

EXPLANATORY STATEMENT

Approved by the Australian Communications and Media Authority

Telecommunications Act 1997

Telecommunications (Infringement Notices) Guidelines 2022

Authority

The Australian Communications and Media Authority (**the ACMA**) has made the *Telecommunications (Infringement Notices) Guidelines 2022* (**the Guidelines**) under subsection 572M(2) of the *Telecommunications Act* (**the Telecommunications Act**).

Subsection 572M(1) of the Telecommunications Act provides that an authorised infringement notice officer must have regard to any relevant guidelines in force under subsection 572M(2) when exercising their power under Part 31B of that Act. Subsection 572M(2) provides that the ACMA may formulate guidelines for the purpose of subsection 572M(1) and subsection 572M(3) provides that an authorised infringement notice officer must not give an infringement notice unless guidelines are in force under subsection 572M(2).

The Guidelines replace the *Telecommunications (Infringement Notices) Guidelines 2011* (**the previous Guidelines**).

Purpose and operation of the instrument

Part 31B of the Telecommunications Act establishes a scheme under which authorised officers of the ACMA may issue infringement notices for contraventions of civil penalty provisions under the Telecommunications Act, *Telecommunications (Consumer Protection and Service Standards) Act 1999* (**the TCPSS Act**) and Chapter 5 of the *Telecommunications (Interception and Access) Act 1979* (**the TIA Act**).

The infringement notice scheme is intended to provide a more efficient means of dealing with contraventions of certain civil penalty provisions as an alternative to instituting civil penalty proceedings.

Subsection 572E(1) of the Telecommunications Act provides that an authorised infringement notice officer of the ACMA is empowered to give a person an infringement notice for a breach of a specified civil penalty provision if the officer has reasonable grounds to believe that the person has contravened the civil penalty provision. A ‘civil penalty provision’ is a provision of the Telecommunications Act, TCPSS Act or TIA Act that is declared by the Telecommunications Act, TCPSS Act or TIA Act to be a civil penalty provision.¹ In the case of breaches of sections 68 and 101 of the Telecommunications Act, an infringement notice may only be given in relation to contraventions of provisions which have been listed by the ACMA in a legislative instrument.

The Guidelines have been formulated for the purposes of subsection 572M(3) of the Telecommunications Act, which provides that an authorised infringement notice officer must not give an infringement notice to a person unless guidelines are in force under subsection 572M(2). This means that an authorised infringement notice officer cannot issue an infringement notice until the ACMA makes such guidelines.

¹ See definition of civil penalty provision under section 7 of the Telecommunications Act.

Further, subsection 572M(1) provides that, in exercising a power conferred under Part 31B, an infringement notice officer must have regard to any relevant guidelines made by the ACMA.

The purpose of the Guidelines is to establish guidelines that an authorised infringement officer must have regard to when exercising a power conferred by Part 31B to issue an infringement notice. The Guidelines will also assist the telecommunications industry and the broader community to understand how the ACMA will use its infringement notice powers.

The previous Guidelines were made to meet this obligation. The Guidelines are substantively similar to the previous Guidelines with some minor and technical amendments.

The Guidelines highlight the discretionary factors which an authorised infringement notice officer would generally consider when exercising their power to issue an infringement notice. The Guidelines also set out other matters in relation to infringement notices, such as:

- the content of an infringement notice;
- requests for extension of time to pay the penalty specified in an infringement notice;
- withdrawal of infringement notices; and
- the ACMA's approach to publication of infringement notices.

A provision-by-provision description of the instrument is set out in the notes at **Attachment A**.

The instrument is a legislative instrument for the purposes of the *Legislation Act 2003 (the LA)*.

Documents incorporated by reference

The Guidelines incorporate by reference the following Acts:

- the Telecommunications Act;
- the TCPSS Act;
- the TIA Act.

The Guidelines incorporate those Acts as in force from time to time.

The Acts listed above can be accessed, free of charge, from the Federal Register of Legislation: <http://www.legislation.gov.au>.

Consultation

Before the Guidelines were made, the ACMA was satisfied that consultation was undertaken to the extent appropriate and reasonably practicable, in accordance with section 17 of the LA.

