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Practice Group:

**Antitrust,
Competition & Trade
Regulation**

ACCC Publishes Guidelines on Its Use of Infringement Notices

By Murray Deakin and Joni Jacobs

The Australian Competition and Consumer Commission (ACCC) have published much needed guidance on its use of infringement notices issued under the *Competition and Consumer Act 2010 (Cth)* (CCA).

This guidance is timely because:

- the ACCC has actively issued infringement notices to the business community, having collected approximately AUD620,000 in penalties under infringement notices up to December 2012¹
- the amount of penalties sought by the ACCC under infringement notices has recently increased by more than 50%.

A copy of the Guidelines, titled "Guidelines on the use of infringement notices" (Guidelines), can be found [here](#).

What are Infringement Notices?

The ACCC has stated that infringement notices are designed to provide "a timely, cost efficient enforcement outcome in relation to relatively minor contraventions of the Act".

The ACCC is empowered to issue infringement notices where it has "reasonable grounds to believe" that a person has contravened certain consumer protection provisions, including:

- unconscionable conduct provisions
- unfair practices provisions (save for certain sections, such as misleading and deceptive conduct provisions)
- certain unsolicited consumer agreement and lay-by agreement provisions
- certain product safety and product information provisions.

The ACCC may also issue an infringement notice to a person in relation to:

- the failure to respond to a substantiation notice; or
- the provision of false or misleading information to the ACCC in response to a substantiation notice.

What are the Infringement Notice Penalties?

The penalty amount in each infringement notice will vary depending on the alleged contravention, but in most cases is fixed for each individual contravention at:

- AUD10,200 for a corporation (or AUD102,000 for a listed corporation)
- AUD2,040 for an individual.

¹ Page 21 of ACCCount 1 October to 31 December 2012

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Different penalties apply in connection with substantiation notices.

Infringement notice penalties are calculated by reference to the value of penalty units set by the *Crimes Act 1914*. From 28 December 2012, the value of a penalty unit increased from AUD110 to AUD170. Therefore, the infringement notices relating to conduct prior to 28 December 2012 attracted lower penalties than what will now be recovered.

How Active Have the ACCC Been in Issuing Infringement Notices?

Since April 2010, the ACCC has issued approximately 95 infringement notices and received approximately AUD620,000 in penalties.²

Examples of infringement notices issued by the ACCC include:

- **SingTel Optus Pty Ltd:** 27 infringement notices totalling AUD178,000 in relation to representations it made in the promotion of its 'Max Cap' mobile phone plans. The ACCC's Media Release can be found [here](#)
- **Foxtel Management Pty Ltd:** seven infringement notices totalling AUD46,200 for running a nationwide advertising campaign that the ACCC believed was misleading. The ACCC's Media Release can be found [here](#)
- **Advanced Lifestyle International Retail Pty Ltd:** three infringement notices totalling AUD19,800 in relation to false or misleading representations to consumers during in-home sales presentations for its massage wands, cushions, chairs and beds. The ACCC's Media Release can be found [here](#).

When Will the ACCC Likely Issue an Infringement Notice?

Issuing an infringement notice signifies that the ACCC considers a contravention of the CCA has occurred that requires a more formal sanction than an administrative resolution (eg resolution of issue by agreement), but also believes the matter may be resolved without legal proceedings.³

However, an infringement notice is only likely to be issued in circumstances where the ACCC would be willing to commence legal proceedings if the recipient of the notice elected not to pay the infringement notice penalty.⁴

The Guidelines indicate that the ACCC is more likely to consider the use of an infringement notice in place of legal proceedings in the following circumstances:

- the ACCC forms the view that the contravening conduct is relatively minor or less serious
- there have been isolated or non-systematic instances of noncompliance
- there have been lower levels of consumer harm or detriment
- the facts are not in dispute or the ACCC considers the circumstances giving rise to the allegations are not controversial
- infringement notices form part of the broader industry or sector compliance and enforcement program following the ACCC raising concerns about industry wide conduct.⁵

² ACCC Annual Report 2010-2010 published 13 October 2011; ACCC and AER Annual Report 2011-2012 published 16 October 2012; ACCC website; ACCC media releases

³ Page 50 of ACCC and AER Annual Report 2011-2012

⁴ Item 3 of the Guidelines

⁵ Item 4 of the Guidelines

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What Are the Implications for Businesses?

