

Business snapshot

don't take advantage of disadvantage

A compliance guide for businesses dealing with disadvantaged or vulnerable consumers



Australian
Competition &
Consumer
Commission



Compliance is not just about obeying the law, it makes good business sense

Businesses that accommodate the special needs of consumers get a good reputation in all areas of their business. Businesses that take advantage of vulnerable or disadvantaged consumers get a bad reputation, not just with the consumer involved, but with their family, friends, carers and the broader community.

This guide will help you recognise when you are dealing with disadvantaged or vulnerable consumers and the factors you may need to consider in these situations, including relevant court decisions.

Businesses are encouraged to deal with all consumers. However, if it is apparent that a potential customer may not have the capacity to make a voluntary or informed decision about the implications and/or benefits of their purchasing or contractual decisions, then businesses need to act responsibly and take extra care in their dealings to ensure that no unfair advantage is taken.

This guide outlines your rights and responsibilities in dealing with disadvantaged or vulnerable consumers.

Business snapshot—don't take advantage of disadvantage

What do we mean by 'disadvantaged' or 'vulnerable'?

Some consumers **may** be disadvantaged or vulnerable in some marketplace situations if they:

- have a low income
- are from a non-English speaking background
- have a disability—intellectual, psychiatric, physical, sensory, neurological or a learning disability
- have a serious or chronic illness
- have poor reading, writing and numerical skills
- are homeless
- are very young
- are old
- come from a remote area
- have an Indigenous background.

Of course, not all consumers with these characteristics are more at risk of making poor business decisions. But be aware that your marketing message and conduct may affect some consumers differently when making decisions about buying goods or services.

Your business should consider that consumers:

- whose English language skills are not good, or who are visually impaired may not be able to compare written contracts with your advertisements or verbal representations—they are at risk if representations about the terms of the contract are unclear, incorrect or fail to mention key terms
- in Indigenous communities may have had limited exposure to commercial transactions and have little understanding of commercial documents
- on low incomes may be more inclined to pursue claims about low prices, but they may also suffer greater financial impact if the claims are unclear, incorrect or simply untrue
- who live in remote areas may have limited choices, and may therefore feel pressured to accept unfair terms
- particularly those from non-English speaking or Indigenous backgrounds, may view transactions according to cultural values rather than market values.

Why does my business need to be aware of these issues?

If your business deals with consumers it is likely that some of these consumers will have one or more of the characteristics of disadvantage or vulnerability listed above. You may even deal in products or services which are specifically designed for or target such consumers. It is therefore important for your business to be aware of these issues.

Research has shown that most dissatisfied consumers do not complain to a business until things get really bad. Even then, around a quarter of consumers will not complain to a business when things go really wrong. However, this

does not mean that they remain silent. The research also estimated that a person with a complaint will tell an average of nine other people (friends, family and workmates) about the poor service they received and name the company involved. When a business' conduct is harmful to disadvantaged or vulnerable consumers, damage to the reputation of a business is probably even more likely.

Businesses generally have more information about the goods or services they sell and/or more bargaining power than their consumers. This imbalance may be greater for disadvantaged or vulnerable consumers than for other consumers. Disadvantaged or vulnerable consumers may also have less understanding of the consequences of a particular action or transaction or may believe that the trader is acting in their best interests in situations where they are not.

All consumers need sufficient and accurate information to make an informed decision. Special care may be needed when dealing with disadvantaged or vulnerable consumers. Be aware that you and your staff or agents are responsible for ensuring that consumers have that information.

Tips for business

Preparing your business:

- Are your staff aware of fair trading, anti-discrimination and other relevant laws? Have they received relevant training?
- Be alert to any special needs your consumers have and make sure you have systems in place to prevent any unfair treatment.
- Is your marketing message clear and accurate? Keep in mind the different needs of current and potential consumers.
- Are all documents you use to market goods or services to consumers clear and simple?

During a transaction:

- Have you clearly disclosed important or unusual terms or conditions of the agreement?
- Does the consumer understand the terms of any agreement associated with the transaction? Has the consumer had an opportunity to consider the offer properly?
- Make sure the consumer is not flustered, agitated or in a highly emotional state when they enter into a contract. Observe any cooling-off periods that may apply or consider offering a cooling-off period in writing.
- Consider that it may be appropriate for a guardian, carer or other appropriate person to be present to either act on the consumer's behalf and/or help explain and assist the consumer with the decision.
- If you are in any doubt, give the consumer an opportunity to seek advice about the contract before they sign it.
- Make sure your actions, whether intentional or not, do not take advantage of any characteristic listed under the heading.