On 24 November 2021, the ACMA placed a copy of the draft Guidelines, together with an accompanying consultation paper, on the ACMA's website for public comment by 24 December 2021. The ACMA received one written submission as a result of that public consultation and took that submission into account when finalising the Guidelines.

Regulatory Impact

The ACMA prepared a preliminary regulatory impact assessment on 26 November 2021, for the purposes of making the Guidelines. On 29 November 2021, the Office of Best Practice Regulation (OBPR) expressed its view that the changes have a minor regulatory impact and that no formal regulatory impact statement is required. The OBPR reference number for this matter is OBPR21-01215.

Statement of compatibility with human rights

Subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* requires the rule-maker in relation to a legislative instrument to which section 42 (disallowance) of the LA applies to cause a statement of compatibility with human rights to be prepared in respect of that legislative instrument.

The statement of compatibility set out below has been prepared to meet that requirement.

Overview of the instrument

The *Telecommunications (Infringement Notices) Guidelines 2022* (the **Guidelines**) are made under subsection 572M(2) of the *Telecommunications Act 1997* (the **Telecommunications Act**). The purpose of this instrument is to establish guidelines that an authorised infringement officer must have regard to when exercising a power conferred by Part 31B of the Telecommunications Act to issue an infringement notice. The instrument will also assist the telecommunications industry and the broader community to understand how the Australian Communications and Media Authority (the **ACMA**) will use its infringement notice powers.

Part 31B of the Telecommunications Act establishes a scheme under which authorised officers of the ACMA may issue infringement notices for contraventions of civil penalty provisions under the Telecommunications Act, *Telecommunications (Consumer Protection and Service Standards) Act 1999* and Chapter 5 of the *Telecommunications (Interception and Access) Act 1979*.

The infringement notice scheme is intended to provide a more efficient means of dealing with contraventions of certain civil penalty provisions as an alternative to instituting civil penalty proceedings.

The Guidelines fulfil the ACMA's legislative obligation to maintain guidelines that an authorised infringement notice officer must have regard to in exercising their power under Part 31B of the Telecommunications Act to give an infringement notice under that Act.

Human rights implications

The ACMA has assessed whether the instrument is compatible with human rights, being the rights and freedoms recognised or declared by the international instruments listed in subsection 3(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* as they apply to Australia.

Having considered the likely impact of the instrument and the nature of the applicable rights and freedoms, the ACMA has formed the view that the instrument does not engage any of those rights or freedoms.

Conclusion

The instrument is compatible with human rights as it does not raise any human rights issues.

Notes to the *Telecommunications (Infringement Notices) Guidelines 2022*

Section 1 Name of Guidelines

This section provides for the Guidelines to be cited as the *Telecommunications (Infringement Notices) Guidelines 2022* (the **Guidelines**).

Section 2 Commencement

Section 2 provides that the Guidelines commence on the day after they are registered on the Federal Register of Legislative Instruments.

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

Section 3 Authority

This section identifies the provision that authorises the making of the Guidelines, namely subsection 572M(2) of the *Telecommunications Act 1997* (the **Telecommunications Act**).

Section 4 Repeal

Section 4 provides that the *Telecommunications (Infringement Notices) Guidelines 2011* are repealed.

Section 5 Definitions and interpretation

This section defines terms used in the Guidelines

Section 6 References to other instruments

This section provides that in the Guidelines, unless the contrary intention appears:

- a reference to any other legislative instrument is a reference to that other legislative instrument as in force from time to time; and
- a reference to any other kind of instrument is a reference to that other instrument as in force from time to time.

Section 7 Introduction

This section deals with a number of introductory matters including by providing a brief description of the ACMA's functions under the *Australian Communications and Media Authority Act 2005* and its regulatory role under the *Telecommunications Act* (subsection 7.1 and subsection 7.2). Subsection 7.3 notes that the Guidelines are made for the purposes of subsection 572M(3) of the *Telecommunications Act*.

Subsection 7.4 provides that the Guidelines set out the discretionary factors which an authorised infringement notice officer would generally consider in the exercise of their power to give an infringement notice under Part 31B of the *Telecommunications Act*.

Subsection 7.5 explains that the Guidelines take into account the objects of and the regulatory policy underpinning the Acts referred to in the Guidelines.

Subsection 7.6 explains that the Guidelines are intended as a guide and the ACMA retains the discretion to impose or seek other remedies or sanctions where the ACMA considers it to be appropriate.

