

Compliance and enforcement

HOW REGULATORS ENFORCE THE AUSTRALIAN CONSUMER LAW

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Contents

Introduction	5
About this guide	5
About the other guides	5
About the Australian Consumer Law	5
Elements of compliance and enforcement	7
Reducing consumer detriment	7
Compliance	7
Enforcement	7
Dispute resolution	7
Approaches to compliance and enforcement	8
Risk-based approach	8
Outcome-focused approach	8
Guiding principles	9
Applying the law	10
Setting priorities	10
Compliance and enforcement options	11
Public statements	11
Impact on traders and consumers	13
Regulator independence	13
Why an ACL regulator might investigate a business	13
What an ACL regulator considers when deciding what enforcement action to take	14
Consumer complaints	14
When a business is a consumer	15
Glossary and abbreviations	16
Contacts	18



Introduction

About this guide

This is one of six guides to the Australian Consumer Law (ACL) developed by Australia's consumer protection agencies to help businesses understand their responsibilities under the law.

This guide will help businesses and legal practitioners understand how regulators enforce the ACL.

It covers the compliance and enforcement principles and approach of the government consumer protection agencies, referred to as the ACL regulators, which administer the ACL.

It covers how they:

- respond to consumer issues and evidence of consumer detriment
- use their compliance and enforcement powers
- approach ACL compliance.

The approach outlined in this guide does not apply to other laws administered by consumer protection agencies. It complements any general policies relating to compliance and enforcement used by each ACL regulator.

Each ACL regulator carries out its compliance and enforcement obligations using its own framework, tailor-made for its own jurisdiction, but aimed at consistent application of the ACL across jurisdictions.

This publication will continue to be reviewed and updated to ensure ACL regulators maintain contemporary and robust compliance and enforcement guidelines.

These guides:

- explain the law in simple language but are no substitute for the legislation
- give general information and examples—not legal advice or a definitive list of situations where the law applies
- includes examples of the ACL's application by Australian consumer protection regulators and by Australian courts.

About the other guides

Other guides in this series cover:

- **Consumer guarantees**
Covers supplier, manufacturer and importer responsibilities when there is a problem with goods and services; refunds, replacements, repairs and other remedies.
- **Sales practices**
Covers unsolicited supplies, unsolicited consumer agreements (door-to-door and telemarketing), lay-by agreements, pricing, proof of transaction and itemised bills, referral selling, pyramid schemes, harassment and coercion.
- **Avoiding unfair business practices**
Covers misleading or deceptive conduct, unconscionable conduct, country of origin, false and misleading representations.
- **Unfair contract terms**
Covers what an unfair term is and which contracts are affected by the law.
- **Consumer product safety**
Covers safety standards, recalls, bans, safety warning notices and mandatory reporting requirements.

Further information and copies of these and other publications are available from the Australian Consumer Law website www.consumerlaw.gov.au

About the Australian Consumer Law

The ACL is the law governing consumer protection and fair trading in Australia.

The ACL came into force on 1 January 2011 and replaced the *Trade Practices Act 1974* and previous Commonwealth, state and territory consumer protection legislation. It is contained in Schedule 2 to the *Competition and Consumer Act 2010* (Cth) (CCA) and is applied as a law of each state and territory by state or territory legislation.

Under the ACL, consumers have the same protections, and businesses have the same obligations and responsibilities, across Australia.

Australian courts and tribunals (including those of the states and territories) can enforce the ACL.

The regulators of the ACL are:

- the Australian Competition and Consumer Commission (ACCC), in respect of systemic conduct in trade or commerce at a national level and consistent with published priorities, and conduct involving the use of postal, telephonic and internet services; and
- state and territory consumer protection agencies, in respect of conduct engaged in by persons carrying on a business in, or connected with, the respective state or territory.

Some of the consumer protection provisions in the ACL are mirrored in the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act) in relation to financial products and services. The Australian Securities and Investments Commission (ASIC) is responsible for administering and enforcing the ASIC Act.

Aside from compliance and enforcement by ACL regulators, the ACL creates private rights such as consumer guarantees that persons can enforce through Commonwealth, state and territory courts and tribunals.

