

EXPLANATORY STATEMENT

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

Telecommunications (Consumer Protection and Service Standards) Act 1999

Telecommunications (Participating Persons) Determination 2011 (No. 1)

Authority

The *Telecommunications (Participating Persons) Determination 2011 (No. 1)* (the Determination) is made by the Minister for Broadband, Communications and the Digital Economy (the Minister) pursuant to paragraph 20A(2)(b) of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (the Act), which provides that the Minister may determine in writing that a certain kind of person is not a ‘participating person’ for an eligible revenue period under the Act.

Purpose

The Determination exempts a carrier from being a ‘participating person’ pursuant to section 20A of the Act if it has revenue below one of three revenue thresholds (initial sales revenue, gross telecommunications sales revenue, or eligible revenue of less than \$25 million in each case) and also provides the Australian Communications and Media Authority (ACMA) with an eligible statutory declaration declaring that its revenue is below one of the three thresholds.

The consequence of being exempt from being a participating person is that a carrier will be exempt from reporting requirements under the Act, which apply only to ‘participating persons’ and will also be relieved from requirements to contribute to the Universal Service Obligation (USO) and National Relay Service (NRS) levies. The carrier will continue to be subject to the requirements of the *Telecommunications Act 1997*, including the provision of information to the ACMA where specified.

Background

On 15 September 2009, the Australian Government announced a package of reforms to telecommunications regulation in Australia which included the intention to remove unnecessary red tape by exempting carriers with annual revenues of less than \$25 million from certain reporting obligations to the ACMA and from having to contribute to the USO and NRS levies and annual carrier licence charges.

The *Telecommunications (Participating Persons) Determination 2011 (No.1)* (the Determination) addresses the government’s commitment to exempting smaller carriers from reporting obligations to the ACMA and having to contribute to the USO and NRS levies.

Subsection 20(1) of the Act requires participating persons (for the purpose of the USO) to submit written returns (eligible revenue returns) to the ACMA setting out their eligible revenue for an eligible revenue period. Subsection 20A(1) of the Act provides in effect that, subject to subsection 20A(2), all carriers and carriage service providers specified under a determination made under paragraph 20A(1)(b) are participating persons for the purposes of reporting to the ACMA. Currently, all carriers are participating persons.

Subsection 20(2) of the Act requires eligible revenue returns to be submitted in a form approved by the ACMA. The *Telecommunications Universal Service Obligation (Eligible Revenue) Determination 2003* (Eligible Revenue Determination) sets out the ACMA's requirements for eligible revenue returns, including requiring carriers to identify their initial sales revenue, gross telecommunications sales revenue and eligible revenue. Eligible revenue returns must include annual financial statements and be accompanied by audit reports on the eligible revenue returns (section 20D of the Act).

Under section 20Z of the Act, participating persons for the purpose of the USO (currently all carriers) are liable to pay the USO levy, as assessed by the ACMA under section 20U of the Act. Under section 99 of Act, participating persons for the purpose of the NRS (which currently includes carriers with \$10 million or more in gross telecommunications sales revenue) are required to pay a quarterly NRS levy. The amount paid by individual carriers for the USO and NRS levies is calculated using the ACMA's assessment of each carrier's eligible revenue for the eligible revenue period, under section 20F of the Act.

As outlined above, the prescription of all carriers as participating persons places considerable regulatory costs on smaller carriers as they are required to calculate and submit eligible revenue returns to the ACMA and contribute to the USO and NRS levies. This places a disproportionate burden on smaller carriers as the compliance costs of preparing and submitting the eligible revenue return and supporting documents (such as independent audit reports on the returns) will often exceed their actual contribution to the levies. In the ACMA's 2008-09 eligible revenue assessment there were a total of 194 carriers, with 170 having eligible revenue of less than \$25 million; and 31 of those carriers having zero eligible revenue and therefore not contributing anything to the levies.

The Determination reduces regulatory compliance costs for carriers with less than \$25 million in revenue (either initial sales revenue, gross telecommunications sales revenue, or eligible revenue) as they will instead be required to provide the ACMA with a statutory declaration stating that their revenue is below one of the three revenue thresholds for the eligible revenue period. These carriers will also be exempt from contributing to the USO and NRS levies, further reducing their regulatory costs.

