ACCC Telecommunications (Infringement Notices) Guidelines 2024

Consultation paper

17 July 2024

Background

On 25 August 2020, the carrier separation rules in the *Telecommunications Act 1997* (**Telecommunications Act**) were amended to enable vertically integrated superfast network operators serving residential customers to offer wholesale and retail services on a functionally separated basis (rather than a structurally separated basis), subject to important legislative requirements. Network operators with no more than 12,000 residential customers can operate on a vertically integrated basis if they elect to be bound by the ACCC's *Telecommunications (Superfast Broadband Network Class Exemption) Determination 2020*. In all cases, operators are required to offer wholesale access on non-discriminatory terms.

The Australian Competition and Consumer Commission (ACCC) published *Industry guidance on the carrier separation rules* in October 2022 that provides an overview of the carrier separation obligations. A number of these obligations are civil penalty provisions, and the ACCC may issue infringement notices or take enforcement action for any alleged contraventions of these obligations.[1]

On 3 June 2024, the *Telecommunications Legislation Amendment (Enhancing Consumer Safeguards and Other Measures) Act 2024* (**the Act**) came into force. Among other things, the Act increases penalties for contraventions of the carrier separation rules in Part 8 of the Telecommunications Act to a maximum penalty of $10 million for each contravention of a civil penalty provision and enables the ACCC to make guidelines for the issuing of infringement notices for certain alleged contraventions of the Telecommunications Act.

Based on current penalty unit values, the penalty payable under an infringement notice for an alleged contravention is $18,780 per contravention for a body corporate (60 penalty units), and $3,756 for an individual (12 penalty units).

The ACCC is now proposing to make the draft *ACCC Telecommunications (Infringement Notices) Guidelines 2024* (draft guidelines) under subsection 572M(5) of the Telecommunications Act. Once made, these will be the guidelines in force for the purposes of subsections 572M(4) and (6) of the Telecommunications Act.

Overview

The ACCC's infringement notice powers are intended to provide a timely and cost-efficient enforcement outcome in relation to relatively minor alleged contraventions of civil penalty provisions in the Telecommunications Act, without the need for litigation.

The Chairperson of the ACCC or a member of ACCC staff appointed in writing is an 'authorised infringement notice officer' and has the power to give an infringement notice to a person if they have reasonable grounds to believe that the person has contravened a civil penalty provision in Part 8 of the Telecommunications Act or sections 68 or 101 of the Telecommunications Act (carrier licence conditions / service provider rules insofar as the condition/rule relates to the civil penalty provisions of Part 8).[2]

The power to give an infringement notice under the Act will usually be exercised by the Chairperson of the ACCC.

An authorised infringement notice officer will be required to have regard to the guidelines when deciding whether to give an infringement notice. The guidelines also provide guidance

[1] Parts 8, 31 and 31B of the Telecommunications Act.

[2] The power to issue an infringement notice in respect of an alleged contravention of section 68 or section 101 is subject to the limitation imposed by section 572E(3) of the Telecommunications Act which provides that where a person's conduct constitutes a contravention of section 68 or 101 **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.

to industry in relation to the ACCC's approach to exercising its infringement notice powers relating to the Telecommunications Act.

Once made, the guidelines will enable an authorised infringement notice officer to give an infringement notice if they have reasonable grounds to believe that a person has contravened one of the following civil penalty provisions in Part 8 of the Telecommunications Act:

- the wholesale-only requirements and ancillary conduct in subsections 142C(2) and (4) and 143(2) and (5);
- the requirement to comply with conditions and limitations of determinations under subsection 143A(1) or (2) (class exemptions) and ancillary conduct under subsections 143B(1) and (2);
- the requirement to comply with functional separation undertakings (standard, joint, or deemed) and ancillary conduct in subsections 151ZD(1) and (2);
- the non-discrimination obligations and ancillary conduct in subsections 151ZF(1), (4) and (5) and 151ZG(2), (3) and (4);
- reporting obligations following the giving of a revocation notice in relation to a standard or joint functional separation undertaking and ancillary conduct in subsections 151ZA(3) and (4);
- the requirement to notify changes in control of a person who gave an undertaking and ancillary conduct in subsections 151ZB(1), (3) and (5);
- the requirements to publish offers and a statement of differences between an access agreement (including variations) and the offer, and ancillary conduct in subsections 151ZH (1), (2), (2A) and (3); and
- the prohibition on anti-avoidance schemes and ancillary conduct in subsections 151ZI(1) and (2).

