

Regulatory guide—No. 5

Infringement notices

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Overview

The Australian Communications and Media Authority (ACMA) issues regulatory guides to assist both industry and the community by:

- > giving practical guidance (for example, guidance about the ACMA's approach to a particular issue or describing the steps of a process)
- > describing the principles underlying the ACMA's approach in particular areas
- > explaining the ACMA's view on the interpretation of the law or its application to a regulated industry
- > explaining when and how the ACMA will exercise specific powers under the legislation it administers.

A regulatory guide does not constitute or replace legal advice on obligations under the relevant legislation.

1. Purpose of this guide

- 1.1 The ACMA is empowered to issue an infringement notice in certain instances under the *Do Not Call Register Act 2006* (the DNCR Act), *Spam Act 2003*, *Telecommunications Act 1997*, *Broadcasting Services Act 1992* (BSA) and the *Interactive Gambling Act 2001* (IGA)—collectively, the Acts—and the Telecommunications Regulations 2001 and Radiocommunications Regulations 1993—collectively, the regulations.
- 1.2 While there are certain statutory differences between the various provisions under which an infringement notice can be given, the ACMA will seek to take a consistent approach in its exercise of this power.
- 1.3 The purpose of this guide is to explain the ACMA's approach to giving an infringement notice.
- 1.4 This regulatory guide should be read in conjunction with *Regulatory guide—No. 6: Publication of investigations and enforcement actions* and the [ACMA compliance and enforcement policy](#).
- 1.5 This guide does not constitute legal advice. You are encouraged to obtain professional advice about the consequences of the ACMA giving an infringement notice.

2. What is an infringement notice?

- 2.1 An infringement notice is an administrative enforcement remedy that the ACMA may issue in certain limited circumstances. Infringement notices are a valuable enforcement and regulatory tool as they can provide a timely and cost-efficient outcome for both the ACMA and the entity or person that is the subject of an investigation.
- 2.2 In issuing the infringement notice, the recipient is put on notice that the ACMA has reasonable grounds to believe that they have contravened the law. They are given the option of resolving the matter immediately by paying the penalty specified in the infringement notice or having the matter determined by the relevant court (see sections 10 and 11 below).
- 2.3 The Acts and regulations set the amount of penalty that can be sought in an infringement notice. These prescribed infringement notice penalties are significantly less than the penalties that the relevant court could otherwise impose.

3. Overview of the ACMA's power to give an infringement notice

- 3.1 The ACMA's power to issue an infringement notice is limited to those provisions that are specified as being an infringement notice provision.¹ It follows that an infringement notice is not an enforcement remedy that can be applied for all contraventions of the laws the ACMA administers.
- 3.2 Where the ACMA is empowered to give an infringement notice, it is under no obligation to do so. The decision to give an infringement notice is made in light of the facts of the matter.
- 3.3 There are strict time limits within which an infringement notice may be issued by the ACMA (generally within 12 months of the alleged contravention).
- 3.4 The Acts and regulations also set out what information must be included in the infringement notice. That information includes:
- > the name of the person who issued it
 - > the nature or details of the alleged contravention/offence
 - > the amount of the penalty imposed and how it was calculated
 - > when the penalty must be paid
 - > how the penalty may be paid
 - > the effect and consequences of withdrawing the notice
 - > the consequences of paying the penalty
 - > the consequences of not paying the penalty.
- 3.5 The decision to give an infringement notice is made in light of the facts of the matter.

4. Discretionary factors

- 4.1 In determining whether an infringement notice is an appropriate enforcement response, the ACMA considers a range of factors including, but not limited to:
- > the nature and seriousness of the conduct²
 - > whether the conduct was deliberate, reckless or inadvertent
 - > what, if any, action was taken following the ACMA bringing the issues of concern to the person's attention (for example, through a formal warning)³

¹ Subsection 572M(1) of the Telecommunications Act provides that an authorised infringement notice officer must have regard to the infringement notice guidelines in force under subsection 572M(2). See too subsection 572M(3) of the Telecommunications Act. Subsection 215(2) of the BSA provides that in exercising infringement notice powers under Part 14E of that Act, regard must be had to the enforcement guidelines in force under subsection 215(4). See section 64C of the IGA and Part 5 of the *Regulatory Powers (Standard Provisions) Act 2014* with respect to using infringement notices under the IGA.

² Regulation 23 of the Radiocommunications Regulations 1993 states that an infringement notice should only be given where the offence is of a minor nature.

³ A formal warning under section 205XA of the BSA must have been issued in relation to the contravention or a similar contravention before an infringement notice can be given under Part 14E of that Act (section 205Y).

- > the impact of issuing the infringement notice on other enforcement action in progress or that may be taken by the ACMA.

4.2 An infringement notice may not, however, be an appropriate enforcement response where:

- > the ACMA has previously taken action against the recipient for similar contraventions
- > the contraventions have occurred over an extended period of time
- > the recipient has, as a consequence of the contraventions, obtained a financial or other advantage, to the detriment of others
- > the recipient's conduct is the subject of other compliance or enforcement action by the ACMA.

