ACCC Telecommunications (Infringement Notices) Guidelines 2024

The Australian Competition and Consumer Commission makes the following Guidelines under subsection 572M(5) of the *Telecommunications Act 1997*.

Dated:

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1 Name

These are the *ACCC Telecommunications (Infringement Notices) Guidelines 2024.*

2 Commencement

These guidelines commence at the start of the day after the day they are registered on the Federal Register of Legislation.

Note: The Federal Register of Legislation may be accessed free of charge at www.legislation.gov.au.

3 Authority

These guidelines are made under subsection 572M(5) of the *Telecommunications Act 1997*.

4 Definitions and interpretation

4.1 In these guidelines, unless the contrary intention appears:

ACCC means the Australian Competition and Consumer Commission.

Authorised Infringement Notice Officer means the Chairperson of the ACCC, or a member of the staff of the ACCC appointed under section 572L of the *Telecommunications Act 1997.*

Telecommunications Act means the *Telecommunications Act 1997*.

4.2 Unless the contrary intention appears, expressions used in these guidelines and the Telecommunications Act have the same meaning in the guidelines as they have in the Telecommunications Act.

Note: See subsection 13(1) of the *Legislation Act 2003* for the application of the *Acts Interpretation Act 1901* to legislative instruments.

5 References to other instruments

5.1 In these guidelines, unless the contrary intention appears:

(a) a reference to any other Act or legislative instrument is a reference to that other Act or legislative instrument as in force from time to time; and

(b) a reference to any other kind of instrument is a reference to that other instrument as in force from time to time.

Note 1: For references to Commonwealth Acts, or any other instruments, see section 589 of the Telecommunications Act.

Note 2: All Commonwealth Acts and legislative instruments are registered on the Federal Register of Legislation.

6 Introduction

6.1 The ACCC is an independent Commonwealth statutory authority established in 1995. The ACCC is responsible for the economic regulation of the telecommunications sector, including enforcement of the carrier separation rules in Part 8 of the Telecommunications Act.

6.2 Section 3 of the Telecommunications Act states that the main object of the Telecommunications Act, when read together with Parts XIB and XIC of the *Competition and Consumer Act 2010*, is to provide a regulatory framework that promotes:

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(a) the long-term interests of end-users of carriage services or of services provided by means of carriage services;

(b) the efficiency and international competitiveness of the Australian telecommunications industry; and

(c) the availability of accessible and affordable carriage services that enhance the welfare of Australians.

6.3 These guidelines are made under subsection 572M(5) of the Telecommunications Act which provides that the ACCC may formulate guidelines for the purpose of the exercise of infringement notice powers by authorised infringement notice officers under Part 31B of the Telecommunications Act. These are the guidelines in force for the purposes of subsections 572M(4) and (6) of the Telecommunications Act.

6.4 The 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. The guidelines also set out the process for payment of an infringement penalty and the effect of such payment.

6.5 The guidelines take into account the objects of the Telecommunications Act.

6.6 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.

7 Infringement notice provisions in the Telecommunications Act

7.1 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.

7.2 Under the Telecommunications Act, an authorised infringement notice officer has the power to give an infringement notice in respect of contraventions of certain civil penalty provisions.

7.3 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 following civil penalty provisions in Part 8 of the Telecommunications Act:

(a) the wholesale-only requirements and ancillary conduct in subsections 142C(2) and (4) and 143(2) and (5);

(b) 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);

(c) the requirement to comply with functional separation undertakings (standard, joint, or deemed) and ancillary conduct in subsections 151ZD(1) and (2);

(d) the non-discrimination obligations and ancillary conduct in subsections 151ZF(1), (4) and (5) and 151ZG(2), (3) and (4);

(e) 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);

(f) the requirement to notify changes in control of a person who gave an undertaking and ancillary conduct in subsections 151ZB(1), (3) and (5);

(g) 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

(h) the prohibition on anti-avoidance schemes and ancillary conduct in subsections 151ZI(1) and (2).

7.4 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.

7.5 An infringement notice must be given within 12 months after the day on which the contravention is alleged to have taken place.

8 The ACCC's approach to the use of infringement notices

8.1 Generally speaking, an authorised infringement notice officer will only consider issuing an infringement notice where the ACCC is likely to seek a court-based resolution should the recipient of the notice choose not to pay. Before an authorised infringement notice officer gives an infringement notice, the ACCC will have turned its mind to the prospect of non-compliance and be prepared to proceed to court as a likely alternative.