The Determination sets out a three-tiered revenue threshold to further minimise the regulatory burden on smaller carriers. Under the Eligible Revenue Determination, eligible revenue is calculated by going through a number of different calculations. Firstly, a carrier is required to identify its initial sales revenue, which includes all sales revenue included in the financial statements of its ultimate Australian parent entity, including consolidated related parties, and in the financial statements of Declared Related Parties

(subsection 14(4) of the Eligible Revenue Determination). Then the carrier is required to calculate its gross telecommunications revenue, which includes all sales revenue listed in its financial statements, plus other telecommunications sales revenue, minus a number of specified deductions (section 20 of the Eligible Revenue Determination). Finally eligible revenue is derived by deducting certain specified revenue and expense items from a carrier's gross telecommunications sales revenue (section 38 of the Eligible Revenue Determination).

Given this method of calculating eligible revenue, a carrier with initial sales revenue and (therefore, by necessity) gross telecommunications sales revenue under the \$25 million threshold can identify that its initial sales revenue is below the \$25 million threshold through an eligible statutory declaration, without having to methodically prepare and submit calculations of gross telecommunications sales revenue and eligible revenue through an eligible revenue return. Similarly, for a carrier with initial sales revenue exceeding \$25 million, but gross telecommunications sales revenue less than this threshold, the carrier will not be required to methodically prepare and submit an eligible revenue return, since the carrier's eligible revenue will by necessity be less than its gross telecommunications sales revenue. While the carrier will still need to calculate its eligible revenue in accordance with the Eligible Revenue Determination it will be subject to the less onerous requirement to submit an eligible statutory declaration as described above. The ACMA has the power to require further information from carriers in support of their statutory declaration, in accordance with the *Telecommunications Act 1997*.

An eligible revenue threshold of \$25 million has been selected because it would align more closely with reporting processes mandated for Australian businesses under Commonwealth legislation and regulations, including reporting requirements for small proprietary companies under section 292 of the *Corporations Act 2001*. For example, one of the features of a small proprietary company (as defined in section 45A of that Act) is that it has less than \$25 million in revenues. As such, companies are exempt from certain reporting obligations under the *Corporations Act 2001*, and a similar threshold has been adopted into the Determination to exempt smaller carriers from their reporting obligations under the Act.

Details of the accompanying Determination are set out in **Attachment A**.

Consultation

The Government undertook a public consultation process on the Determination following the release of the consultation paper on 2 May 2011. The Government held meetings with key stakeholders including carriers and the ACMA. Carriers were advised of the public consultation process and were invited to make submissions. Six submissions were received. Minor amendments were made to the Determination in light of the submissions to more accurately target the reduction in regulatory burden to smaller carriers.

The Determination is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

Notes on sections

Section 1 - Name of Determination

Section 1 provides that the name of the Determination is the *Telecommunications (Participating Persons) Determination 2011 (No.1)*.

Section 2 - Commencement

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

The Determination is intended to apply in respect of the 2010/11 eligible revenue period and each subsequent eligible revenue period.

Section 3 - Repealed

Section 3 of the Determination repeals the *National Relay Service (Participating Persons) Determination 2005 (No.1)*.

The *National Relay Service (Participating Persons) Determination 2005 (No.1)* was made pursuant to paragraph 94A(2)(b) of the Act and sets out that a person (a carrier) with gross telecommunications revenue of less than \$10 million in an eligible revenue period will not be liable to pay the NRS levy. Because the Determination will result in USO non-participating persons not being liable to pay the NRS levy under section 99 of the Act (see section 5), the 2005 Determination is no longer required. Carriers with initial sales revenue, gross telecommunications sales revenue and eligible revenue of \$25 million or more will still be liable to pay the NRS levy under section 99 of the Act.

Section 4 - Definitions

Subsection 4(1)

Subsection 4(1) defines key terms used in the Determination.

The term ‘ACMA’ is defined to mean the Australian Communications and Media Authority.

The term ‘Act’ refers to the *Telecommunications (Consumer Protection and Service Standards) Act 1999*.