Objectives of the Australian Consumer Law

The Intergovernmental Agreement for the Australian Consumer Law states that the objective of the national consumer policy framework is to:

- improve consumer wellbeing through empowerment and protection
- foster effective competition
- enable the confident participation of consumers in markets in which both consumers and suppliers trade fairly.

This is supported by six operational objectives:

- to ensure that consumers are sufficiently well-informed to benefit from and stimulate effective competition
- to ensure that goods and services are safe and fit for the purposes for which they were sold

- to prevent practices that are unfair
- to meet the needs of consumers who are most vulnerable or are at the greatest disadvantage
- to provide accessible and timely redress where consumer detriment has occurred
- to promote proportionate, risk-based enforcement.

The ACL replaced previously separate legislation, which means that:

- a trader who operates across jurisdictions has a single set of rules and responsibilities to comply with (in addition to any jurisdictional legislation that covers their particular industry)
- a consumer moving between jurisdictions or buying from interstate will have the same set of protections as in their home jurisdiction.

One law, multiple regulators

The ACL is a single national law enforced in all jurisdictions by the various jurisdictions' consumer regulators.

Under this arrangement ACL regulators work to:

- ensure that marketplace misconduct is addressed
- employ the most effective means of addressing consumer harm through cooperative and complementary enforcement action
- avoid unnecessary duplication of effort in the effective administration of the ACL
- ensure, wherever appropriate, a consistent approach to dispute resolution and enforcement action.

As a law of each jurisdiction—Commonwealth, states and territories—the ACL will be enforced by courts and tribunals in each jurisdiction subject to the specific rules that apply to enforcement processes, courts and tribunals in each state and territory jurisdiction.

The ACL regulators coordinate their activity through Consumer Affairs Australia and New Zealand (CAANZ).

Elements of compliance and enforcement

Reducing consumer detriment

ACL regulators use a range of activities and powers to encourage compliance with and enforcement of the law.

A core issue for regulators is to minimise consumer detriment. Consumer detriment can include:

- the direct financial or material loss or disadvantage from a trader not complying with the law (for example, goods damaged or not delivered, noting that actual detriment may exceed the cost of the item)
- costs incurred in seeking a remedy to the loss (for example, time lost in repeated trips to a trader to seek a refund).

Consumer detriment can also include loss of confidence, emotional distress or embarrassment caused by trader non-compliance.

ACL regulators may act to address actual detriment or the risk of or potential for detriment.

Compliance

ACL regulators aim to promote a high level of compliance with the law. For this to occur, consumers as well as traders need to be aware of their rights and responsibilities, and how to obtain redress. Providing information and advice to consumers and traders for this purpose is a key function of ACL regulators.

ACL regulators use market intelligence to improve their knowledge of market conditions and the experiences of consumers and traders and to identify emerging issues.

Enforcement

To be effective, compliance measures must be supported by a range of escalating enforcement options that can be used if a trader fails to comply or when there is a serious contravention of the ACL.

ACL regulators have a range of civil, administrative and criminal enforcement remedies at their disposal under the ACL and supporting legislation.

When enforcing the law, ACL regulators seek to achieve one or more of the following:

- stop unlawful conduct
- rectify the harm caused by the unlawful conduct
- ensure future compliance with the law and deter offending conduct by individual businesses and within industries
- encourage the effective use of compliance systems
- when warranted, punish the wrongdoer with penalties, including financial penalties.

ACL regulators will choose the most appropriate enforcement tools to achieve these outcomes in a timely and proportionate manner.

Dispute resolution

State and territory ACL regulators play an important role in resolving disputes between consumers and traders about goods and services covered by the ACL. Regulators provide information on their websites about dispute resolution and trader engagement programs.

Even if a dispute is resolved between the consumer and trader, the regulator may still take compliance and enforcement action for any non-compliance identified.

Approaches to compliance and enforcement

Risk-based approach

Compliance and enforcement activity targets areas of strategic priority, with a focus on incidents with evidence or likelihood of consumer detriment.

ACL regulators cannot pursue all complaints. They consider complaints carefully and exercise discretion, directing resources to matters that can result in industry-wide change or provide the greatest overall benefit for consumers.

As these discretionary matters may vary within or between jurisdictions, priorities for enforcement action differ accordingly.

