

# Public warning notices guide



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This guide has been developed jointly by Consumer Affairs Victoria, NSW Fair Trading and Commonwealth, State and Territory consumer agencies.

These guidelines are available at [consumerlaw.gov.au](http://consumerlaw.gov.au) as well as the websites of each ACL regulator (see Appendix 1 for a list of regulators and their websites).

Disclaimer: Because this publication avoids the use of legal language, information about the law may have been expressed in general statements. This guide should not be relied upon as a substitute for the ACL or professional legal advice.

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# 1. Introduction

The Australian Consumer Law (ACL) is the law governing consumer protection and fair trading in Australia. From 1 January 2011, it applies nationally and as a law of each state and territory. The ACL also incorporates the national unfair contract terms law.

It is a key part of regulatory reforms initiated by the Council of Australian Governments (COAG) to deliver a seamless national economy, and implements recommendations made in 2008 by the Productivity Commission in its review of Australia's consumer policy framework.

## **One law, multiple regulators**

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

At the Commonwealth level, this is the Australian Competition and Consumer Commission and the Australian Securities and Investments Commission. In the States and Territories these are the Australian Capital Territory Office of Regulatory Services, Consumer Affairs and Fair Trading Tasmania, Consumer Affairs Victoria, the New South Wales Office of Fair Trading, Northern Territory Consumer Affairs, the Queensland Office of Fair Trading, the South Australian Office of Consumer and Business Services and the Western Australian Department of Commerce. The agencies are referred to collectively as "the ACL regulators".

Mirror provisions in the Australian Securities and Investments Commission Act 2001 (ASIC Act) provide similar protections in relation to financial services. These provisions are administered by ASIC.

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; and
- > ensure, wherever appropriate, a consistent approach to dispute resolution and enforcement action.

This guide describes the general approach of ACL regulators in relation to the consideration and issue of public warning notices under the ACL.

## 1. Introduction

### 1.1 Public warning notices

In certain circumstances it may be appropriate to alert the public about a person's conduct that may contravene the ACL.

This guide relates only to the use of public warning notices for the purposes of section 223 of the ACL, and does not attempt to discuss wider issues around more general communications and public comment by an ACL regulator.

ACL regulators retain broad functions and powers, not governed by this protocol, including informing and educating the public about consumer protection issues. An ACL regulator has discretion to publish information about consumer protection activities such as institution of proceedings or successful enforcement outcomes.

A public warning notice provides the ACL regulators with a compliance tool that may be used to prevent or reduce the opportunity for consumer detriment by alerting consumers to the alleged conduct. The public warning notice power establishes a more flexible and responsive tool to support timely intervention against conduct which may contravene the ACL.

While section 223 of the ACL sets out the requirements that must be satisfied to exercise the public warning notice power, additional considerations, discussed in the body of this guide, may be relevant to a decision whether or not a public warning notice is the appropriate regulatory response in each instance.

### 1.2 Purpose

This guide sets out the principles that may be considered by ACL regulators when considering the exercise of the public warning notice power.

This guide should be read in conjunction with the ACL compliance and enforcement guide, for a more complete understanding of the ACL regulators' approach. While endorsing this guide, each ACL regulator will make decisions in accordance with their own decision making process.

### 1.3 Provisions

An ACL regulator does not need to make application to a court or prove that a contravention has occurred to issue a public warning notice. An ACL regulator has a discretionary power to issue a public warning notice to the public if:

- > it has reasonable grounds to suspect that 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.

Section 223<sup>1</sup> of the ACL specifically provides that 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.

<sup>1</sup> References to s223 of the ACL should be read to also refer to s12GLC of the ASIC Act unless otherwise indicated.

## 2. Approach

Issuing a public warning notice to alert the public to conduct which may contravene the ACL may be appropriate when there is an imminent or ongoing risk of consumer detriment. Relevant to a decision to exercise the public warning notice power is the balance between the likely impact on the relevant person or business, against the known or likely risk of consumer detriment and the need to act in a timely manner. Flexibility in the approach of the ACL regulators helps foster positive compliance behaviours, increased self-regulation and voluntary compliance.

It is important to note that the power to issue a public warning notice is a discretionary power of the regulator and any decision to issue a public warning will be made after consideration of the merits in each individual case. The type of considerations identified in this guide are not prescriptive and are only intended to be representative of the type of matters an ACL regulator may consider when determining whether the issuing of a public warning is appropriate. ACL regulators will apply this guidance flexibly and have regard to the individual circumstances of each case when determining an appropriate approach.

### 2.1 Objective

The objective of issuing a public warning notice is to prevent or reduce the opportunity for consumer detriment by alerting the public to conduct that may contravene the ACL. A public warning notice promotes an informed and fair market place and may realise compliance outcomes where timely action is required.

