Home care services

Know your business rights and obligations under the competition and consumer law

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# Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>About this guide</td>
<td>2</td>
</tr>
<tr>
<td>What are the competition and consumer laws?</td>
<td>2</td>
</tr>
<tr>
<td>Who the law applies to</td>
<td>2</td>
</tr>
<tr>
<td><strong>What you say to consumers</strong></td>
<td>3</td>
</tr>
<tr>
<td>Businesses must be honest, clear and upfront with consumers</td>
<td>3</td>
</tr>
<tr>
<td><strong>Home Care Agreements</strong></td>
<td>5</td>
</tr>
<tr>
<td>Allow consumers the time to understand the Home Care Agreement or get some advice</td>
<td>5</td>
</tr>
<tr>
<td>Home Care Agreement terms and conditions</td>
<td>6</td>
</tr>
<tr>
<td><strong>Dealing with your home care customers</strong></td>
<td>7</td>
</tr>
<tr>
<td>Dealing with vulnerable people fairly</td>
<td>7</td>
</tr>
<tr>
<td>Consumer guarantees</td>
<td>8</td>
</tr>
<tr>
<td>Supplying safe goods</td>
<td>9</td>
</tr>
<tr>
<td><strong>When things go wrong</strong></td>
<td>10</td>
</tr>
<tr>
<td>Handling complaints</td>
<td>10</td>
</tr>
<tr>
<td><strong>Businesses have rights too</strong></td>
<td>11</td>
</tr>
<tr>
<td>Small business and unfair contract terms</td>
<td>11</td>
</tr>
<tr>
<td>Unconscionable conduct and misleading or deceptive conduct</td>
<td>11</td>
</tr>
<tr>
<td><strong>Competing fairly</strong></td>
<td>12</td>
</tr>
<tr>
<td>Collusion</td>
<td>12</td>
</tr>
<tr>
<td>If you breach the Competition and Consumer Act 2010 or the Australian Consumer Law</td>
<td>13</td>
</tr>
<tr>
<td><strong>For more information</strong></td>
<td>14</td>
</tr>
<tr>
<td><strong>Consumer and competition laws – A good practice checklist to assist home care businesses</strong></td>
<td>15</td>
</tr>
</tbody>
</table>
About this guide

This guide aims to help both new and existing businesses (including not-for-profit organisations) who provide home care to older Australians to understand their rights and obligations under the *Competition and Consumer Act 2010* (CCA) including the Australian Consumer Law (ACL). These laws apply in addition to any rights and obligations an approved provider of home care has under the *Aged Care Act 1997* and its Principles.

Home care assists older consumers to live independently in their own home for longer. The government’s Home Care Package program, which is now delivered on a consumer directed care basis, allows consumers more control over the types of care and services they access and the delivery of those services, including who delivers the services and when. With this increase in consumer choice, more businesses are providing home care services resulting in more competition.

What are the competition and consumer laws?

The competition and consumer laws help all businesses to compete fairly, and outlines the rules about how businesses in Australia must deal with their competitors, suppliers and customers.

The ACL governs business behaviour when advertising and interacting with consumers. It also sets out a number of consumer rights, including specific guarantee rights.

State, territory and federal regulators including the Australian Competition and Consumer Commission (ACCC) enforce the ACL.

Only the ACCC enforces the competition laws.

Who the law applies to

If you provide goods or services (whether you are a for-profit business, sole trader or a not-for-profit organisation) to a consumer, including those with a government subsidised Home Care Package, you will need to comply with the competition and consumer laws.

The obligations in this guide apply if you are engaging in trade or commerce. This means you are running some type of regular or business-like activity involving repeated transactions for goods or services in exchange for payment. Both for-profit and not-for-profit organisations who are engaging in trade and commerce (e.g. providing goods or services) must comply with the competition and consumer laws.
What you say to consumers

Businesses must be honest, clear and upfront with consumers

As a provider of home care you will want to promote your business so that you can compete for customers. But you also have to make sure that you don’t break the law by saying things to consumers that might mislead or confuse them.

When you offer home care services to consumers it is important that you present information (whether it be written or verbal) to a consumer accurately, clearly and honestly. This allows consumers the opportunity to make decisions with all the facts. Under the ACL, businesses that do not do this are likely to be engaging in misleading and deceptive conduct.

Misleading and deceptive conduct can include practices such as:
- false claims or statements about your home care services or the price
- false claims about a consumer’s legal rights
- not telling a consumer important information
- hiding important information in small print or disclaimers
- using overly complex language that means important information is not clear.