Outcome-focused approach

ACL regulators use a range of administrative, civil and criminal enforcement remedies. A regulator will choose from a range of tools to suit the individual case and to achieve a variety of outcomes, which can go beyond just punishing wrongdoing.

This means regulators can design an enforcement strategy to achieve one or more of the following:

- make a trader aware of how the law affects their operations—for example through education, advice, warnings or reprimands
- obtain a fair remedy for the individual consumer (or class of consumers) concerned, for example:
 - by obtaining redress (remedy or compensation),
 - an injunction (an order for the trader to do, or cease doing, something); or
 - an enforceable undertaking (where a trader agrees to an ongoing obligation to do or cease doing something)
- stop a pattern of continuing conduct and deter future misconduct—for example through injunctions, enforceable undertakings or prosecution.

Guiding principles

ACL regulators use the following guiding principles when undertaking compliance and enforcement activity.

Transparency

ACL regulators will deal with consumers and traders in an open and transparent manner. Transparency has two aspects:

- Compliance and enforcement takes place within appropriate corporate governance processes and can be reviewed by appropriate courts, tribunals and public administration review agencies (such as public service ombudsmen and auditors-general).
- ACL regulators do not make private arrangements—matters taken to enforcement action (for example, matters dealt with through litigation or formal resolution) will be made public.

Confidentiality

Enquiries into complaints and investigations are undertaken according to the appropriate legal privacy requirements of the jurisdiction and according to each regulator's specific policies and procedures. ACL regulators balance confidentiality requirements and the need to inform the public when in the public interest.

Proportionality

Enforcement action is in proportion to the level of consumer detriment and the seriousness of the breach. More serious contraventions, involving:

- deliberate or systemic conduct
- deceit, dishonesty or unconscionable conduct
- the potential for death and injury
- targeting of vulnerable groups
- wilfully repeated conduct
- a significant impact on market integrity
- wide consumer detriment

will result in more serious enforcement action.

Timeliness

Complaint handling, dispute resolution, investigation processes and the resolution of enforcement matters should be conducted as efficiently as possible. This helps avoid costly delays, business uncertainty, and minimises consumer detriment.

Targeted

ACL regulators make effective use of limited resources by strategically targeting issues and traders in line with risks, new and emerging issues, and enforcement priorities. Each year, ACL regulators undertake coordinated and targeted compliance activity on a limited number of national projects or initiatives. ACL regulators may make public reference to these activities as appropriate.

Accountability

All ACL regulators are accountable for their compliance and enforcement activity. The specific mechanisms will vary between jurisdictions depending on:

- public administration legislation
- public interest and efficiency considerations
- regulator-enabling legislation, and
- governmental, departmental and agency codes of conduct.

National collaboration

ACL regulators make decisions mindful of the national implication of actions and the public interest. Compliance priorities in state, territory and regional markets have regard to the broader national environment.

ACL regulators work collaboratively in compliance and enforcement matters to improve regulatory outcomes. Through research and interaction with other jurisdictions, ACL regulators seek to identify effective and innovative investigative, monitoring and enforcement techniques and initiatives.

Applying the law

Setting priorities

Each ACL regulator exercises its compliance and enforcement powers independently, in the public interest and with integrity and professionalism.

An ACL regulator will choose how it will use its resources to pursue particular cases to achieve the most effective outcomes for consumers, having regard to all the circumstances of the case.

To assist with this determination, ACL regulators prioritise matters that demonstrate one or more of the following:

- conduct of public interest or concern
- conduct resulting in significant consumer detriment
- conduct affecting disadvantaged or vulnerable consumer groups
- conduct that suggests a pattern of non-compliance by the trader or is indicative of a risk of future misconduct
- conduct involving a significant new or emerging market issue
- conduct that is industry-wide or likely to become so
- a significant impact on market integrity
- whether action is likely to have a worthwhile educational or deterrent effect
- conduct demonstrating a blatant disregard for the law.

When appropriate, an ACL regulator may also pursue matters that test or clarify the law.

