

Senate Legal and Constitutional Affairs Legislation Committee
Attorney-General's Department

Hearing date: 17 November 2022

Senator David Shoebridge asked the following question:

What kind of activity would satisfy the test of a benefit you can't determine the quantum of. Does anybody have any examples of when this big fine would apply?

The response to the question is as follows:

For a body corporate, the Privacy Legislation Amendment (Enforcement and Other Measures) Bill 2022 proposes to increase the maximum penalty for a serious or repeated interference with privacy to the greater of:

- (a) \$50 million
- (b) if the court can determine the value of the benefit obtained – 3 times the value of that benefit
- (c) if the court cannot determine the value of that benefit – 30% of the adjusted turnover of the body corporate during the breach turnover period.

The second and third paragraphs are only available to be considered in the calculation of the maximum penalty where the entity has obtained a benefit from a serious or repeated interference with privacy. If there is no benefit derived from the privacy breach, the maximum penalty that a court could apply is \$50 million for a body corporate (compared to the current maximum penalty under section 13G of the *Privacy Act 1988* of \$2.22 million).

An example of a benefit obtained from a serious or repeated interference with privacy could be where an entity that is a body corporate collects personal information without the consent of the individuals, in circumstances when consent was required. This information could include demographic information such as age and income. If the entity sold that personal information to another business, then the value of the benefit obtained could be calculated for the purposes of paragraph (b) to determine the maximum penalty that could apply under that paragraph. If the amount under paragraph (b) was greater than \$50 million, then the maximum penalty available would be the amount under paragraph (b). If the amount under paragraph (b) was less than \$50 million then the maximum penalty would be \$50 million. The court would have the discretion to impose the penalty it considered appropriate in the circumstances up to the maximum available penalty.

However, if the entity uses that personal information to 'improve' a product or service that it offers, which gives it some competitive advantage or enables it to collect even more data in future through the attraction of new users, the entity has benefited from the serious or repeated privacy breach, but it could be difficult to quantify the benefit from the improperly collected data. If the benefit obtained by the entity is reasonably attributable to the serious or repeated privacy breach, a court could calculate 30% of the entity's adjusted turnover for the purposes of paragraph (c) to determine the maximum penalty that could apply. Again, the court would have the discretion to determine the penalty it considered appropriate up to the maximum available penalty.