

**COMMUNICATIONS
ALLIANCE LTD**



**Department of Broadband, Communications and
the Digital Economy**

**Consultation on Determination of penalties for
infringement notices issued under the
*Telecommunications Act 1997***

Submission by Communications Alliance

TABLE OF CONTENTS

COMMUNICATIONS ALLIANCE.....	2
INTRODUCTION	2
EXECUTIVE SUMMARY.....	3
DISCRETIONARY FACTORS	3
CUSTOMER SERVICE GUARANTEE BENCHMARKS	4
CONCLUSION.....	4
CONTACTS	5

The Department of Broadband, Communications and the Digital Economy (DBCDE)

Determination of penalties for infringement notices issued under the *Telecommunications Act 1997*

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COMMUNICATIONS ALLIANCE

Communications Alliance is the primary communications industry body in Australia. Its membership is drawn from a wide cross-section of the information and communication technology (ICT) industry, including network and service providers, content providers, equipment vendors, consultants, law firms and suppliers.

Our mission is to provide a unified voice for the ICT industry and to lead it into the next generation of converging networks, technologies and services.

More information about Communications Alliance can be found at:
www.commsalliance.com.au

INTRODUCTION

Communications Alliance is pleased to have the opportunity to comment on the Department of Broadband, Communications and the Digital Economy's (DBCDE) Consultation Paper on the **Determination of penalties for infringement notices issued under the *Telecommunications Act 1997*** (the Consultation Paper).

Communications Alliance believes it is in the best interests of industry, customers, regulators and government that the industry takes a proactive role in assisting regulatory bodies with the development of practical enforcement measures which facilitate both increased consumer confidence without limiting opportunities for industry growth.

The structure of this submission reflects a common industry response to the key issues raised by the Australian Communications and Media Authority (the ACMA) in the Consultation Paper. Members of Communications Alliance may also make individual submissions directly to the DBCDE following consideration of the Consultation Paper. This submission is intended to represent a consolidation of industry's position which complements the submissions of individual members but does not derogate from the individual positions advanced.

EXECUTIVE SUMMARY

Any enforcement regime that proposes financial penalties as a means of deterring regulatory non-compliance will naturally have follow-on operational and commercial consequences for providers. Accordingly it is important that consideration is given to the degree of discretion that is applied when issuing such penalties, and that the penalty units can be reconciled against the actual level of detriment experienced by consumers as a result of the infringement.

Communications Alliance notes that the ACMA has sought input on its proposed infringement provisions by way of a consultation paper. Communications Alliance has made a submission to the ACMA highlighting industry's concerns with its infringement provision methodology, and similarly would like to provide to the DBCDE some observations and recommendations for its consultation on the penalty amounts to be applied. This submission highlights some concerns with regards to how the proposed penalty regime is to be applied and where some degree of flexibility should be considered, particularly with regards to the CSG Wholesale Performance Benchmarks.

DISCRETIONARY FACTORS

Table 1 of the Consultation Paper outlines the infringement provisions as formulated by the ACMA and the proposed DBCDE penalty in the event of an infringement of each provision. In each case the penalty is a fixed amount. This framework is reliant on a 'black and white' approach to the application of penalties: if a provider is found to be in breach of a provision, then the nominated penalty amount is to be applied without any possibility of recourse.

Communications Alliance submits that this approach does not give consideration to certain significant variables:

- Scope of impact of the infringement – some degree of discretion should be exercised where the level of consumer detriment experienced as a result of the infringement is variable. Clearly an infringement by a smaller provider, with a comparatively small customer base, is not going to result in the level of consumer detriment that might result from an infringement by a larger provider with a significant customer base.
- Contributing factors – in some cases a minor administrative oversight might result in an infringement, yet the oversight can be easily corrected within a short space of time. This is particularly applicable to the enforcement of the provisions relating to the Mobile Premium Services Industry Register.
- Multiple infringement instances - Industry proposes that where there are multiple individual instances of the same breach then consideration should be given to placing a cap on the total amount that a provider can be penalised. Communications Alliance notes that in its enforcement of the SPAM Act the ACMA has the discretion to limit the number of infringements that are issued where there are multiple instances of an infringement by the same provider.

CUSTOMER SERVICE GUARANTEE BENCHMARKS

The Consultation paper proposes a penalty of \$990,000 for an infringement of the CSG wholesale performance benchmarks. Communications Alliance notes it has not received any formal advice that a wholesale CSG standard is to be introduced. In the event it was to be introduced, it would be unreasonable to expect industry to accept, or comment on, this figure until the opportunity to review a draft Ministerial Determination has been provided.

With regards to the higher penalties that would apply to non-compliance with the CSG performance benchmarks, this submission proposes that a tiered approach be developed for the application of this penalty. Industry has tabled the following proposal:

- Providers should be given greater latitude in rural and remote areas to take account of the far lower order volumes in these areas. The maximum number of penalty units that should therefore apply in rural and remote areas is 4,500 and 2,250 respectively. For example, based upon an annual volume of 1,500 orders, the difference between achieving 89% and 90% is only a matter of 15 additional orders having met the CSG timeframe.
- The penalty amounts should also incorporate a staggered approach that takes account of how many percentage points a performance benchmark has been missed by. The rationale behind this is that minor indiscretions should not incur the full penalty. Missing a CSG benchmark by less than 2% should only incur a penalty that is equivalent to 25% of the maximum penalty that applies to the particular demographic, whereas missing a CSG benchmark by between 2% and 5% should incur a penalty that is equivalent to 25% of the maximum penalty that applies to the particular demographic.

This approach would allow for some level of discretion to be applied when determining the penalty amount under specific mitigating circumstances, and provide the added benefit of engaging industry in the policy making process, as opposed to the blunt instrument approach that a fixed penalty regime, with little scope for discretion, would entail.

CONCLUSION

Communications Alliance notes that it has also made a submission to the ACMA's Infringement Notices Consultation. The ACMA has set out for consideration specific infringement provisions relating to designated sectors of the telecommunications industry, the proposed penalties for which have been tabled in the DBCDE's Consultation Paper.

The key issues raised by industry in the ACMA submission circulated around the need for some level of discretion when determining how infringements were to be applied, and the manner in which infringements relating to the CSG Wholesale Benchmarks were formulated.

This submission raises similar concerns-in this case with the penalty amounts being proposed. Communications Alliance believes that the DBCDE's proposed penalty regime does not give sufficient consideration to the numerous operational complexities and variables that are presented during the course of providing telecommunications services and products in a sector that is already measured against a wide ranging and highly prescriptive set of regulatory requirements. The rigid approach to the determination and imposition of the DBCDE's proposed infringement penalty regime has the potential for even the most minor of deviations from mandated operational requirements to result in the highest level of penalty being applied. The proposed penalty structure to be applied against the CSG Wholesale benchmarks and the MPS Do Not Contact Determination are the most obvious examples of the potential for this to occur.

Accordingly, industry seeks the opportunity to engage in greater detail with the DBCDE on the issues raised in this submission and in particular on how an infringement penalty regime could be an effective deterrent against consumer detriment, but with the appropriate level of discretion applied to its administration.

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