommunications (Customer Service Guarantee – Retail Performance Benchmarks) Instrument (No. 1) 2011* sets out the relevant minimum benchmarks.

The graduated penalty amounts operate in the same way as the graduated penalty amounts described above for Items [1] to [3] of Schedule 1.

The graduated penalties are calibrated to the seriousness of the contravention, and are intended to give carriage service providers that are falling short of meeting a minimum benchmark an incentive to keep striving to minimise the extent to which they fall short of meeting it.

Item [9] specifies that the penalty amount for a contravention of section 6 of the *Telecommunications Service Provider (Mobile Premium Services) Determination 2010 (No. 1)* (MPS Determination No. 1) is equal to 300 penalty units (currently \$33,000). Section 6 requires a mobile carriage service provider to implement a service that is capable of barring all premium SMS and MMS services on the public mobile telecommunications services it supplies to its customers.

Item [10] specifies that the penalty amount for a contravention of subsection 13(3) of MPS Determination No. 1 is equal to 300 penalty units (currently \$33,000). Subsection 13(3) requires a mobile carriage service provider to comply with a notice given to it by the ACMA under subsection 13(2). Subsection 13(2) sets out that, where the ACMA determines that a mobile carriage service provider does not comply with the MPS Determination No. 1, the ACMA may give a notice to the mobile carriage service provider setting out how the service must be improved and/or the information that must be provided to customers (including how and when this information must be conveyed).

Item [11] specifies that the penalty amount for a contravention of subsection 2.1(1) of the *Telecommunications Service Provider (Mobile Premium Services) Determination 2010 (No. 2)* (MPS Determination No. 2) is equal to 200 penalty units (currently \$22,000). Subsection 2.1(1) stipulates that a content service provider must not enter into a contract with another content service provider for the supply of premium SMS and MMS services to a customer unless the other content service provider is listed in the register maintained by Communications Alliance Ltd under the *Mobile Premium Services Industry Code C637:2009*.

Item [12] specifies that the penalty amount for a contravention of subsection 2.1(2) of MPS Determination No. 2 is equal to 200 penalty units (currently \$22,000). Subsection 2.1(2) stipulates that a mobile carriage service provider must not enter into a contract with a content service provider for the supply of premium SMS and MMS services to a customer unless the content service provider is listed in the register maintained by Communications Alliance Ltd under the *Mobile Premium Services Industry Code C637:2009*.

Item [13] specifies that the penalty amount for a contravention of section 3.8 of MPS Determination No. 2 is equal to 300 penalty units (currently \$33,000). Section 3.8 requires a mobile carriage service provider to comply with a do not bill order, or a variation to a do not bill order, within 1 business day after the day on which the order or variation comes into force. A do not bill order (or a variation to a do not bill order) may be made by the ACMA under section 3.4 of MPS Determination No. 2 and would require all mobile carriage service providers to cease billing customers and collecting charges from customers for the supply of specified premium SMS and MMS services of a specified content service provider.

Item [14] specifies that the penalty amount for a contravention of section 3.13 of MPS Determination No. 2 is equal to 300 penalty units (currently \$33,000). Section 3.13 requires a mobile carriage service provider to comply with an interim do not bill order, or a variation to

an interim do not bill order within 1 business day after the day on which the order or variation comes into force. An interim do not bill order (and a variation to an interim do not bill order) may be made by the ACMA under section 3.9 of MPS Determination No. 2. This type of order is similar to a do not bill order (described above for Item [13] of Schedule 2), but expires 60 days after it is made.