An ACL regulator is less likely to pursue matters that:

- are one-off, isolated events
- involve contraventions that are technical in nature
- are more appropriately resolved directly between the parties under an industry code (for example, by mediation or an industry dispute resolution body)
- are more appropriately dealt with under jurisdiction-specific legislation
- involve issues more effectively dealt with by another agency; or
- are best dealt with between the parties (the ACL provides complainants with a private right of action in these circumstances).

Litigation is costly compared to other compliance and enforcement actions. Where breaches are blatant, repeated and/or cause significant detriment, the regulator will target those traders for court action. ACL regulators have a range of other tools available as an alternative to court action.

Compliance and enforcement options

Civil court action may result in fines, pecuniary penalties, disqualification orders, injunctions or compensation orders. Criminal court action may result in convictions or fines.

Other tools and strategies that may be available to ACL regulators include:

- education, advice and influencing good practice
- encouraging voluntary industry self-regulation codes
- ‘without prejudice’ discussions
- dispute resolution
- formal written warnings
- infringement notices
- enforceable undertakings
- public statements such as media releases and public warnings.

See **Figure 1** for a diagram showing these compliance and enforcement options.

Public statements

Public statements may be used to prevent or reduce consumer detriment by alerting consumers to alleged misconduct. It establishes a more flexible and responsive tool to support timely intervention against conduct which may contravene the ACL.

Public statements can take a variety of forms including:

- publication of enforcement actions or outcomes
- consumer warning notices concerning particular sectors, practices, businesses or other consumer risks
- industry notification of an ACL regulator’s intent or priorities for compliance and enforcement activities
- media releases about regulator activities
- social and traditional media engagement and advertising
- reporting on complaints, disputes, infringements or other data held by regulators
- public warning notices under section 223 of the ACL.

An ACL regulator does not need to apply to a court or prove that a contravention has occurred to issue a public statement.

An ACL regulator has a discretionary power to issue a public warning notice if:

- it has reasonable grounds to suspect the relevant conduct may constitute a contravention of a provision in Chapter 2, 3 or 4 of the ACL
- it is satisfied that one or more persons has suffered, or is likely to suffer, detriment as a result of the conduct; and
- it is satisfied that it is in the public interest to do so.

In addition, under section 223 of the ACL, an ACL regulator may issue a public warning notice if a person refuses, or fails to respond to a substantiation notice and it is satisfied it is in the public interest to do so.

The factors an ACL regulator may consider in deciding whether to issue a public warning notice depend on each case. Examples include:

- the need to take timely action to protect consumers at large
- other intended compliance and enforcement action and the preferred regulatory outcome
- the numbers and types of persons that have been affected, or may potentially be at risk
- any risk to vulnerable or disadvantaged persons
- the types and extent of loss that has or may be incurred
- the capacity to alert consumers most at risk and the appropriate medium
- the number, nature and outcome of enquiries and complaints received
- any past dealings and compliance history
- the availability and appropriateness of other regulatory action
- responsiveness to dealings with the ACL regulators and willingness to remedy the offending conduct
- any regulatory action by another ACL regulator.

