

EXPLANATORY STATEMENT

Telecommunications Universal Service Management Agency Act 2012

Levy Amount Formula Modification Determination 2014

Issued by the Authority of the Minister for Communications

Authority

The *Levy Amount Formula Modification Determination 2014* (the **Determination**) is made by the Minister for Communications (the Minister) under subsection 99(2) of the *Telecommunications Universal Service Management Agency Act 2012* (the **Act**). This provision enables the Minister to modify the formula for calculating the levy amount of a ‘participating person’ for an eligible revenue period under the Act.

Purpose

The Determination modifies the general formula by which a levy amount is calculated for a participating person in an eligible revenue period (other than the first or second eligible revenue periods) to provide for the calculations to be adjusted in the event that a participating person goes into receivership, liquidation, general administration or ceases to exist.

Background

Part 6 of the Act sets out the provisions for the assessment, collection and recovery of an industry levy, imposed under the *Telecommunications (Industry Levy) Act 2012*. A levy is payable by a ‘participating person’, as defined in section 92 of the Act and the *Telecommunications (Participating Persons) Determination 2013*. This levy (together with government funding) covers the costs of the Telecommunications Universal Service Management Agency (**TUSMA**). TUSMA has responsibility for the effective implementation and administration of service contracts or grants that deliver universal service and other public policy telecommunications outcomes.

The first and second eligible revenue periods

For the first and second eligible revenue periods (ie the 2011 - 2012 and 2012 - 2013 financial years respectively), subsection 99(3) of the Act provides that the levy amount is the ‘levy contribution factor’ (as calculated under section 98 of the Act) multiplied by the ‘overall levy cap amount’ (which is an amount ascertained in accordance with a written instrument made by the Minister under subsection 99(4) of the Act).

In 2013, the *Levy Amount Formula Modification Determination 2013* (the **2013 Determination**) was made under subsection 99(8) of the Act and modified the formula set out in subsection 99(3) of the Act for the first and second eligible revenue periods. The calculation of the levy amount was adjusted in the event that a participating person

goes into receivership, liquidation, general administration or ceases to exist. The formula for calculating the levy amount for the first or second eligible revenue periods is different from the formula that applies in subsequent eligible revenue periods because of the substantially different liabilities incurred by TUSMA during its first two years of operation.

Subsequent eligible revenue periods

For subsequent eligible revenue periods (ie commencing with the financial year 2014 – 2015), the formula in subsection 99(1) of the Act applies. This formula provides that the levy amount will be calculated for each participating person for an eligible levy period by multiplying each person's 'levy contribution factor' by the 'overall levy target amount' (which is an amount worked out under section 88 of the Act).

As with the modifications to the formula in subsection 99(3) of the Act, the Determination modifies the formula in subsection 99(1) of the Act in the event that a participating person goes into receivership, liquidation, general administration or ceases to exist.

The formula in subsection 99(1) of the Act relies on all participating persons paying in full their respective levy amounts so that the 'overall levy target amount' is recovered. If a participating person does not pay the levy amount owed (because, for example, they enter some form of external administration under the *Corporations Act 2001*, or otherwise cease to exist before the end of the relevant eligible revenue period), there will be a shortfall in TUSMA's funding for that financial year.

Subsection 99(2) of the Act sets out that the Minister may, by legislative instrument, modify the formula in subsection 99(1). The Explanatory Memorandum to the *Telecommunications Universal Service Management Agency Bill 2011* provides the following relevant commentary:

This ability to vary the formula of a levy amount would allow the Minister to modify the means by which the overall levy amount is calculated to account for any irregularities that might otherwise adversely affect the accurate assessment of a levy amount under this clause. For example, this power could be utilised to adjust the calculations of a levy amount in the event of a participating person going into receivership, liquidation or general administration or who for any reason has ceased to exist.

The Determination provides a mechanism to automatically recover a shortfall of the overall levy target amount, in circumstances where a participating person is unable to pay the full levy amount in an eligible revenue period, due to receivership, liquidation, general administration or that the person ceases to exist. The Determination achieves this in an equitable manner, with the relevant shortfall being distributed amongst the remaining carriers for payment.

The Determination is consistent with previous levy modification determinations, including the 2013 Determination and the *Levy Debit Formula Modification Determination (No.1) 2002* made by the Minister under subsection 20R(3) of the *Telecommunications (Consumer Protection and Service Standards) Act 1999*, in respect of the former Universal Service Obligation levy. The Determination does not impose new obligations on participating persons, or alter their existing obligations in any significant way.

Consultation

The Australian Communications and Media Authority was consulted in relation to the making of this Determination.

