

# EXPLANATORY STATEMENT

Approved by the Australian Competition and Consumer Commission

*Telecommunications Act 1997*

*ACCC Telecommunications (Infringement Notices) Guidelines 2024*

## Authority

The Australian Competition and Consumer Commission (the **ACCC**) has made the *ACCC Telecommunications (Infringement Notices) Guidelines 2024* (the **Instrument**) under subsection 572M(5) of the *Telecommunications Act 1997* (the **Telecommunications Act**).

Subsection 572M(4) of the *Telecommunications Act* provides that an authorised infringement notice officer of the ACCC must have regard to any relevant guidelines in force under subsection 572M(5) in exercising a power conferred on them by Part 31B of that Act. Subsection 572M(5) of the *Telecommunications Act* provides that the ACCC may, by legislative instrument, formulate guidelines for the purposes of subsection 572M(4).

## Purpose and operation of the instrument

Part 31B of the *Telecommunications Act* establishes a scheme under which an authorised infringement notice officer of the ACCC may give an infringement notice to a person if the officer has reasonable grounds to believe that the person has contravened certain civil penalty provisions under or relating to Part 8 of the *Telecommunications Act*.

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

The Instrument is made under subsection 572M(5) of the *Telecommunications Act*, which provides that the ACCC may formulate guidelines for the purpose of the exercising of infringement notice powers by an authorised infringement notice officer of the ACCC. Subsection 572M(6) provides that an authorised infringement notice officer of the ACCC must not give an infringement notice to a person unless guidelines are in force under subsection 572M(5).

These are the guidelines in force for the purposes of subsections 572M(4) and (6) of the *Telecommunications Act* and enliven the ACCC's power to issue infringement notices under Part 31B whilst they are in force.

The purpose of the Instrument is to establish guidelines that an authorised infringement officer of the ACCC must have regard to when exercising a power conferred by Part 31B to give an infringement notice. The Instrument also provides general guidance to industry in relation to the ACCC's approach to exercising its infringement notice powers.

The Instrument sets out the discretionary matters which an authorised infringement notice officer of the ACCC would generally consider in exercising their power to give an infringement notice under Part 31B of the *Telecommunications Act*. The Instrument also covers a range of administrative matters, including the form and process for infringement notices, requests for a longer period for payment of an infringement notice 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.

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

The Instrument is a disallowable legislative instrument for the purposes of the *Legislation Act 2003*.

## **Documents incorporated by reference**

The Instrument does not incorporate any document by reference.

## **Consultation**

Before the Instrument was made, the ACCC was satisfied that consultation was undertaken to the extent appropriate and reasonably practicable, in accordance with section 17 of the *Legislation Act 2003*.

On 17 July 2024, the ACCC published the draft Instrument, together with an accompanying consultation paper, on the ACCC's website for public comment by 14 August 2024. The ACCC received one submission from the Australian Communications Consumer Action Network in response to the public consultation. The submission is available on the ACCC's website.

The ACCC took the submission into account when finalising the Instrument.

## **Regulatory impact assessment**

The ACCC prepared a preliminary regulatory impact assessment on 30 July 2024, for the purposes of making the Instrument. On 30 July 2024, the Office of Impact Analysis (**OIA**) determined that detailed analysis is not required under the Australian Government's Policy Impact Analysis Framework, as the Instrument is a necessary precondition to the exercise of the infringement notice powers pursuant to subsection 572M(4) of the Telecommunications Act. The OIA reference number for this matter is OIA24-07847.

## **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 *Legislation Act 2003* 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.

### ***Human rights implications***

The ACCC 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 ACCC 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.

# Attachment A

## Notes to the *ACCC Telecommunications (Infringement Notices) Guidelines 2024*

### Section 1 – Name of Instrument

This section provides for the Instrument to be cited as the *ACCC Telecommunications (Infringement Notices) Guidelines 2024*.

### Section 2 – Commencement

This section provides that the Instrument commences on the day after it is registered on the Federal Register of Legislation.

The Federal Register of Legislation may be accessed free of charge at [www.legislation.gov.au](http://www.legislation.gov.au).

### Section 3 – Authority

This section provides that the Instrument is made under subsection 572M(5) of the *Telecommunications Act 1997* (the **Telecommunications Act**).

### Section 4 – Definitions and interpretation

This section defines key terms used in the Instrument, and indicates where other key terms are defined.

### Section 5 – References to other instruments

This section provides that in the Instrument, 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.

Reference is made to section 589 of the *Telecommunications Act*, which authorises the outlined approach to providing for matters by reference to other instruments.

### Section 6 – Introduction

This section deals with a number of introductory matters including by providing a brief description of the ACCC's functions and its regulatory role under the *Telecommunications Act* (subsections 6.1 and 6.2). Subsection 6.3 notes that the Instrument is made for the purposes of subsections 572M(4) and (6) of the *Telecommunications Act*.