The term ‘Eligible Revenue Determination’ is defined by reference to the *Telecommunications Universal Service Obligation (Eligible Revenue) Determination 2003* as in force from time to time.

The term, ‘specified timeframe’ is used in section 4. It is defined by reference to the timeframe for when a participating person is required to submit an eligible revenue return for that period, as specified in writing by the ACMA from time to time under paragraph 20(2)(a) of the Act. This approach to defining the applicable timeframe for the lodgement of the eligible statutory declaration by a USO non-participating person relies upon paragraph 14(1)(b) of the *Legislative Instruments Act 2003* and section 589 of the *Telecommunications Act 1997*. It ensures that the timeframe for the lodgement of the eligible statutory return by a USO non-participating person will be aligned with the timeframe for the lodgement of the eligible revenue return for participating persons. As at the date this Determination comes into effect, the applicable timeframe is within four months following the end of the eligible revenue period (see *Telecommunications (Period for Providing Return of Eligible Revenue) Specification 2010*).

The term ‘ultimate Australian parent entity’ is defined as having the same meaning as in the Eligible Revenue Determination. Section 6 of the Eligible Revenue Determination provides that it means an entity that is described as such under accounting methods commonly used in Australia; and the entity in whose financial statements the person’s revenue is reported.

The note to subsection 4(1) clarifies that the terms ‘eligible revenue period’ and ‘participating person’ have the same meaning as in section 5 of the Act.

Subsection 4(2)

Subsection 4(2) provides that a person’s initial sales revenue, gross telecommunications sales revenue and eligible revenue for the purposes of the Determination are to be calculated with reference to each of those amounts under either the Act (in the case of eligible revenue) or the Eligible Revenue Determination (in the case of gross telecommunications sales revenue and initial sales revenue), as if that person were a participating person under the Act.

Under the Act and the Eligible Revenue Determination, only a participating person is required to lodge an eligible revenue return which sets out their eligible revenue and also their initial sales revenue and gross telecommunications sales revenue. Subsection 4(2) is intended to allow persons and the ACMA to ascertain whether they may fall below one or more of the \$25 million revenue thresholds described in subsection 4(4) below.

Subsection 4(3) - Eligible statutory declaration

Subsection 4(3) provides that an eligible statutory declaration for the purpose of the Determination is a statutory declaration that is both made by a person with appropriate authority for the company or individual and complies with the *Statutory Declaration Act 1959*. Under the *Statutory Declaration Act 1959*, a person who wilfully makes a false statement in a statutory declaration is guilty of an offence and may be fined or jailed or both.

Subsection 4(4) - USO non-participating person

Subsection 4(4) provides three circumstances in which a person is a USO non-participating person for the purposes of paragraph 20A(2)(b) of the Act. The rules under subsection 4(4) are subject to subsection 4(5) regarding calculation of revenues for group entities. The effects of being a USO non-participating person under the Determination are set out at section 5 below.

'Initial sales revenue' less than \$25 million

Paragraph 4(4)(a) provides that a person is a USO non-participating person if both:

- (i) the person's initial sales revenue for the eligible revenue period is less than \$25 million; and
- (ii) within the specified timeframe (defined in section 4) for the eligible revenue period, the person provides an eligible statutory declaration stating that the person's eligible sales revenue for the eligible revenue period was less than \$25 million.

The purpose of these criteria is to make clear that to be a USO non-participating person under paragraph 4(4)(a), a person must in fact have initial sales revenue of less than \$25 million for an eligible revenue period, in addition to providing the ACMA with an eligible statutory declaration to that effect.

'Gross telecommunications sales revenue' less than \$25 million

Paragraph 4(4)(b) largely mirrors paragraph 4(4)(a), except that it relates to a \$25 million threshold for gross telecommunications sales revenue, rather than initial sales revenue.

The purpose of these criteria is to make clear that to be a USO non-participating person under paragraph 4(4)(b), a person may have initial sales revenue of more than \$25 million, but must have gross telecommunications sales revenue of less than \$25 million for an eligible revenue period, in addition to providing the ACMA with an eligible statutory declaration to that effect.

'Eligible revenue' less than \$25 million

Paragraph 4(4)(c) largely mirrors paragraph 4(4)(a), except that it relates to a \$25 million threshold for eligible revenue, rather than initial sales revenue.