### 2.2 ACL regulators working together

ACL regulators work cooperatively to achieve appropriate regulatory responses and consistency of compliance and enforcement outcomes nationally. An ACL regulator may discuss its intention to issue a public warning notice and the conduct suspected to contravene the ACL with other ACL regulators. Information sharing and cooperation in regard to appropriate regulatory responses assists in promoting national consistency in regulatory outcomes.

### 2.3 Why issue a public warning notice

ACL regulators will choose the most appropriate enforcement tools consistent with the national approach set out in the compliance and enforcement guide.

The decision to issue a public warning notice may, in the circumstances, be:

- > the most appropriate response available;
- > a standalone action;
- > part of a broader compliance strategy to address offending conduct;
- > initial action that communicates a warning to the public in a timely and effective manner to prevent or reduce the opportunity for consumer detriment;
- > an effective means to communicate successful enforcement outcomes from a partner ACL regulator where the conduct may be subject to inquiries and risk consumer detriment in other jurisdictions; and
- > in response to a person refusing or failing to respond to a substantiation notice.

A public warning notice is intended to bring attention to the conduct of a person where it is suspected it may contravene the ACL. A public warning notice will identify a business or individuals suspected of being involved in a contravention of the ACL.

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### 2.4 Possible considerations

The factors that an ACL regulator may consider in deciding whether to issue a public warning notice depend on the facts of each case. Some examples of factors that an ACL regulator may consider 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 inquiries 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.

This list is provided for illustration only and is not an exhaustive list of examples that an ACL regulator may consider in deciding whether a public warning notice is appropriate.

### 2.5 Notice

An ACL regulator may in certain circumstances provide advance notice to the subject of a public warning notice, including an opportunity to respond as to why the decision to issue a public warning notice should not proceed.

If an ACL regulator determines to provide advance notice to a person or business, it will set out the persons and businesses to be named in the public warning, along with the conduct suspected to contravene the ACL.

If the subject of a public warning notice is provided an opportunity to make a submission on the matter, a reasonable time will be afforded. The desire to provide a reasonable opportunity for the subject to respond should be balanced against the need to alert the public to the offending conduct.

### 2.6 Record of public warning notices

Each ACL regulator has indicated their intention to maintain a record of public warning notices issued for the purposes of the ACL. The record of public warning notices will be available to the public.

## 2. Approach

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### 2.7 How is a public warning notice published

Generally speaking, a public warning notice will be communicated through the media and other ACL regulator tools such as websites and social media. ACL regulators will also look at ways of communicating with targeted groups of relevant consumers.

An ACL regulator may issue a media release to accompany a public warning notice to alert the public. In addition to providing information on the offending conduct and any detriment that may have occurred, a media release may provide more general information on the purpose of public warning notices, cooperation with other ACL regulators and other regulatory responses that may be available.

### 2.8 What may a public warning notice include

A public warning notice is issued to alert the public to conduct which may contravene the ACL and should include sufficient information to inform the public on the possible risks. A public warning notice may include:

- > the grounds for issuing the public warning notice;
- > identify 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.

## 3. Conclusion

This guide sets out the approach of the ACL regulators in regard to exercising public warning notice powers. This guide should be read in conjunction with the ACL compliance and enforcement guide for a more informed understanding of the ACL regulators' approach to administering the ACL and the range of regulatory tools available.

While it is the responsibility of traders to comply with the ACL at all times, this guide assists traders to understand how regulators will exercise public warning notice powers.



# Appendix: details of ACL regulators

Commonwealth

**Australian Competition  
and Consumer Commission**

[acc.gov.au](http://acc.gov.au)  
1300 302 502

**Australian Securities and  
Investments Commission**

[asic.gov.au](http://asic.gov.au)  
1300 300 630

Australian Capital Territory

**Office of Regulatory Services**

[ors.act.gov.au](http://ors.act.gov.au)  
(02) 6207 0400

New South Wales

**NSW Fair Trading**

[fairtrading.nsw.gov.au](http://fairtrading.nsw.gov.au)  
13 32 20

Northern Territory

**Consumer Affairs**

[consumeraffairs.nt.gov.au](http://consumeraffairs.nt.gov.au)  
1800 019 319

Queensland

**Office of Fair Trading**

[fairtrading.qld.gov.au](http://fairtrading.qld.gov.au)  
13 74 68

South Australia

**Office of Consumer  
and Business Services**

[cbs.sa.gov.au](http://cbs.sa.gov.au)  
(08) 8152 0732

Tasmania

**Consumer Affairs and  
Fair Trading**

[consumer.tas.gov.au](http://consumer.tas.gov.au)  
1300 654 499

Victoria

**Consumer Affairs Victoria**

[consumer.vic.gov.au](http://consumer.vic.gov.au)  
1300 558 181

Western Australia

**Department of Commerce**

[docep.wa.gov.au](http://docep.wa.gov.au)  
1300 304 054

**Australian Consumer Law**

[consumerlaw.gov.au](http://consumerlaw.gov.au)