Make sure that what you say or give to consumers is easy to understand, honest, and contains all the relevant information. Being honest and clear with your customers is the best way to promote longer relationships and grow your business.

Example

‘Home Care X’ (an Approved Provider) offers wheel chair transport as part of its sales pitch. The provider’s brochure describes the wheel chair transport as ‘generally readily available for the customer’s day to day use’ as long as they book it 2 days in advance.

Mr Peterson, a 75 year old consumer with a Home Care Package, is impressed by the convenience of the easy access to wheelchair transport and enters into a Home Care Agreement with the home care provider. However, after signing, he finds that access to this service is more limited than promised and despite giving 3 to 5 days’ notice on many occasions he is unable to access the service.

Mr Peterson complained and Home Care X advised that it had experienced an ongoing increase in demand for the wheel chair transport which it could not meet. However, Mr Peterson was entitled to expect that Home Care X could deliver on its promises. He was also concerned that it was still using the same brochures. The representations made by the home care provider were misleading and in breach of the ACL. Also, as the service was not provided adequately, the provider did not meet the consumer guarantees. Home Care X should have taken reasonable steps to account for new demand to avoid misleading consumers and ensure compliance with the consumer guarantees.

Businesses selling door-to-door or over the phone

As a provider of home care, you may be dealing with older people in their own homes. You might be approaching older Australians over the phone or door-to-door to discuss the goods or services they need. Approaching consumers without an invitation (unsolicited selling) either door-to-door, over the phone or in public, means you have to comply with additional rules under the ACL.

When approaching older consumers, consider the following:

- permitted hours for telemarketing and making uninvited house visits. You are not allowed to visit a consumer:
  - on Sundays or public holidays
  - before 9am or after 6pm on weekdays
  - before 9am or after 5pm on Saturdays.
- you must not approach a home with a ‘do not knock’ sign
- you must leave, or finish a call, when asked to do so
- information the salesperson must provide before making a sales pitch:
  - their name
  - the name and address of the business they represent
  - that the purpose for contacting them is to try and sell them particular goods or services.
- customers’ cooling-off rights
- information requirements for the sales agreement.

If you approach a consumer (without invitation) and they enter into a Home Care Agreement with you, the consumer has an automatic right to a 10 business day cooling off period. This starts when the consumer receives the Home Care Agreement document. You must include a form of notice that the consumer can use to cancel the agreement. You cannot provide goods or services or take payments within this period. Consumers should be advised to choose an end date with their current provider after this 10 business day period to ensure uninterrupted care. You must never supply goods or services if the consumer has not agreed to them beforehand.

Case study

Breaching these laws can lead to serious penalties. For example, in 2013 the Federal Court ordered a business to pay penalties of approximately $1.5 million after several of its sales agents failed to leave a number of consumers’ premises when requested to do so. One consumer had a ‘do not knock’ sign on the front door that requested salespeople to leave the premises. The salesperson ignored the sign and attempted to make a sale. The Court also found that the salespeople had breached the ACL by failing to clearly advise the consumers of the purpose of the approaches. (ACCC v AGL Sales Pty Ltd & Ors (2013) FCA 1030)

Home Care Agreements

Allow consumers the time to understand the Home Care Agreement or get some advice

Home Care Agreements need to be clear and easy to understand so that consumers are able to make informed decisions.

Make sure that your Home Care Agreements are transparent, in plain language and highlight important terms, especially key information such as:

- what services are to be provided, by who, when and how
- costs and fees
- any conditions that may apply to the Home Care Agreement (for example termination conditions).

Allow consumers enough time to read the Home Care Agreement, ask questions and seek assistance or advice if they need to. **Never rush or pressure a consumer**, as consumers have the right to take their time and seek financial or legal advice before signing.

If you think a consumer is having trouble understanding your Home Care Agreement or what you’re telling them you should suggest they seek assistance from a family member, advocate or other support person. If you are aware that the consumer is unwell or has a cognitive impairment you should ensure they have a family member or independent help to assist them. Some people may not have the ability to sign binding Home Care Agreements and may need someone with power of attorney to sign on their behalf. Making sure a consumer understands your Home Care Agreement should be important to your business and will help avoid problems that may arise in the future.