The purpose of these criteria is to make clear that to be a USO non-participating person under paragraph 4(4)(c), a person may have initial sales revenue and gross telecommunications sales revenue of more than \$25 million, but must have eligible revenue of less than \$25 million for an eligible revenue period, in addition to providing the ACMA with an eligible statutory declaration to that effect.

Accordingly, under subsection 4(4) a person is only required to be below the \$25 million for one of the three revenue thresholds to be a USO non-participating person. This is

because a person with initial sales revenue and gross telecommunications sales revenue under the \$25 million threshold will necessarily have eligible revenue below \$25 million; or a person with gross telecommunications sales revenue under the \$25 million threshold will necessarily have eligible revenue below \$25 million.

Given that it is simpler for carriers to identify their initial sales revenue and gross telecommunications sales than to identify their eligible revenue, the Determination has adopted this three-tiered revenue threshold approach to further minimise the regulatory burden on smaller carriers.

For example, if Carrier A has initial sales revenue below the \$25 million threshold and complies with the statutory declaration requirements at subparagraph 4(4)(a)(ii), then Carrier A will be a USO non-participating person. Carrier A will not need, for the purpose of the Determination, to calculate its gross telecommunications sales revenue or its eligible revenue.

As noted above for paragraph 4(4)(a), it is not enough that a person claims that they are below the threshold, the person must actually be below the specified threshold. It is envisaged, that in appropriate instances, the ACMA may consider using its investigation powers under Part 27 of the *Telecommunications Act 1997* to be satisfied that a person is below the relevant threshold in subsection 4(4) of the Determination.

Accounting for group entities

Subsection 4(5) requires that for the purposes of subsection 4(4) of the Determination, if a person has the same ultimate Australian parent entity as one or more other carriers (or carriage service providers, if a determination under paragraph 20A(1)(b) of the Act is in force) then each carrier (or applicable carriage service provider) must calculate initial sales revenue, gross telecommunications sales revenue and eligible revenue, on a group basis, accounting for revenues and deductions as a whole.

Subsection 4(5) has been implemented to protect against ultimate Australian parent entity carriers restructuring the group entities in an artificial manner so that the individual carriers fall below one or more of the \$25 million thresholds, in circumstances where their interest in the group of carriers as a whole has combined eligible revenues of \$25 million or more. However, in submitting their eligible revenue returns, these group entities are still able to choose how they account for their revenue/deductions calculations in the return in accordance with the options available under the Eligible Revenue Determination, that is, either on a group or individual basis.

An example of the effects of the Determination on a group entity is contained at **Attachment B**.

Section 5 - Determination

Section 5 provides that the effect of being a USO non-participating person for an eligible revenue period is that the person is exempt from section 20A of the Act for that eligible revenue period.

Section 20A of the Act specifies who is, for the purpose of the Act, a participating person for an eligible revenue period. An exemption from section 20A of the Act is intended to exclude a USO non-participating person from being a participating person under the Act.

Exemption from USO levy

Pursuant to section 20 of the Act, a participating person under the Act is required to give the ACMA a written return setting out the person's eligible revenue for that eligible revenue period. The ACMA is then required to make a written assessment of each participating person's eligible revenue for an eligible revenue period, which will be used by the ACMA to assess a person's USO levy liability. The assessment usually occurs on an annual basis.

If a person is a USO non-participating person for an eligible revenue period, they will not be a participating person for that eligible revenue period and will not be required to submit a written return to the ACMA. Consequently, the ACMA will not assess the person's eligible revenue and as such the person will not be assessed for a USO levy liability.

Exemption from NRS levy

Pursuant to section 99 of the Act, a person is liable to pay the NRS levy (paid quarterly) if the person is a participating person for the relevant NRS quarter (for the purposes of section 94A of the Act) and is covered by the most recent eligible revenue assessment made by the ACMA before the start of the quarter. A participating person for the purposes of the NRS levy is a person who is a carrier at any time during the relevant NRS quarter.

