

31 January 2022

The Manager
Content and Consumer Division
Australian Communications and Media Authority
By email: haveyoursay@acma.gov.au



Dear Manager,

Re: Telecommunications (Listed Infringement Notice Provisions) Declaration 2011

ACCAN thanks the Australian Communications and Media Authority (**ACMA**) for the opportunity to provide views on the sunseting and remaking of the *Telecommunications (Listed Infringement Notice Provisions) Declaration 2011 (the Declaration)*.

The Declaration specifies the provisions of Commonwealth legislation for which the ACMA may issue an infringement notice (**IN**) should a carriage service provider (**CSP**) contravene a provision. CSP activities that can incur an IN include (but are not limited to) failure to comply with:

- Requirements to join the Telecommunications Industry Ombudsman scheme, which provides consumers access to free and independent external dispute resolution,
- ACMA remedial directions, which require CSPs to prevent or cease activities deemed non-compliant,¹ and
- Rules about record-keeping, which assist the ACMA in its compliance investigations.²

While the Declaration only captures certain provisions in the telecommunications regulatory landscape, ACCAN strongly supports its remaking. The Declaration, and the IN scheme more broadly, constitute a vital part of the ACMA's enforcement regime, and ensure that CSPs' compliance with certain telecommunications rules is incentivised. Our submission provides feedback to improve the robustness of the Declaration and suggests improvements to the ACMA's IN scheme more broadly.

1. Is the current Declaration operating effectively and efficiently?

To ACCAN's knowledge, the Declaration operates effectively and efficiently insofar as it provides the ACMA the ability to issue INs for contraventions of certain telecommunications rules. Further suggestions to improve the way in which the Declaration operates for consumers are detailed below.

2. Should the Declaration be remade and amended as proposed?

ACCAN is strongly supportive of the Declaration being remade to ensure that the ACMA's IN scheme continues to operate. The proposed amendments, including new provisions to be included in the

¹ ACMA 2017, *Regulatory guide—No. 4: Remedial directions*,

<https://www.acma.gov.au/sites/default/files/2019-06/Regulatory-guide-No-4-Remedial-Directions.pdf>

² ACMA, Infringement notices for breaking the telco rules, <https://www.acma.gov.au/infringement-notice-breaking-telco-rules>

Declaration, strengthen the existing scheme, and give consumers confidence that their providers are better incentivised to follow telecommunications rules. The proposed administrative changes should also be made to ensure the Declaration remains accurate and fit for purpose.

Statutory Infrastructure Provider rules

ACCAN is particularly supportive of the inclusion of new provisions related to Statutory Infrastructure Providers (SIPs). ACCAN is aware of consumer cases where non-NBN SIPs have failed to comply with important obligations; for example, connecting a consumer to a qualifying network on request, and publishing wholesale terms and conditions online. The ACMA has investigated this type of conduct in the past and issued a formal warning in response.³ Under the amended proposed Declaration, in this instance the ACMA would have the discretionary power to issue an IN where appropriate, rather than being constrained to issue a warning or direction first.

3. Are there any other changes that should be made to the Declaration?

The ACMA does not have the power to issue INs for any and all contraventions of the rules the ACMA enforces. ACCAN's view, in line with our position expressed in the Consumer Safeguards Review Part C, is that all rules directly related to the supply of communications to consumers should be directly enforceable by the ACMA,⁴ and consequently captured by the Declaration or the Telecommunications Act 1997 (**the Telecommunications Act**). This would allow the ACMA a wider and more proportionate range of enforcement tools to respond to any CSP contravention. We urge the ACMA to consider extending the Declaration to address the following gaps.

International mobile roaming

The Declaration should be updated to include provisions contained in the *Telecommunications Service Provider (International Mobile Roaming) Determination 2019 (IMR Determination 2019)* that prevent CSPs from charging fees for certain communications about international mobile roaming.

Despite reductions in international travel in the past few years due to COVID-19, consumers continue to raise issues with mobile roaming charges. Given the risk of financial stress that IMR charges can create,⁵ and the reopening of international borders and subsequent increase in international travel, it is ACCAN's position that provisions from the IMR Determination 2019 should be included in the Declaration.