After a transaction:

- If things go wrong, be open to resolving complaints and, where appropriate, setting aside contracts or agreements.
- Do not reward your staff or agents for unfair, pressure-based selling.

What does the ACL say?

Many of the fair trading provisions in the ACL (including those discussed below) take into account the circumstances, including the characteristics, of the people affected.

Misleading or deceptive conduct

The ACL prohibits misleading or deceptive conduct which can include:

- leading someone to a wrong conclusion
- creating a false impression
- leaving out or hiding important information
- making false claims about products or services.

This applies to all interactions with the public—from the overall impression you create in your advertising to one-on-one sales situations.

Unconscionable conduct

Unconscionable conduct is difficult to define or describe as it varies on a case-by-case basis. It requires something substantially more than just being 'unfair' or hard commercial bargaining. As a general rule, it is conduct that is against good conscience.

Disadvantaged or vulnerable consumers may be especially vulnerable to unfair business conduct. Make sure consumers understand everything you say. If you are unsure, give them the opportunity to think about it or talk it over with someone else.

The ACL sets out a number of factors the courts may consider in deciding whether conduct was unconscionable, including:

- the relative bargaining strength of the parties
- whether any unreasonable (including unnecessary) conditions were imposed on the consumer
- whether the consumer was able to understand the documentation used
- the use of any undue influence or pressure tactics
- the terms on which the consumer could have bought the same or equivalent goods or services from another business (including the price).

The courts may also consider any other factors that are relevant in the circumstances, including whether the consumer possesses any 'special disadvantage'. In the unwritten law (also known as Common Law), 'special disadvantage' means that the consumer has a condition or is in a circumstance that seriously affects their ability to judge what is in their best interests.

Factors that may give rise to a special disadvantage include an ignorance of important facts known to the staff or agent of the business, illiteracy or lack of education, poverty or need of any kind, the consumer's age, infirmity of body or mind, drunkenness, or lack of explanation and assistance where necessary. Many of these factors match the categories of disadvantage or vulnerability that the ACCC has identified.

ACCC v Craftmatic Pty Ltd

The ACCC instituted proceedings against Craftmatic Pty Ltd alleging that Craftmatic had acted unconscionably against senior citizens in the door-to-door sale of beds by taking advantage of the commercial inexperience of elderly and housebound consumers through high pressure sales tactics.

Between August 2005 and at least 1 June 2008, Craftmatic used misleading and unfair tactics to convince elderly people to agree to a home presentation by one of Craftmatic's sales representatives. Once at the consumer's home, an elaborate and well rehearsed sales process was used to persuade the consumer to buy a Craftmatic bed, in some cases costing more than \$10 000.

While some consumers were happy to buy a bed, others who indicated that they either didn't want, or could not afford, to buy a bed were subjected to a barrage of unfair sales techniques to change their mind.

The Federal Court of Australia declared, by consent, that Craftmatic's method of promotion and sale consisted of steps designed, scripted and conducted to unduly influence potential customers and to create and take advantage of an unequal bargaining position.

The Federal Court ordered injunctions for a period of seven years restraining Craftmatic from a wide range of conduct that was found to be misleading and unconscionable, in breach of the Trade Practices Act (renamed Competition and Consumer Act 2010 on 1 January 2011).

ACCC v NuEra Health Pty Ltd

The ACCC alleged that NuEra Health Pty Ltd and the family members who operated NuEra Health engaged in unconscionable conduct in the marketing of the 'RANA System' to highly vulnerable consumers when signing them up to pay for alternative cancer treatments.

The RANA System was described as 'an alternative approach to cancer care which offers HOPE to cancer sufferers'. The System included a variety of products and services including, vitamin and mineral supplements, Cesium or high PH therapy, Zen Chi Massages Magnetic Pulsers, coffee enemas, ozone therapy, diets described as eating according to blood type, live blood analysis and thermal imaging, which cost up to \$35 000.

In marketing the RANA System, NuEra falsely claimed that it:

- could cure cancer, or reverse, stop or slow its progress or would prolong the life of a person suffering cancer
- was based on generally accepted science, when this was not correct.