In some circumstances, an authorised infringement notice officer may also give an infringement notice if they have reasonable grounds to believe that a person has contravened section 68 (compliance with carrier licence conditions) or section 101 (compliance with service provider rules) insofar as the condition/rule relates to the civil penalty provisions in sections 142C, 143, 143B, 151ZA, 151ZB, 151ZD, 151ZF, 151ZG, 151ZH or 151ZI of the Telecommunications Act. Where a person's conduct constitutes a contravention of section 68 or 101 **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.[3]

As the guidelines must be in the form of a legislative instrument,[4] the ACCC is required to undertake public consultation on the draft guidelines.[5]

The ACCC seeks comments from interested stakeholders on the draft guidelines. This consultation paper provides relevant background information together with an overview of the draft guidelines. A copy of the draft guidelines is available on the ACCC's website.

[3] Subsection 572E(3) of the Telecommunications Act.

[4] Subsection 572M(5) of the Telecommunications Act.

[5] Section 17 of the Legislation Act 2003.

Timetable for this consultation

The ACCC requests written submissions on the draft ACCC Telecommunications (Infringement Notices) Guidelines 2024 by no later than **Wednesday 14 August 2024**.

After considering submissions from interested parties, the ACCC proposes to publish its decision on whether to make the draft guidelines.

Making a submission

The ACCC encourages industry participants, other stakeholders and the public more generally to consider and make submissions on the draft guidelines and related issues raised in this consultation paper.

We have provided questions at the end of the paper to guide responses, but stakeholders should feel free to respond on any matter of concern.

To foster an informed and consultative process, all submissions will be considered as public submissions and will be posted on the ACCC's website. Interested parties wishing to submit commercial-in-confidence material to the ACCC should submit both a public and a commercial-in-confidence version of their submission. The public version of the submission should clearly identify the commercial-in-confidence material by replacing the confidential material with an appropriate symbol or 'c-i-c'.

The ACCC expects that claims for commercial-in-confidence status of information by parties will be limited in nature. Reasons should be provided in support of any claim and the identified information must be genuinely of a confidential nature and not otherwise publicly available.

The ACCC-AER information policy: the collection, use and disclosure of information sets out the general policy of the ACCC and the Australian Energy Regulator (AER) on the collection, use and disclosure of information.

The ACCC requests to receive submissions in electronic form, either in PDF or Microsoft Word format which allows the submission text to be searched. Submissions should be emailed to telcoseparationrules@accc.gov.au.

Overview of the draft guidelines

The ACCC is proposing to make the draft guidelines under subsection 572M(5) of the Telecommunications Act, which states that the ACCC may formulate guidelines for the purpose of enabling an authorised infringement notice officer of the ACCC to exercise the infringement notice powers under Part 31B of the Telecommunications Act.

Once made, these will be the guidelines in force for the purposes of subsection 572M(4) and (6) of the Telecommunications Act.

The draft guidelines set out the discretionary matters which an authorised infringement notice officer would generally consider in the exercise of their powers conferred under Part 31B of the Telecommunications Act to give infringement notices. The draft guidelines also cover a range of administrative matters, including the form and process for infringement notices, requests for a longer period for payment of the penalty, withdrawal of an infringement notice and its effect, the effect of payment and non-payment of the penalty, and the ACCC's general approach to publication.

While the guidelines provide general guidance to industry in relation to the ACCC's approach to exercising its infringement notice powers, the ACCC will determine the most appropriate outcome on a case-by-case basis, taking into consideration the alleged contravention, the business or the individual involved and the impact of the conduct.