If a person is a USO non-participating person for an eligible revenue period under the Determination, they will not be a participating person (for the purposes of section 20A of the Act) for that eligible revenue period and will not be required to submit an eligible revenue return to the ACMA. Consequently the ACMA will not assess the person's eligible revenue for that eligible revenue period under section 20F; and therefore the person will not be covered by the ACMA's eligible revenue assessment as outlined in sections 99 and 101C of the Act. This will result in the person not being liable to pay the NRS levy from the quarter immediately after the quarter in which the ACMA conducted its eligible revenue assessment.

Attachment C sets out an example of the effect of the Determination on the USO and NRS levies.

Attachment B – Example of the effect on a group entity under the Determination

Carrier	initial sales revenue	gross telecommunications sales revenue	eligible revenue	Combined initial sales revenue	Combined gross telecommunications sales revenue	Combined eligible revenue
Carrier A	\$ 20 million	\$ 15 million	\$ 10 million	\$ 60 million	\$ 39 million	\$ 22 million
Carrier B	\$ 40 million	\$ 24 million	\$ 12 million			

In this example, Carrier A is the parent company of Carrier B. This means that Carrier A has the same ultimate Australian parent company as Carrier B and therefore Carrier A must make its calculations of initial sales revenue, gross telecommunications sales revenue and eligible revenue (for the purpose of the Determination) on a group basis with Carrier B in accordance with subsection 4(5) of the Determination.

Carrier A will not satisfy paragraph 4(4)(a) to be considered a USO non-participating person, because its initial sales revenue is \$60 million (the combined initial sales revenue of both Carrier A and Carrier B because of subsection 4(5)) and therefore exceed the \$25 million threshold as required under subparagraph 4(4)(a)(i). This is the case even though individually Carrier A has initial sales revenue of \$20 million which is under the \$25 million threshold.

Carrier A will not satisfy paragraph 4(4)(b) to be considered a USO non-participating person, because its gross telecommunications sales revenue is \$39 million (the combined gross telecommunications sales revenue of both Carrier A and Carrier B because of subsection 4(5)) and therefore exceed the \$25 million threshold as required under subparagraph 4(4)(b)(i). This is the case even though individually Carrier A has gross telecommunications sales revenue of \$15 million which is under the \$25 million threshold.

Carrier A will however fall within subparagraph 4(4)(c)(i) to be considered a USO non-participating person, because its eligible revenue is \$22 million (the combined eligible revenue of both Carrier A and Carrier B because of subsection 4(5)) which is below the \$25 million threshold.

Assuming that Carrier A complies with the statutory declaration requirements at subparagraph 4(4)(a)(ii), Carrier A will be a USO non-participating person for the eligible revenue period.

Attachment C - Effect of the Determination on Carrier C in the eligible revenue period 2010–11

USO levy liability

In this example, for the 2010–11 eligible revenue period, Carrier C's eligible revenue is \$20 million as calculated in accordance with the Eligible Revenue Determination. In accordance with the Determination, Carrier C submits an eligible statutory declaration within the specified timeframe (assuming the applicable timeframe is within 4 months (i.e. 31 October 2011)) to the ACMA declaring its eligible revenue to be under \$25 million. Given that Carrier C has met the requirements of paragraph 4(4)(c) of the Determination, Carrier C is a USO non-participating person and is not a participating person for the purposes of section 20A of the Act.

In mid-2012 the ACMA would make an eligible revenue assessment setting out the eligible revenue of all participating persons for the 2010–2011 eligible revenue period (section 20F of the Act). Given Carrier C is not a participating person (i.e. it is a USO non-participating person) it will not be covered by the 2010–11 eligible revenue assessment.

In late 2012, the ACMA would make the Universal Service Assessment which sets the levies for 2011–12 based on whether a carrier was a participating person in the 2010–11 eligible revenue period (sections 20U and 20N of the Act). As Carrier C was a USO non-participating person in the 2010–11 eligible revenue period, Carrier C will not be liable to pay a USO levy relating to the 2011–12 eligible revenue period. (See Figure 1).