8.2 There are a range of factors which an authorised infringement notice officer may consider in determining whether an infringement notice should be given. These will include the objects underpinning the Telecommunications Act. The authorised infringement notice officer may also consider:

(a) the nature, circumstances and seriousness of the conduct;

(b) the duration of the conduct and whether it is ongoing;

(c) the impact of the conduct, and whether it has caused significant harm or detriment;

(d) the corporate culture of compliance of the person; and

(e) the need for specific and general education and/or deterrence.

8.3 Examples of circumstances where an authorised infringement notice officer may be more likely to give an infringement notice in respect of an alleged contravention include where:

(a) the alleged contravening conduct is relatively minor or less serious;

(b) there have been isolated or non-systemic instances of non-compliance;

(c) there have been lower levels of harm or detriment;

(d) the facts are not in dispute or where the authorised infringement notice officer considers the circumstances giving rise to the allegations are not controversial; and

(e) infringement notices form part of a broader telecommunications industry compliance and enforcement program following ACCC concerns about industry wide conduct.

8.4 Examples of circumstances where an authorised infringement notice officer may be less likely to give an infringement notice, and other forms of enforcement action may instead be considered appropriate, in respect of an alleged contravention include where:

(a) the alleged conduct is more serious in nature and warrants consideration by the court;

(b) there has been significant detriment arising from the alleged conduct;

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(c) a person has obtained a significant financial or other advantage from the alleged conduct;

(d) multiple alleged contraventions have occurred and/or where the alleged contraventions occurred over an extended period of time;

(e) there are concerns that the alleged conduct may be continuing;

(f) there are questions about whether the alleged conduct occurred within the 12-month period in which an authorised infringement notice officer may give an infringement notice;

(g) the matter raises complex questions about the interpretation of a provision of Part 8 of the Telecommunications Act; and

(h) the ACCC has previously taken action against the person involved in the alleged contravention – particularly when recent or very similar.

8.5 In each case, all the relevant facts and circumstances will be taken into account in determining whether an infringement notice should be given.

8.6 An authorised infringement notice officer may give multiple infringement notices, each relating to a separate alleged contravention, where they consider it appropriate to do so, taking into account all of the circumstances. In deciding whether to give more than one infringement notice, the authorised infringement notice officer will take into account a range of considerations including whether:

(a) the authorised infringement notice officer believes that there have been systemic instances of non-compliance;

(b) the alleged contraventions have occurred in a number of states or territories; and

(c) there are circumstances which make it desirable to give multiple notices to deter similar conduct by the specific business or individual involved or the broader industry.

9 Form and Process for Infringement Notices

Content of an infringement notice

9.1 An infringement notice given by an authorised infringement notice officer under Part 31B of the Telecommunications Act will, among other things:

(a) state the name of the person to whom the notice is given;

(b) state the date on which the notice is given;

(c) set out brief details of the alleged contravention, including the date of the alleged contravention and the civil penalty provision that was allegedly contravened;

(d) state the relevant penalty units and the amount of the infringement notice penalty;

(e) set out the date by which payment can be made, how the payment is to be made and to whom payment should be addressed;

(f) state that the person to whom a notice is given can request a longer period for payment of the penalty;

(g) state that, if payment of the penalty amount specified in the infringement notice is made, proceedings will not be instituted by the ACCC in the Federal Court with respect to the alleged contravention which is the subject of the infringement notice;

(h) explain that the authorised infringement notice officer may withdraw the infringement notice within 28 days of giving the notice and must, if the penalty has already been paid, refund the penalty (see discussion below concerning applications for withdrawal); and

(i) set out the name of the authorised infringement notice officer who gave the notice and the contact details of the person to whom enquiries concerning the notice may be directed.

Request for a longer period for payment of the penalty

9.2 Generally, the compliance period for payment of a penalty under an infringement notice is 28 days. However, the authorised infringement notice officer may specify a longer compliance period in the infringement notice.

