

Business snapshot

ACCC powers to issue infringement, substantiation and public warning notices



Australian
Competition &
Consumer
Commission



The *Competition and Consumer Act 2010* (the Act) and the Australian Consumer Law provide for the Australian Competition and Consumer Commission (ACCC) to use infringement, substantiation and public warning notices in carrying out its compliance and enforcement activities. The ACCC will have regard to its Compliance and Enforcement Policy in deciding when to use these powers.

These powers provide the ACCC with an alternative to legal proceedings when dealing with potential contraventions of the Act. The ACCC's powers also mean that businesses and individuals can potentially face both financial penalty and reputational damage from having their name listed on the ACCC's website in the Infringement Notice Register or the Public Warning Register.

Infringement notices

The ACCC may issue an infringement notice where it has reasonable grounds to believe that a person has contravened certain consumer protection laws.

Infringement notices may be issued for alleged contraventions of various provisions of the Australian Consumer Law. These include:

- unconscionable conduct
- certain unfair practices
- pyramid selling
- certain product safety and product information provisions.

The ACCC may also issue an infringement notice in relation to an allegation of:

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

The ACCC must issue an infringement notice within 12 months of the alleged contravention.

When issued with an infringement notice, a person will also be provided with certain information, including the nature of the alleged contravention, the amount to be paid and the period for payment if the person wishes to avoid court action.

The penalty amount in an infringement notice will vary, depending on the alleged contravention, but in most cases is fixed at \$10 800 for a corporation (or \$108 000 for a listed corporation) and \$2160 for an individual for each alleged contravention. In connection with substantiation notices, the infringement notice penalty amount for failure to comply with a substantiation notice is \$5400 for a corporation and \$1080 for an individual and the infringement notice penalty amount for providing false or misleading information is \$9000 for a corporation and \$1800 for an individual. (Penalty amounts for infringement notices are calculated by reference to value of a penalty unit set in the *Crimes Act 1914*. On 1 July 2015 the value of a penalty unit increased from \$170 to \$180 and these penalty amounts for infringement notices reflect that adjustment. Infringement notices relating to conduct prior to 28 December 2012 attract a lower penalty.) The compliance

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period for payment of an infringement notice penalty is 28 days, but this may be extended for a further 28 days in certain circumstances.

A person may choose not to pay an infringement notice penalty. However, if a person does not pay the penalty within the prescribed period, the ACCC may commence court-based action in respect of the conduct alleged to have contravened the Act.

Once an infringement notice penalty is paid, the ACCC may not commence court proceedings in relation to the alleged contravention.

Implementation of the ACCC's Compliance and Enforcement Policy is governed by guiding principles, which include transparency. This means that the ACCC does not do private deals, and every enforcement matter that is dealt with through litigation or formal resolution is made public. A register recording the payment of infringement notices appears on the ACCC's website.

It is important to note that a person's payment of an infringement notice penalty is not taken as an admission of liability or a contravention of the Act. However, in appropriate cases, as well as issuing an infringement notice, the ACCC may seek additional remedies to resolve its concerns, including by way of court-enforceable undertakings.

Substantiation notices

The ACCC may issue a substantiation notice requiring a person to give information and/or produce documents that could be capable of substantiating or supporting a claim or representation made by the person.

If the claims relate to a supply or possible supply of goods or services, the ACCC can issue a substantiation notice seeking information or documents in relation to the quantities in which, and the period for which, the corporation will be able to make the supply.

Substantiation notices do not require a person to prove that a claim or representation is true or is not misleading; rather, they are a preliminary investigative tool that helps the ACCC determine whether further investigation is warranted.

A substantiation notice may be used, for example, to respond to concerns about:

- two-part advertising claims—such as 'was/now' pricing and strikethrough advertising
- business opportunities—such as projected earnings
- food claims—such as place of origin claims, composition claims, health claims

- environmental claims—such as biodegradability claims, claims about carbon emission impacts
- product safety claims—such as meeting a prescribed standard that requires testing.

Individuals are not required to provide information or documents if the information or documents may incriminate them or expose them to a penalty.

A person served with a substantiation notice must comply with the notice within 21 days. Penalties may apply where false or misleading information is provided. The period for compliance with a notice may be extended where a person applies for the extension during the compliance period and the ACCC considers it appropriate to grant the extension.

If a person does not respond to the substantiation notice within the compliance period, the ACCC may issue an infringement notice under which a penalty of \$5400 for a body corporate or \$1080 for an individual is payable. Alternatively, the ACCC may seek an order from the court for payment of a pecuniary penalty of up to \$16 500 for a body corporate or \$3300 for an individual.

Public warning notices

The ACCC may issue a public warning notice to alert consumers to a suspected breach of certain provisions of the Australian Consumer Law.

The ACCC may issue such a notice where:

- it has reasonable grounds to suspect that the conduct may constitute a contravention of a provision of the Act
- it is satisfied that one or more other 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.

A key consideration for the ACCC in evaluating whether it is appropriate to issue a public warning notice will be whether it considers there is an imminent need to inform consumers so they can avoid suffering detriment.

For example, such detriment may arise where there is potential for physical injury from unsafe products or concerns about widespread loss through scams. The likely impact on the businesses involved will also be a key consideration.

The ACCC may also issue a public warning notice where a person refuses or fails to respond to a substantiation notice and the ACCC considers it to be in the public interest to issue the public warning notice.

ACCC contacts

Infocentre 1300 302 502

Website www.accc.gov.au

For information in languages other than English, call 13 1450 and ask for 1300 302 502

TTY service for people with hearing or speech difficulties: 1300 303 609

Small business helpline 1300 302 021

For all other business information go to www.business.gov.au

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Important notice

The information in this publication is for general guidance only. It does not constitute legal or other professional advice, and should not be relied on as a statement of the law in any jurisdiction. Because it is intended only as a general guide, it may contain generalisations. You should obtain professional advice if you have any specific concern.

The ACCC has made every reasonable effort to provide current and accurate information, but it does not make any guarantees regarding the accuracy, currency or completeness of that information.

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