NRS levy liability

Given Carrier C was a USO non-participating person in the 2010–11 eligible revenue period, it will not be covered by the 2010–11 eligible revenue assessment, the most recent eligible revenue assessment for the purposes of sections 20F, 99 and 101C of the Act. Carrier C will not be liable to pay the NRS levy from the quarter immediately after the quarter in which the ACMA makes its eligible revenue assessment. For example, if the ACMA's 2010–11 eligible revenue assessment is made in April 2012 (fourth quarter of 2011–12 financial year), for each quarter until the ACMA makes its next eligible revenue assessment, Carrier C is not required to pay the NRS levy (See Figure 2).

FIGURE 1: Example of effect of a carrier being a USO non-participating person under the Determination and USO levy liability

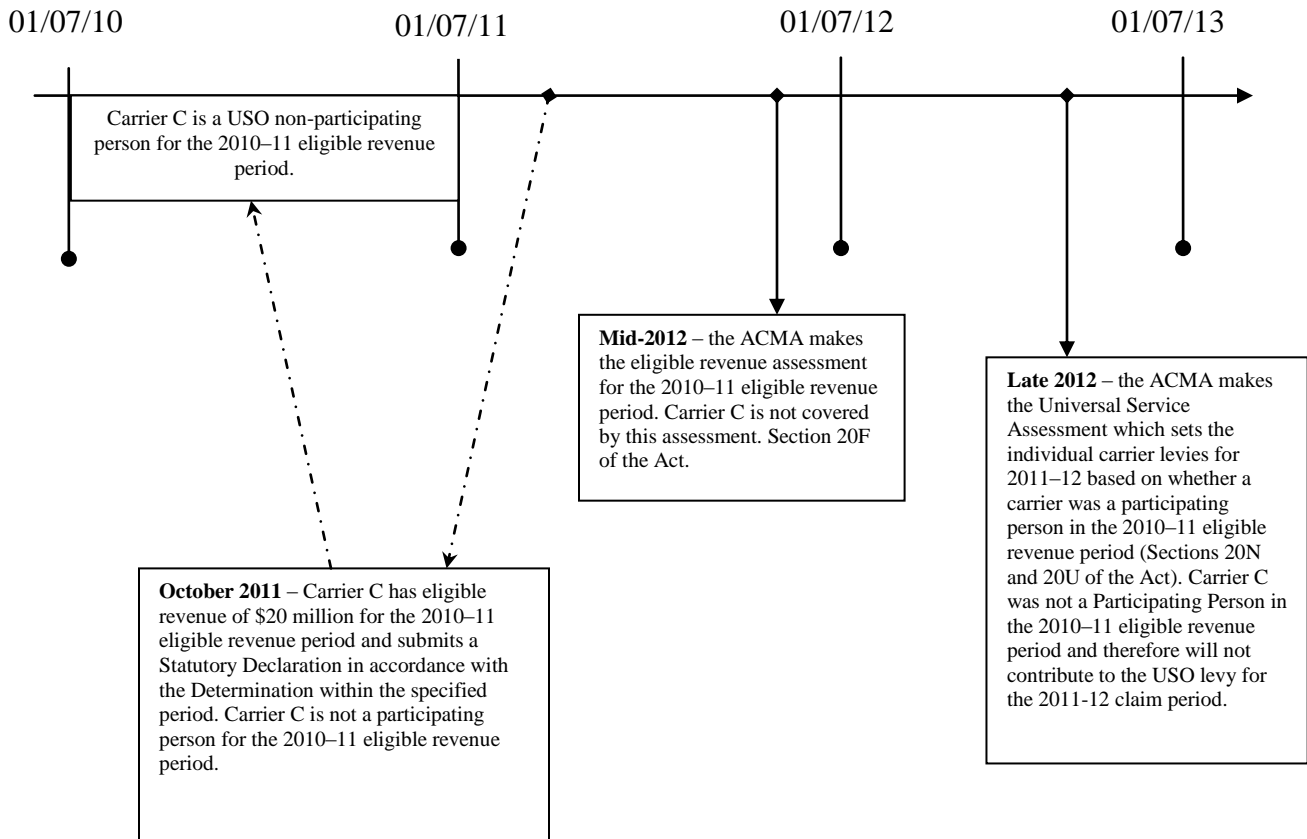


FIGURE 2 Example of effect of a carrier being a USO non-participating person under the Determination and NRS levy liability