An exposure draft of this Determination was provided to carriers who were participating persons for the 2012-13 eligible revenue period, as well as those additional carriers who might be participating persons for the 2013-14 eligible revenue period. A total of three submissions were received, two of which provided only general criticisms of the levy and broader TUSMA funding arrangements.

The third submission raised concerns regarding the Determination's treatment of participating persons under external administration and whether such persons were receiving preferential treatment. Further discussions were held with the party and as a consequence it was considered that no amendments were required to be made to the Determination.

Regulatory impact

The Office of Best Practice Regulation (the **OBPR**) has agreed that the regulatory changes arising from the Determination are machinery in nature and that no further regulatory impact analysis is required.

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 modifies the formula by which a levy amount is calculated for a participating person in an eligible revenue period. This modified formula provides for the calculations to be adjusted in the event that a participating person goes into receivership, liquidation, general administration or ceases to exist.

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 2011*. It does not engage any of the applicable rights or freedoms and does not raise any human rights issues.

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 *Levy Amount Formula Modification Determination 2014*.

Section 2 - Commencement

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

Section 3 - Application

Section 3 provides that the Determination applies in relation to the 2014- 2015 eligible levy period and subsequent eligible levy periods.

Section 4 - Definitions

This section defines the terms used in the Determination.

Section 5 - Modification of the formula in subsection 99(1) of the Act

The formula in subsection 99(1) of the Act has been replaced with three separate formulas in relation to an eligible revenue period:

- (a) levy amounts for a participating person that ceases to exist;
- (b) levy amounts for a participating person that is an externally-administered body corporate; and
- (c) levy amounts for participating persons where paragraphs (a) or (b) do not apply.

Levy amounts for an eligible revenue period, for a participating person that ceases to exist

The formula in new subsection 99(1) sets out that the amount payable by a participating person for an eligible revenue period is zero, where the participating person ceases to exist before the end of the ‘date of assessment’ (i.e. a date determined by the ACMA, being a date which is no earlier than the end of the relevant eligible revenue period and no later than the date the ACMA issues its written assessment under section 100).

Setting the levy amount for these particular participating persons at zero avoids the administrative burden on the ACMA in pursuing these entities in circumstances where no levy amount will be recoverable.

Levy amounts for an eligible revenue period, for a participating person that is an externally-administered body corporate

The formula in new subsection 99(1A) sets out the amount payable by a participating person for an eligible revenue period, in circumstances where the participating person is an ‘externally-administered body corporate’. This formula is the same as that which is currently provided for in subsection 99(1) of the Act.

The term ‘externally-administered body corporate’ is defined in the *Corporations Act 2001*. It applies to a body corporate that is being wound up, in receivership, under administration or has executed a deed of company arrangement that has not yet terminated or has entered into a compromise or arrangement with another person the administration of which has not been concluded.

Unlike participating persons that have ceased to exist, it remains viable that a levy amount will be recoverable from a participating person that is under external administration.

Levy amounts for an eligible revenue period, for all other participating persons

The formula in new subsection 99(1B) sets out the amount payable by a participating person in an eligible revenue period, in circumstances where the participating person is not under external administration.

This formula includes concepts of a ‘levy contribution factor’ and an ‘overall levy target amount’, similar to new subsection 99(1A). However, this formula introduces the concepts of an ‘adjustment factor’ and ‘previous levy deficit’ into the formula. The effect of this modified formula is that those participating persons to which it applies may be required to pay a higher levy amount in order to cover a portion of the levy amount owed by participating person(s) to whom the new subsections 99(1) and (1A) applies.

The Determination recognises that, in practice, the only category of participating person that can guaranteed to be able to pay levy at the time it is due are those carriers which remain fully operational. The modified levy formula for these carriers includes an adjustment factor to ensure any levy shortfall that occurs due to other carriers ceasing to exist or entering into external administration is spread equitably based on each operational carrier’s share of eligible revenue. This is consistent with the approach first introduced in the *Levy Debit Formula Modification Determination (No.1) 2002* and the 2013 Determination.

Should levy be recovered from a participating person under external administration, then there are mechanisms under the TUSMA Act for reimbursing carriers which made up the shortfall.

Section 87 of the Act may apply in circumstances where a carrier pays a levy amount under subsection 99(1B) and the levy deficit is subsequently reduced (for example, where a participating person in external administration subsequently pays an amount which reduces the levy deficit for the purposes of the formula in subsection 99(1B)). Section 87 of the Act enables TUSMA to redistribute an amount from the Telecommunications

Universal Service Special Account (where the balance is in credit and the debits for an eligible levy period have been paid) to relevant participating persons. Section 111 also enables TUSMA on behalf of the Commonwealth to refund any overpayment of levy.