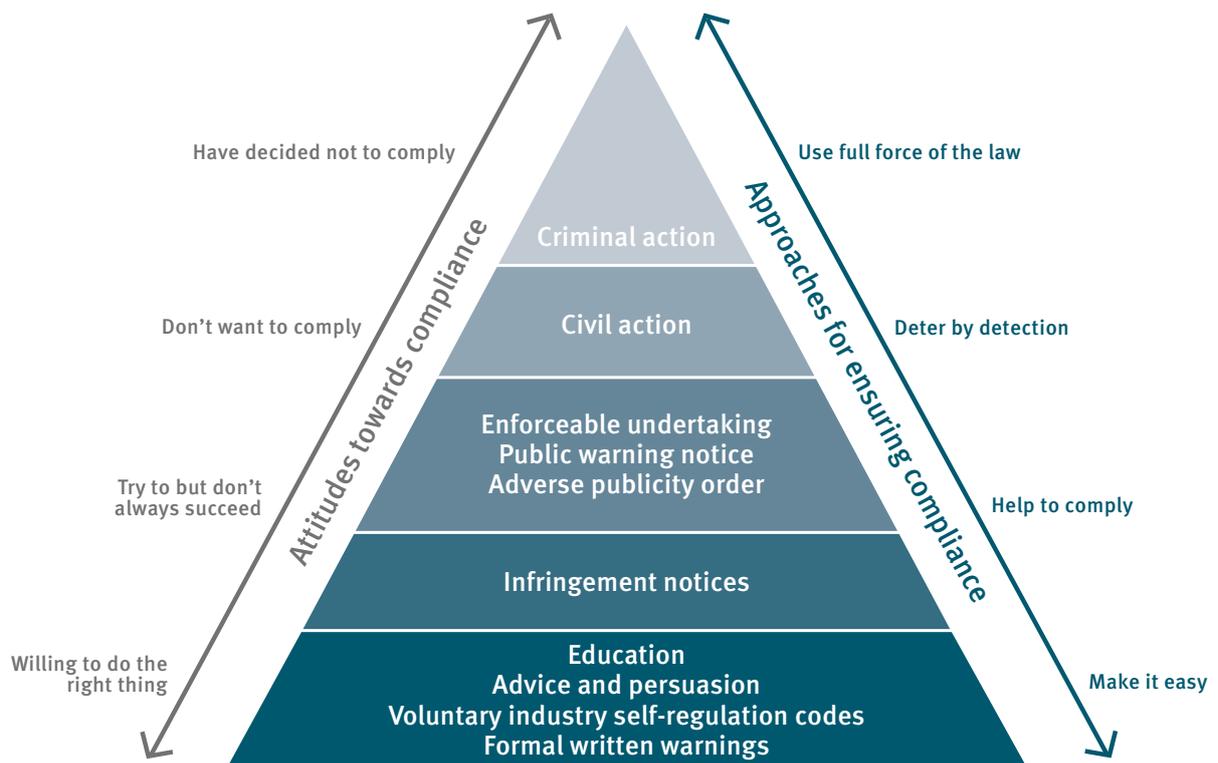
Applying the law continued

This list is provided for illustration only and is not an exhaustive list of examples.

A public warning notice may include:

- the grounds for issuing the public warning notice
- the identity of the person or business
- details of the suspected offending conduct and the products or services involved
- details of any detriment incurred or likely to be incurred
- details of why the offending conduct may contravene the ACL
- details of any advertising used to promote the offending conduct; and
- any specific warning to the public.

Figure 1. Compliance and enforcement options



Impact on traders and consumers

Regulator independence

Each ACL regulator is independent, has its own enabling legislation and exercises its powers and functions accordingly.

ACL regulators have put in place systems to create a national approach to compliance and enforcement. They agree to:

- consider this compliance and enforcement document
- regularly consult and communicate about priorities, markets, compliance and enforcement
- general principles for handling and managing complaints and market intelligence under the ACL
- general principles for compliance and enforcement action to bring about trader compliance for serious breaches of the ACL.

The following principles apply to compliance and enforcement action:

- all traders must comply with the ACL
- there are private rights of action for traders and consumers under the ACL
- the ACCC and ASIC have national responsibilities and can act in all states and territories
- each state and territory regulator can act in its own jurisdiction, as defined by its own legislation, as well as in the Federal Court
- circumstances will vary between jurisdictions and ACL regulators will have varying priorities relevant to their jurisdiction.

As a result of their independence, ACL regulators may sometimes take different compliance and enforcement actions. This often reflects coordination between regulators to take action, or a particular priority in a specific jurisdiction, rather than inconsistent application of the law.

All ACL regulators participate in Consumer Affairs Australia and New Zealand (CAANZ).

Why an ACL regulator might investigate a business

A business may be investigated by an ACL regulator as a result of:

- a complaint from a consumer, competitor or other regulator
- marketplace intelligence
- information from whistleblowers or other informants
- a targeted compliance activity designed to identify and reduce non-compliant behaviour by businesses in a particular industry or area.

What an ACL regulator considers when deciding what enforcement action to take

Factors to be considered may vary between each ACL regulator, but generally include:

- seriousness of the alleged contravention and the impact on the community and industry. Public safety is of particular importance when determining appropriate enforcement action
- intent and whether a trader has made a genuine attempt to comply with the law, or has wilfully disregarded it
- compliance history of the trader
- public interest and consideration of the efficient and proper use of public resources
- justification and whether the decision will withstand scrutiny under any potential independent review, for example by an Ombudsman
- mitigating circumstances, including circumstances outside the trader's control
- the course of conduct demonstrated by the trader, which might include evidence of a lack of diligence or negligence in running their business
- evidence and whether an offence can be substantiated.

