

# **REPLACEMENT EXPLANATORY STATEMENT**

*Telecommunications Act 1997*

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

### **Issued by the Authority of the Minister for Communications**

#### **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 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 including:

- 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 disallowable legislative instrument for the purposes of the *Legislation Act 2003*. The Determination commences the day after it is registered.

Details of the Determination are set out in [Attachment A](#).

This replacement explanatory statement has been issued to include a new section on why delegated legislation rather than primary legislation has been used, in line with the guidance of the Senate Standing Committee for the Scrutiny of Delegated Legislation.

#### **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.

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 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.

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. ACMA 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, the number of penalty units that will apply.

Accordingly, 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)).*

In accordance with current Commonwealth guidelines published by the Attorney-General’s Department<sup>1</sup>, 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.

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

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<sup>1</sup> [www.ag.gov.au/legal-system/administrative-law/regulatory-powers/infringement-notice](http://www.ag.gov.au/legal-system/administrative-law/regulatory-powers/infringement-notice)

failures to exceed USO payphone repair and CSG performance benchmarks, with the amount of penalty adjusted to a set formula based on the margin a given benchmark is not met. This recognises the large number of consumers that could be impacted where one or more performance benchmarks are 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).

Accordingly, the infringement notice penalty units specified in the Determination are set at a level that is appropriate for less serious and less factually complex contraventions of the relevant provisions. The penalty units here reflect those that were previously included in an earlier Determination made under subsection 572G(2), the *Telecommunications (Infringement Notice Penalties) Determination 2012* (the 2012 Determination).

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>2</sup>, those two instruments sunset, or ceased, on 1 April 2021.

### Consultation

Public consultation on a draft Determination was undertaken from 18 November to 16 December 2022. Submissions were received from Telstra, the Australian Communications and Media Authority (ACMA), Australian Communications Consumer Action Network (ACCAN) and the Consumer Action Law Centre (CALC). Telstra queried the need for the instrument given its level of compliance and cautioned against the inclusion of additional penalties but did not ultimately oppose the Determination being made. The ACMA, ACCAN and CALC supported the making of the Determination and proposed the inclusion of additional penalties and/or a review of penalties in telecommunications generally.

### Legislative instrument and primary legislation

Delegated legislation rather than primary legislation has been used because the primary legislation provides for this in recognition of the likely level of detailed drafting that would be required and the need for flexibility. Moreover the use of delegated legislation enables the matter to be dealt with relatively quickly, saving the Parliament's valuable time, while leaving the rules subject to the scrutiny of the Parliament, and disallowance if warranted.

More specifically, the Determination utilises the authority conferred by Parliament on the Minister under s.572G of the Act that allows the Minister to set higher penalties. The drafting of the determination is detailed, for example, in that it provides higher penalties for a range of contraventions, and escalation triggers depending on the magnitude of the contravention. While the penalties are a continuation of a prior Determination, flexibility is still required because the Determination is dependent on rules set out in other detailed subordinate

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<sup>2</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)

legislation, which may itself change due to changes in telecommunications technology and services and/or consumer preferences, or enforcement approaches and priorities, noting these may also affect the approach in the Determination itself.

#### Regulatory impact

A preliminary assessment of the proposal to make a replacement instrument for the 2012 Determination, but incorporating minor changes and updates to reflect current legislative drafting practice, was provided to the Office of Impact Analysis (OIA) to determine whether a Regulatory Impact Statement (RIS) was required. The OIA assessed the proposal as having no more than a minor regulatory impact and advised no RIS was required (OBPR22-0374).

#### 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.

**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

instrument made under subsection 12EE(6). The Minister has set out minimum benchmarks in Part 3 of the *Telecommunications (Payphones) Determination 2022*, which presently sets out 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, 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 \$666,000) (see item 1 of Schedule 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 \$1,998,000) (see item 3 of Schedule 1).

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 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 under 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

flexibility should arrangements change and the primary universal provider no longer holds a carrier licence.

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. Currently, Part 2 of the *Telecommunications (Customer Service Guarantee – Retail Performance Benchmarks) Instrument (No. 1) 2011* 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
- appointment keeping
- new connections (in urban, major rural, minor rural and remote areas), and
- fault repairs (in urban, major rural, minor rural and remote areas).

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

This disallowable legislative instrument 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 2011*.

#### **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>3</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 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.

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>3</sup> [www.legislation.gov.au/Details/F2022L00250](http://www.legislation.gov.au/Details/F2022L00250)