The Federal Court of Australia described the conduct of NuEra as 'unconscionable in the full sense meant under the Trade Practices Act' (renamed the Competition and Consumer Act on 1 January 2011) and 'of the most reprehensible kind, revealing a cynical and heartless exploitation'.

The NuEra companies, and the family members who ran NuEra were permanently restrained by the court from engaging in any of the offending conduct.

ACCC v Ramon Lal Keshow

The ACCC brought an action alleging unconscionable conduct against Mr Keshow who was marketing educational materials to Indigenous people in the Northern Territory. The ACCC identified eight Indigenous women who had signed forms allowing automatic deductions from their bank accounts into accounts controlled by Mr Keshow as payment for educational materials. Justice Mansfield found that for a significant proportion of Mr Keshow's customers, the goods were not supplied and excessive payments were deducted from the customers' accounts.

The court not only found that Mr Keshow was unconscionable in his dealings with the particular consumers, but also found him to have acted unconscionably in relation to Indigenous consumers in the Northern Territory generally—based on his 'way of operating'.

This general unconscionable course of conduct did not depend on the particular interactions or transactions of the witnesses produced by the ACCC. Mr Keshow's 'way of operating' included:

- not offering the consumers a written record of the contracts they entered into, which involved automatic bank account deductions as well as other conditions that the Federal Court found were not reasonably necessary to protect Mr Keshow's legitimate business interests
- being aware of his consumers' relative poverty, cultural differences and lack of experience in commercial matters but not notifying consumers of the excessive payments, not holding the excessive payments on behalf of the consumers and not advising consumers how to stop the automatic payments.

The Federal Court banned Mr Keshow from entering Indigenous communities to conduct his business, and also placed restrictions on his receipt of automatic payments for goods or services.

Harassment or coercion

While a business has the right to market its goods or services and reasonably pursue a debt owed to it, when a sustained marketing or debt collection effort is unwarranted, unreasonable, excessive or too intense, it can constitute 'undue harassment' or 'coercion' and breach the ACL.

A person is 'coerced' when they are made to do or not do something (for example, buy a product or obtain legal advice) by force or threat of force or other intimidation. Actions that may be reasonable for most consumers may distress or intimidate disadvantaged or vulnerable consumers.

Collection House Limited v Taylor

An unemployed mother of a deaf dependent child was cold-called by a Collection House Limited collector who questioned her about her personal and financial circumstances. The collector implied that legal proceedings may be instituted if no payment was made on a debt of \$10 000 that, unknown to the debtor, was statute-barred.

The court found the collector's conduct to be unconscionable and noted that the circumstances were sufficient to require the collector to establish that the transaction was fair, just and reasonable—which the collector did not do.

Be fair and be aware—the role of the Australian Human Rights Commission

You also need to be aware of your obligations under anti-discrimination legislation. In some cases, discriminating against consumers who experience vulnerability or disadvantage may break the law.

This could include refusing to deal with these consumers or treating them less favourably than other consumers. Contact the Human Rights Commission or the state or territory equivalent for more information.

The Human Rights Commission can help you with any questions in relation to **anti-discrimination laws**.

Telephone: (02) 9284 9600

Complaints Infoline: 1300 656 419

Privacy Hotline: 1300 363 992

General inquiries and publications: 1300 369 711

TTY: 1800 620 241

Facsimile: (02) 9284 9611

Website: www.humanrights.gov.au

Email: complaintsinfo@humanrights.gov.au to request information on lodging or responding to a complaint. Please note that this email address is an information service only. You can lodge a complaint online from the Human Rights Commission website.

Where can I get more information?

For more information on the Competition and Consumer Act, visit the ACCC website www.accc.gov.au or call the ACCC's Small Business Helpline on 1300 302 021.

You can also visit www.consumerlaw.gov.au for an overview of the Australian Consumer Law—the new consumer law regime operating across Australia.

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

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Website www.accc.gov.au

For information in languages other than English,
call 131 450 and ask for 1300 302 502

TTY service for people with hearing or speech difficulties:
1300 303 609 www.accc.gov.au

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Important notice

This publication has been updated to refer to the *Competition and Consumer Act 2010* which replaces the *Trade Practices Act 1974* on 1 January 2011. For more information on the Australian Consumer Law changes see www.consumerlaw.gov.au

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.

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