Consumer complaints

When a consumer contacts an ACL regulator about a dispute with a business, in many cases, the relevant state or territory ACL regulator will first encourage the consumer and business to resolve or settle the dispute informally.

The ACL regulator:

- cannot force a business or consumer to settle the dispute
- can investigate a business when a law may have been broken, even if the complaint was resolved.

In some cases, ACL regulators will conduct enquiries before contacting the business in order to gather sufficient information about the matter and to protect the integrity of the investigation.

The ACCC does not handle individual disputes; rather it prioritises enforcement action on more widespread issues that reflect the potential for greater consumer detriment.

ASIC does not generally act on behalf of individuals and can only take action if a matter is within its areas of responsibility and is in the wider public interest.

When a business is a consumer

Under the ACL, a business is also a consumer and protected by the same consumer guarantees if it buys:

- goods or services that cost up to \$40,000
- goods or services that cost more than \$40,000 and are of a kind ordinarily acquired for domestic, household or personal use or consumption
- a vehicle or trailer primarily used to transport goods on public roads.

However, where a business acquires goods for the purpose of resupply or transforming them in a manufacturing or production process, or treating or repairing other goods, it will not be a consumer and the consumer guarantees will not apply to those goods.

ACL regulators can receive complaints from businesses. Some states and territories also operate small business commissioner schemes, which may provide access to dispute resolution and mediation services.

Each ACL regulator is independent, has its own enabling legislation and exercises its powers and functions accordingly.

Glossary and abbreviations

TERM	DEFINITION
consumer	<p>a person who buys:</p> <ul style="list-style-type: none">• any type of goods or services costing up to \$40,000 (or any other amount stated in the ACL Regulations)• goods or services costing more than \$40,000 which would normally be for personal, domestic or household use; or• goods which consist of a vehicle or trailer used mainly to transport goods on public roads. <p>Australian courts have said that the following are not normally used for personal, domestic or household purposes:</p> <ul style="list-style-type: none">• an air seeder—<i>Jillawarra Grazing Co v John Shearer Ltd</i> [1984] FCA 30• a large tractor—<i>Atkinson v Hastings Deering (Queensland) Pty Ltd</i> [1985] 6 FCR 331• an industrial photocopier—<i>Four Square Stores (QLD) Ltd v ABE Copiers</i> [1981] ATPR 40–232 at 43,115.
Consumer Affairs Australia and New Zealand (CAANZ)	<p>CAANZ supports the Legislative and Governance Forum on Consumer Affairs (CAF), which comprises ministers with responsibilities for consumer affairs, to undertake specific functions relating to the administration of consumer protection and fair trading laws.</p> <p>CAANZ has established arrangements to enhance consistency, coordination and cooperation amongst the ACL regulators. CAANZ produces annual reports on compliance and enforcement of the ACL, which can be found at www.consumerlaw.gov.au</p>
goods	<p>include, among other things:</p> <ul style="list-style-type: none">• animals, including fish• gas and electricity• computer software• second-hand goods• ships, aircraft and other vehicles• minerals, trees and crops, whether on or attached to land• any component part of, or accessory to, goods.

TERM	DEFINITION
Intergovernmental Agreement	A copy of the Intergovernmental Agreement can be found at www.consumerlaw.gov.au/the-australian-consumer-law
services	include duties, work, facilities, rights or benefits provided in the course of business, for example: <ul style="list-style-type: none"> • dry cleaning • installing or repairing consumer goods • providing swimming lessons • lawyers' services.
substantiation notice	A statutory notice requiring the production of information or documents that could substantiate, explain the basis or support a claim or representation.

Abbreviations

ACCC	Australian Competition and Consumer Commission
ACL	Australian Consumer Law
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i> (Cth)
CAANZ	Consumer Affairs Australia and New Zealand
CCA	<i>Competition and Consumer Act 2010</i> (Cth)

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