Section 8 Exercising Enforcement Powers

Section 8 provides a list of factors that the ACMA may consider when determining the appropriate enforcement response to particular conduct. The list is not exhaustive.

Section 9 Infringement Notices

Subsection 9.1 explains that an authorised infringement notice officer may give a person an infringement notice in respect of a contravention of a particular civil penalty provision. It also explains that, in respect of certain civil penalty provisions, namely sections 68 and 101 of the Telecommunications Act, an infringement notice may only be given in respect of certain kinds of contraventions of those provisions (this is dealt with in subsections 572E(5) and (6) of the Telecommunications Act and the instrument listing infringement notice provisions which is made for the purposes of subsection 572E(7) of the Telecommunications Act²).

Subsection 9.2 reiterates that there is no obligation on the ACMA to issue an infringement notice in relation to an alleged contravention and that a range of factors (as outlined in section 8) may be considered in deciding whether an infringement notice is an appropriate enforcement tool. Subsection 9.2 outlines some circumstances where the ACMA may consider an infringement notice is not an appropriate enforcement tool.

Subsection 9.3 provides that the decision to issue an infringement notice must be made by the Chair of the ACMA or by a member of staff of the ACMA appointed by the ACMA as an authorised infringement notice officer under section 572L of the Telecommunications Act.

Subsection 9.4 notes that an infringement notice must be given within 12 months after the day on which the contravention is alleged to have taken place.

Subsection 9.5 explains that the ACMA may not take further action regarding an alleged contravention of a listed infringement notice provision, if the recipient makes, by the due date, a payment of the penalty amount specified on the infringement notice. Such payment discharges the liability of the person for that alleged contravention. In the event that payment is not made in accordance with the infringement notice, the ACMA may take action including the commencement of proceedings for the imposition of a pecuniary penalty, as set out in subsection 9.6.

Content of an infringement notice

Subsection 9.7 outlines what information an infringement notice given by the ACMA under Part 31B of the Telecommunications Act will include.

² As at the date these guidelines were made that instrument made for the purposes of subsection 572E(7) of the Telecommunications Act was the *Telecommunications (Listed Infringement Notice Provisions) Declaration 2011*.

Request for an extension of time in which to pay the penalty

Subsection 9.8 provides that in most circumstances, payment of the penalty specified in the infringement notice is required within 28 days after the notice is given, however the ACMA has discretion under section 572F of the Telecommunications Act to extend the time for payment.

Subsection 9.9 explains that a request for an extension of time to make a payment must be made before the due date and that the ACMA will consider extension requests on a case-by-case basis.

Withdrawal of an infringement notice

Subsection 9.10 provides that an infringement notice may be withdrawn by the ACMA either of its own volition or following a successful request for withdrawal by the recipient of the notice. For such requests to be considered, they must occur within 28 days after the notice was given. Subsection 9.10 also notes that a request for withdrawal should be made as early as possible to ensure that it can be given due consideration and a decision, whether or not to withdraw the notice, can be made before the expiration of the 28 day period.

Subsection 9.11 outlines factors that may be relevant in determining whether an infringement notice should be withdrawn. These include whether there is further information or evidence suggesting that a breach did not occur or the conduct is more serious than initially believed.

Subsection 9.12 provides that in most cases, the issuing officer will be best placed to review a request made under subsection 9.10 and therefore, such requests should be made to the issuing officer, as outlined in subsection 9.13.

Effect of withdrawal of an infringement notice

Subsection 9.14 provides that the penalty amount will be refunded if an infringement notice is withdrawn after payment of the penalty. Subsection 9.15 explains that the ACMA will consider whether further action is appropriate if an infringement notice is withdrawn.

Publication

Subsection 9.16 outlines the ACMA's general approach to the publication of circumstances relating to infringement notices given under Part 31B of the Telecommunications Act. Subsection 9.17 sets out the view of the ACMA that publication of the fact of compliance, as outlined in subsection 9.16, may have an educative and deterrent effect.

Subsection 9.18 outlines a non-exhaustive list of factors the ACMA may consider when deciding whether or not publication should occur. Subsection 9.19 provides that the ACMA may publish information concerning the issue of, and compliance with, infringement notices, in an aggregated manner without the identification of the individual recipients of the notices.