Subsection 6.4 provides that the Instrument sets out the discretionary matters which an authorised infringement notice officer of the ACCC would generally consider in the exercise of their powers conferred under Part 31B of the *Telecommunications Act*. The Instrument also sets out the process for payment of an infringement notice penalty and the effect of such payment.

Subsection 6.5 explains that the Instrument takes into account the objects of the *Telecommunications Act*.

Subsection 6.6 explains that while the Instrument provides 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.

## **Section 7 – Infringement notice provisions in the Telecommunications Act**

This section explains that an authorised infringement notice officer of the ACCC has the power to give an infringement notice in respect of contraventions of certain civil penalty provisions under the Telecommunications Act.

Subsection 7.1 explains 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.

Subsections 7.3 and 7.4 explain that an authorised infringement notice officer of the ACCC 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 Instrument; 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.

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

## **Section 8 – The ACCC's approach to the use of infringement notices**

This section outlines the discretionary matters which an authorised infringement notice officer of the ACCC would generally consider in determining whether an infringement notice is an appropriate enforcement outcome. This section also provides examples of circumstances where an authorised infringement notice officer of the ACCC may be more likely, or less likely, to give an infringement notice in respect of an alleged contravention.

Subsection 8.1 explains that, generally, an authorised infringement notice officer of the ACCC 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. This subsection also explains that before an authorised infringement notice officer of the ACCC 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.

Subsection 8.2 explains that there are a range of factors which an authorised infringement notice officer of the ACCC may consider in determining whether an infringement notice should be given, including the objects underpinning the Telecommunications Act and the matters listed in paragraphs 8.2(a) to (e).

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

Subsection 8.4 provides examples of circumstances where an authorised infringement notice officer of the ACCC may be less likely to give an infringement notice in respect of an alleged contravention (and other forms of enforcement action may instead be considered appropriate).

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

Subsection 8.6 explains that an authorised infringement notice officer of the ACCC may give multiple infringement notices, each relating to a separate alleged contravention. This subsection also explains that there are a range of considerations the authorised infringement notice officer of the ACCC will take into account in deciding whether to give more than one infringement notice, including the matters listed in paragraphs 8.6(a) to (c).

## **Section 9 – Form and process for infringement notices**

### *Content of an infringement notice*

Subsection 9.1 outlines the content of an infringement notice, which will include, among other things, the matters listed in paragraphs 9.1(a) to (i).

### *Request for a longer period for payment of the penalty*

Subsection 9.2 explains the general 28-day compliance period for payment of a penalty under an infringement notice but notes that an authorised infringement notice officer of the ACCC may specify a longer compliance period in the infringement notice.

Subsections 9.3 to 9.6 outline the process to submit a request for a longer period for payment of the penalty.

### *Withdrawal of an infringement notice*

Subsection 9.7 explains that an infringement notice may be withdrawn by an authorised infringement notice officer of the ACCC within 28 days after the notice was given.

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

Subsections 9.9 to 9.12 outline the process for requesting withdrawal of an infringement notice.

Subsection 9.13 notes that the ACCC is unable to alter the penalty amount set out in any infringement notice as the penalty amount is set out in section 572G of the Telecommunications Act.

### *Effect of withdrawal of an infringement notice*

Subsection 9.14 provides that the penalty paid will be refunded if an infringement notice is withdrawn after payment of the penalty.

Subsection 9.15 explains that the ACCC will consider whether further action is appropriate if an infringement notice is withdrawn.

## **Section 10 – Effect of an infringement notice**

### *Effect of payment of an infringement notice*

Subsection 10.1 explains that 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.

### *Effect of non-payment of an infringement notice*

Subsection 10.2 explains that there is no legal obligation on a recipient to pay an infringement notice.

Subsection 10.3 explains that infringement notices are a way of resolving the ACCC's concerns and avoiding legal proceedings seeking imposition of a civil penalty. Recipients benefit by having the option of paying the infringement notice penalty as a way of resolving the ACCC's concerns.

Subsection 10.4 provides that 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.

Subsection 10.5 notes that 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 sections 68 or 101 or Part 8 of the Telecommunications Act.

#### *Publication*

Subsection 10.6 explains that the ACCC will not ordinarily publicise the mere fact a person has been given an infringement notice under Part 31B of the Telecommunications Act. The ACCC will also generally not publicise that a person did not pay the infringement notice penalty.

Subsection 10.7 notes that, for transparency, every ACCC enforcement matter that is dealt with through litigation or formal resolution is made public.

Subsection 10.8 provides that, in accordance with its transparency principle, the ACCC will maintain a register on its website listing paid infringement notices and sets out what is ordinarily included in entries on the register.

Subsection 10.9 explains that 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.