Below we provide an overview of the key provisions in the draft guidelines.

Infringement notice provisions in the Telecommunications Act *(section 7)*

Paragraph 7.1 states that infringement notices are designed to provide a timely and cost-efficient enforcement outcome in relation to relatively minor alleged contraventions of the civil penalty provisions in the Telecommunications Act, without the need for litigation.

Paragraphs 7.3 and 7.4 state that an authorised infringement notice officer may give an infringement notice if they have reasonable grounds to believe that a person has contravened:

- one of the civil penalty provisions in Part 8 of the Telecommunications Act which are set out in paragraphs 7.3(a) to (h) of the draft guidelines; or
- in some circumstances, section 68 (compliance with carrier licence conditions) or section 101 (compliance with service provider rules) insofar as the condition/rule relates to the civil penalty provisions in sections 142C, 143, 143B, 151ZA, 151ZB, 151ZD, 151ZF, 151ZG, 151ZH or 151ZI of the Telecommunications Act.

The ACCC's approach to the use of infringement notices (*section 8)*

Paragraph 8.1 states that, generally speaking, an authorised infringement notice officer will only consider giving an infringement notice where the ACCC is likely to seek a court-based resolution should the recipient of the notice choose not to pay. In each case, all the relevant facts and circumstances will be taken into account in determining whether an infringement notice should be given.

Paragraph 8.2 sets out a range of factors which an authorised infringement notice officer may consider in determining whether an infringement notice should be given.

Paragraph 8.3 provides examples of circumstances where an authorised infringement notice officer may be more likely to give an infringement notice in respect of an alleged contravention.

Paragraph 8.4 provides examples of circumstances where an authorised infringement notice officer may be less likely to give an infringement notice in respect of an alleged contravention.

Paragraph 8.6 states that an authorised infringement notice officer may give multiple infringement notices, each relating to a separate alleged contravention, and sets out a range of considerations the authorised infringement notice officer will take into account in deciding whether to give more than one infringement notice.

Form and process for infringement notices (*section 9)*

Paragraph 9.1 outlines the contents of an infringement notice, including brief details of the alleged contravention, the amount of the infringement notice penalty, the date by which payment can be made and how the payment is to be made.

Paragraphs 9.2 to 9.6 outline the general 28-day compliance period for payment of a penalty under an infringement notice and the process to submit a request for a longer period for payment of the penalty.

Paragraphs 9.7 to 9.15 explain that an infringement notice may be withdrawn within 28 days, the process for requesting withdrawal of an infringement notice and the effects of withdrawal.

Effect of an infringement notice (*section 10)*

Paragraphs 10.1 to 10.5 explain the effects of payment and non-payment of an infringement notice. If the penalty is paid in full to the ACCC within the compliance period, the ACCC may not bring proceedings under Part 31 against the person for the imposition of a civil penalty for that alleged contravention. In addition, any liability of the person for the alleged contravention which is the subject of the infringement notice is discharged.

There is no legal obligation on a recipient to pay an infringement notice. Infringement notices are a way of resolving the ACCC's concerns and avoiding legal proceedings seeking imposition of a civil penalty. If payment is not made, the ACCC may take action, including commencing proceedings for the imposition of a pecuniary penalty under Part 31 of the Telecommunications Act.

Paragraphs 10.6 to 10.9 outline the ACCC's approach to publication and transparency. In accordance with its transparency principle, the ACCC will maintain a register on its website listing paid infringement notices. The ACCC considers that publishing information about the payment of infringement notices provides a broader educative and deterrent effect. For this reason, the ACCC is also likely to issue a media release describing the alleged matters and the fact that payment has been made.

Questions

Q1. Do you have any concerns or comments about the ACCC's approach to the issuing of infringement notices as set out in section 8 of the draft ACCC Telecommunications (Infringement Notices) Guidelines 2024?

Q2. Do you have any other concerns or comments about the draft ACCC Telecommunications (Infringement Notices) Guidelines 2024?