5. Guiding principles

5.1 The ACMA may consider issuing an infringement notice instead of:

- > taking other administrative action, including taking licensing action (for example, imposing conditions on a licence or suspending/cancelling a licence), issuing a [remedial direction](#) and accepting an [enforceable undertaking](#)
- > commencing civil proceedings or, if relevant, referring a matter to the Commonwealth Director of Public Prosecutions.

5.2 The ACMA may consider giving an infringement notice at the time when it has gathered sufficient evidence and information to have reasonable grounds for believing that the contravention/s or offence has occurred. The point in time at which that requisite belief can be formed will turn, among other things, on the nature and complexity of the issues involved and the quality of the evidence and information obtained.

5.3 As noted in section 3, there are strict time limits within which an infringement may be issued by the ACMA. It follows that an infringement notice will not be available as an option if the relevant time limit has elapsed.

6. Who can issue an infringement notice?

6.1 Only the Chairman or a member of staff of the ACMA who has a written authorisation can issue an infringement notice.⁴

6.2 As noted in section 3, the name of the person who issues the infringement notice will be set out in the notice.

7. Penalty amount

7.1 As noted in section 2, that penalty is significantly less than the penalty that potentially may be imposed should the matter proceed to court.

⁴ Sections 6 and 205ZE of the BSA, sections 7 and 572L of the Telecommunications Act, subsection 64C(2) of the IGA, section 4 and clause 8 of Schedule 3 of the DNCR Act, clauses 2 and 9 of Schedule 3 of the Spam Act, regulations 1.7 and 6.2 of the Telecommunications Regulations 2001, and regulations 3 and 23 of the Radiocommunications Regulations 1993.

- 7.2 The ACMA will set out in the infringement notice the amount of the penalty and how it was calculated.

8. Time for payment

- 8.1 Generally, the penalty is required to be paid within 28 days after the infringement notice is given. However, the ACMA may extend the time for payment.⁵
- 8.2 Requests for extensions of time must be received before the due date for payment and will be considered on a case-by-case basis. The request should be directed to the issuing officer in the first instance. The period sought as well as the reasons for the request should also be set out.
- 8.3 If an extension is granted, the recipient will be notified in writing. Liability will be discharged if the penalty is paid by the new date.

9. Withdrawing an infringement notice

- 9.1 An infringement notice may be withdrawn by the ACMA of its own volition or following a request for withdrawal from the recipient of the notice.
- 9.2 Factors that may have a bearing on whether a notice should be withdrawn include whether there is further information or evidence suggesting that:
- > the recipient of the notice did not breach the Act
 - > the conduct is more serious than initially believed and, as a consequence, the matter would be more appropriately dealt with by the court.
- 9.3 The decision as to who should consider an application for withdrawal will be made in light of the facts of the case including the basis/reasons for the request. In most cases, the officer who issued the notice will be best placed to consider the request. As the issuing officer, they will be aware of the factual issues and in a position to make an informed and timely decision, taking into account the reasons for the request and any new information or facts presented.
- 9.4 Requests for withdrawal should therefore be directed to the officer specified in the notice, in the first instance. The request must generally be made within 28 days of the date of the notice. The reasons for the request should be set out.

Effect of withdrawing an infringement notice

- 9.5 If the infringement notice is withdrawn after payment of the penalty, the penalty paid will be refunded.
- 9.6 In the event that an infringement notice is withdrawn, the ACMA will consider what, if any, further action is appropriate. See the discussion in section 11.

10. Consequences if the penalty is paid

- 10.1 If the recipient pays the infringement notice penalty within time—that is, 28 days after the notice is given or the extended date (see section 8)—their liability for the alleged contravention/s or offence, the subject of the notice, is discharged.

⁵ Under the regulations, the ACMA may only extend the time for a further period of 14 days.

- 10.2 As a consequence, proceedings cannot be instituted with respect to the contravention/s or offence, the subject of the notice. Payment does not, however, equate to a finding that the contravention/s or offences occurred.

11. Consequences if the penalty is not paid

- 11.1 In the event that the penalty is not paid, the ACMA will consider further enforcement action. That action may include commencing civil penalty proceedings or, where an infringement notice may be issued instead of prosecution, referral to the Commonwealth Director of Public Prosecutions.
- 11.2 In the event that litigation is commenced, it is the court's role to consider and determine whether the alleged contravention/s or offence/s have been established and, if so, the orders that should follow. As noted in section 2, the penalties that the court can impose are potentially significantly higher than the amount payable under the infringement notice.
- 11.3 The ACMA will determine what action should be taken in light of the facts of the case.

12. Publication

- 12.1 The ACMA's policy is set out in *Regulatory guide—No. 6: Publication of investigations and enforcement actions*.
- 12.2 In summary, the ACMA will not publicise the giving of an infringement notice unless and until the recipient party has paid the penalty specified in the notice.