³ ACMA 2021, Telco breaches new network infrastructure rules by failing to publish terms and conditions, <https://www.acma.gov.au/articles/2021-11/telco-breaches-new-network-infrastructure-rules-failing-publish-terms-and-conditions>

⁴ ACCAN 2020, ACCAN response to Consumer Safeguards Review Part C / Choice and Fairness, <https://www.infrastructure.gov.au/sites/default/files/submissions/csr-part-c-accan-response-to-consumer-safeguards-review-part-c-choice-and-fairness.pdf>

⁵ ACCAN 2019, Response to proposed changes to international mobile roaming regulations, <https://accan.org.au/our-work/submissions/1676-response-to-proposed-changes-to-international-mobile-roaming-regulations>

Contravention timeframes

S 572E.2 of the Telecommunications Act indicates that an IN must be given within 12 months after the day on which the contravention is alleged to have taken place.⁶ ACCAN's view is that the 12-month window for the issuing of an IN is too limited given the time it takes for a consumer issue to emerge, then be referred to a regulator, then be investigated, and then for enforcement action to be taken. This is particularly the case for issues experienced by consumers experiencing vulnerability, who may face a delay accessing dispute resolution, or barriers escalating a problem with their communications service.

By extending the window of time for issuing an IN to 2 years after the alleged contravention took place, this process would become consistent with the time allowed for consumers to make a TIO complaint about an issue.⁷ ACCAN urges the ACMA to take the necessary steps towards increasing the timeframe for issuing INs.

Review of the Declaration

The Declaration should continue to be regularly updated with new provisions to ensure no delay in the enforcement of new telecommunications rules.

Broader reforms to the ACMA infringement notice scheme

ACCAN understands that broader reforms to the IN scheme set out under S 572E of the Telecommunications Act are out of scope for this consultation. However, a regulatory system where the ACMA does not have the power to immediately issue an IN related to any breach of consumer protections rules, where appropriate, is incomplete. The Australian public should be safeguarded by a regulatory system that allows the ACMA to impose swift and proportionate INs and other civil penalties where telecommunications rules are not followed, regardless of whether the rules are in industry codes or regulations. Two-step mechanisms where the ACMA must first issue a direction to comply or a warning before pursuing civil penalties undermine the robustness of the telecommunications regulatory system. The ACMA should be given discretionary powers to issue immediate INs for all contraventions of the rules it oversees, where appropriate.

As the ACMA expressed in its response to the Consumer Safeguards Review Part C, direct regulation of consumer protections is critical due to the essentiality of communications services.⁸ Thus, ACCAN urges the Australian Government to consider amendments to the Telecommunications Act to allow the ACMA to issue INs for breaches of industry codes, including the Telecommunications Consumer Protections (TCP) Code.

Additionally, civil penalties for breaches of consumer protections matters should be proportionate with the harm caused. As the ACMA indicated in its Consumer Safeguards Review Part C submission,

⁶ Telecommunications Act 1997 (Cth) S 572E.2, <https://www.legislation.gov.au/Details/C2021C00558/>

⁷ TIO, What we can help with, <https://www.tio.com.au/complaints/what-we-can-help-with#:~:text=Your%20complaint%20should%20be%20about,unsure%20if%20we%20can%20help.>

⁸ ACMA 2020, ACMA Consumer Safeguards Review Part C submission, <https://www.acma.gov.au/sites/default/files/2020-10/ACMA-submission-to-Consumer-Safeguards-Review-Part-C.pdf>

pecuniary penalty and infringement notice amounts vary significantly and do not always allow the ACMA a graduated enforcement response commensurate with the harm caused by an alleged contravention. IN penalty amounts listed in the *Telecommunications (Infringement Notice Penalties) Determination 2012*⁹ may not offer sufficient incentive for compliance and are not consistent with other penalty amounts – for example, for breaching a service provider rule – and should be reviewed to ensure they are modernised and more closely aligned with other ACMA-issued penalty amounts.¹⁰

ACCAN welcomes any additional opportunities to provide input on the remaking of the Declaration. Please do not hesitate to contact us should you require further information about any of the issues raised in our submission.

Yours sincerely,

Rebekah Sarkoezy
Policy Officer

ACCAN’s submission has been endorsed by the following organisations:



Consumer Action Law Centre



Isolated Children’s Parents’ Association



Consumer Policy Research Centre

⁹ Telecommunications (Infringement Notice Penalties) Determination 2012, <https://www.legislation.gov.au/Details/F2012L00232>

¹⁰ ACCC 2020, ACCC Consumer Safeguards Review Part C response, <https://www.accc.gov.au/system/files/ACCC%20submission%20to%20Part%20C%20of%20the%20Consumer%20Safeguards%20Review%20-%20September%202020.pdf>, p. 13