9.3 The recipient of a notice may make a request for a longer period for payment of the penalty. In making a request for a longer period for payment of the penalty, the recipient should set out the reasons why such a longer period for payment is appropriate. In making such requests, the recipient should advise the ACCC:

(a) whether they intend to pay the infringement notice penalty;

(b) the circumstances as to why they are not able to pay the infringement notice penalty within the current compliance period; and

(c) why they anticipate they will be able to comply if the compliance period is extended.

9.4 A request for a longer period for payment of the penalty should allow sufficient time for the authorised infringement notice officer's consideration of the request for a longer compliance period. Generally speaking, requests should be made no later than two weeks before the payment due date.

9.5 Requests should be directed to the contact officer specified in the infringement notice in the first instance.

9.6 The ACCC will notify the recipient in writing of its decision whether or not to grant a longer period for payment of the penalty.

Withdrawal of an infringement notice

9.7 An infringement notice may be withdrawn by an authorised infringement notice officer. To be effective, the withdrawal must occur within 28 days after the notice was given (withdrawal period).

9.8 The recipient of an infringement notice may request that the infringement notice be withdrawn.

9.9 Requests for withdrawal should be directed in the first instance to the contact officer specified in the infringement notice.

9.10 Any request to withdraw an infringement notice:

(a) must be made within the withdrawal period;

(b) must be in writing;

(c) must include the reasons the withdrawal is sought; and

(d) may include additional evidence or information that may assist the infringement notice officer in deciding whether or not to withdraw the notice.

9.11 The infringement notice recipient should allow sufficient time for ACCC consideration and possible withdrawal of the infringement notice when submitting a request for withdrawal. This is because, to be effective, the withdrawal of an infringement notice by the ACCC must occur

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within the withdrawal period. Generally speaking, requests should be made no later than two weeks before the end of the withdrawal period.

9.12 The authorised infringement notice officer will only withdraw the infringement notice within the 28-day period if they are satisfied it is appropriate to do so. The authorised infringement notice officer will decide, based on the information provided as part of the request and the information the ACCC already has, whether or not to withdraw the infringement notice.

9.13 As the penalty amount is set out in section 572G of the Telecommunications Act, the ACCC is unable to alter the penalty amount set out in any infringement notice.

Effect of withdrawal of an infringement notice

9.14 If the infringement notice is withdrawn after payment of the penalty, the penalty paid will be refunded.

9.15 If an infringement notice is withdrawn, the ACCC will consider on a case-by-case basis whether further action is appropriate. That action may include the institution of civil penalty proceedings with respect to the alleged contravention or contraventions that were the subject of the infringement notice(s).

10 Effect of an infringement notice

Effect of payment of an infringement notice

10.1 If the penalty is paid in full to the ACCC within the compliance period in the infringement notice, and the infringement notice is not withdrawn, 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.

Effect of non-payment of an infringement notice

10.2 There is no legal obligation on a recipient to pay an infringement notice.

10.3 Infringement notices are a way of resolving the ACCC's concerns and avoiding legal proceedings seeking imposition of a civil penalty under the Telecommunications Act in respect of the conduct which is the subject of the infringement notice. Recipients benefit by having the option of paying the infringement notice penalty as a way of resolving the ACCC's concerns.

10.4 In the event that payment is not made in accordance with the infringement notice, the ACCC may take action, including commencing proceedings for the imposition of a pecuniary penalty under Part 31 of the Telecommunications Act.

10.5 Infringement notice penalties are lower than the maximum penalty a court could impose should the recipient be found to have contravened a particular civil penalty provision in section 68, section 101 or Part 8 of the Telecommunications Act.

Publication

10.6 The ACCC's approach is that it will not ordinarily publicise the mere fact a person has been given an infringement notice under Part 31B of the Telecommunications Act. It will also generally not publicise that a person did not pay the penalty specified in the infringement notice.

10.7 In accordance with the principle of transparency, every enforcement matter that is dealt with through litigation or formal resolution is made public.

10.8 In accordance with this principle, the ACCC will publicise when a person has paid a penalty specified in an infringement notice given by an authorised infringement notice officer under Part 31 of the Telecommunications Act. The ACCC will maintain a register on its website

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listing paid infringement notices. Entries on the register will ordinarily contain the following details:

(a) the person who paid the notice;

(b) the infringement notice number;

(c) the date paid; and

(d) section of the relevant legislation.

10.9 The ACCC considers that publishing information about the payment of infringement notices provides for 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.

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