Substantial Monetary Penalties

Despite criticism, the ACCC may continue its practice of issuing multiple infringement notices where it considers it is appropriate to do so. This may occur where the ACCC believes there have been multiple contraventions, where the contraventions have occurred in multiple states or territories, where contraventions have involved different types of media, or where it is considered desirable to deter similar conduct by the specific business involved or the broader industry.⁶ The payment of multiple infringement notice penalties may result in payment of a substantial amount of money (especially given the increase in penalty unit rates from December 2012).

Court Proceedings and Additional Remedies

There is no legal obligation on a recipient to pay an infringement notice. However, nonpayment of infringement notice penalties will expose the recipient to the prospect of proceedings arising from the ACCC's concerns. Infringement notice penalties are lower than the maximum penalty a Court could impose should the recipient be found to have contravened the CCA.⁷ In fact, should the ACCC be successful, the business may be liable to pay a penalty of up to AUD1.1 million for each contravention in addition to legal costs.

Where appropriate, the ACCC may also seek additional remedies, including Court enforceable undertakings.⁸

ACCC Infringement Notice Register and Media Releases

The ACCC operates a public "Infringement Notice Register" of paid infringement notices on its website. Entries on the register ordinarily list the person or business that paid the notice, the date paid and the section of the relevant legislation. Additionally, the ACCC often issues a media release that confirms payment has been made and includes details of the alleged matters and the amount paid.⁹ Given the affect this may have on a businesses reputation, it is vital that all options are carefully considered prior to payment of the penalty.

What Should a Business Do If It Receives an Infringement Notice?

When issued with an infringement notice, the recipient will be provided with information including the nature of the alleged contravention, the amount to be paid and the period for payment if the recipient wishes to avoid Court action.¹⁰ On receipt of an infringement notice, it is advisable for the business to obtain legal advice as to the appropriate response.

There are a number of steps a recipient may take once they receive an infringement notice:

- **Request an extension to comply with the infringement notice.** The compliance period for payment of an infringement notice penalty is 28 days. This may be extended for a maximum of a further 28 days. Any extension request made to the ACCC should be made as soon as possible.

⁶ Item 4(a) of the Guidelines

⁷ Item 9 of the Guidelines

⁸ Item 4(b) of the Guidelines

⁹ Item 8 of the Guidelines

¹⁰ Item 6 of the Guidelines

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- **Request that the infringement notice be withdrawn.** If a business believes that they have not engaged in the conduct alleged by the ACCC or there is additional information the ACCC should consider, a recipient may request that the infringement notice be withdrawn. Any withdrawal request must be provided to the ACCC as soon as possible and it is advisable that the business obtains legal advice to maximise the potential for a successful outcome. Any information provided to the ACCC in response to an infringement notice should be carefully considered and must not be false or misleading.
- **Pay the infringement notice penalty.** Payment of the infringement notice is not taken to be an admission of wrong doing by the recipient and involves no Court finding of any contravention of the CCA. Further, the ACCC cannot commence Court proceedings in relation to the alleged contravention. However, this does not impact on the rights of action other parties may have against the recipient¹¹ and the recipient should consider the possible implications of paying the penalty - discussed above.
- **Not pay the infringement notice penalty.** There is no legal obligation on a recipient to pay an infringement notice. However, nonpayment of an infringement notice during the compliance period will expose the recipient to the prospect of ACCC initiated Court proceedings in relation to the alleged contravention detailed in the infringement notice once the compliance period expires.¹² The recipient should seek legal advice before taking such action (or inaction).

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¹¹ Item 7 of the Guidelines

¹² Items 6 & 9 of the Guidelines