Remember that under the Aged Care Act 1997 providers also have a responsibility to ensure that the consumers are given the right information and are helped to understand the terms of the Home Care Agreement.
Home Care Agreement terms and conditions

Home Care Agreements have terms and conditions which set out the rights and responsibilities of those who signed the contract. Generally the contract for home care services will be between you (the provider) and a consumer who has been assigned a Home Care Package.

While consumers may discuss and plan the types of services and how much they will pay before they agree, it is likely that you will offer the same or a substantially similar contract to all your customers. This is known as a standard form contract and there are laws to protect consumers from unfair terms in these contracts. If a term is unfair, you won’t be able to rely on it. Only a court can determine if a term is unfair.

Under the consumer law, a term of a contract may be unfair if it:
- gives you more rights than the consumer or the consumer too much responsibility
- includes terms that might benefit you but are not needed to protect your business
- would cause the consumer detriment (financial or non-financial) if you tried to use it.

Whether a term is fair or not will depend on the whole contract and how easy it is to understand.

Examples or signs that your terms might be unfair include if:
- you try to avoid or limit your obligations or responsibility
- you can unreasonably terminate the contract
- only the consumer is penalised for breaching or terminating the contract
- you can vary the terms of the contract without consent
- you can automatically renew the contract without consent.

Example

A term in a Home Care Agreement says “you agree to allow the provider to place a caveat over your home to enable the collection of any unpaid fees”. This would likely be an unfair term as it is not reasonably necessary to protect the legitimate interests of the business in relation to government funded home care services and would cause significant detriment to the consumer if it were relied upon.
Dealing with your home care customers

Dealing with vulnerable people fairly

When dealing with consumers it is important to consider whether they may be vulnerable, and whether any extra steps should be taken to ensure you treat them fairly. It is against the law to engage in ‘unconscionable conduct’ which means you should not act against conscience as judged against the norms of society. Put simply you should not engage in conduct that is unethical, oppressive or particularly harsh towards a consumer.

For example, if you pressure a consumer to sign a Home Care Agreement when you know that the person does not have the skills to understand the contract, this may be unconscionable.

Misleading or unconscionable behaviour can sometimes be driven by sales commissions paid to staff, so be careful how you reward your sales people. Relying on commissions or incentives leads to poor selling tactics (like pressure selling) that can harm consumers and breach the ACL. In addition, under the Aged Care Act 1997 providers are not permitted to charge an entry fee to consumers when commencing the service.

Below are some things you should consider in your dealings with consumers:

- the vulnerability of the consumer and their ability to understand what you are telling them. For example, use plain English when dealing with customers and consider recommending interpreters, trusted friend or family assistance for those that do not speak English
- avoid the use of pressure or unfair tactics, give the consumer time and if necessary, suggest they have someone to help them (like friends/family or an advocate or their power of attorney)
- be honest, transparent and informative
- be careful about, and generally avoid, offering consumers incentives to sign, for example vouchers or devices such as tablets or laptop computers.
Example

Mrs Smith chooses ‘Home Care Y’ a new home care provider she found on the My Aged Care website and meets with them to discuss her home care needs. At the meeting, the provider quickly explains the general services they offer and the average costs. Mrs Smith tells the provider she hasn’t been very well this week and apologises if she seems tired or confused. Home Care Y gives Mrs Smith the Home Care Agreement and says that everything they have discussed is in the Home Care Agreement and she doesn’t need to read it as she isn’t feeling well. The provider says she should sign it quickly because places are limited and they are meeting with someone else in a few minutes. They also tell her she will receive a $200 supermarket voucher if she signs that day.

Mrs Smith signs the Home Care Agreement on the spot. A short time after commencing the service, Mrs Smith realises that there is a significantly higher cost for weekend care. These costs were not disclosed to her at the meeting but were buried in the Home Care Agreement.

The conduct of Home Care Y in failing to clearly disclose fees or charges and pressuring Mrs Smith to sign the Home Care Agreement in these circumstances is likely to have been misleading and potentially unconscionable.

Case study

In 2014, the Full Federal Court found a first aid and water filter seller engaged in unconscionable conduct when its sales representative, among other things, failed to take reasonable steps to determine whether its customers were able to understand the agreement documents.

The company’s unfair and pressuring sales tactics were also considered unconscionable due to the customer’s limited ability to understand the agreement. As a result the business was fined $750 000, and its director $50 000. ([ACCC v Titan Marketing Pty Ltd [2014] FCA 913](http://www.accc.gov.au/business/anti-competitive-behaviour/unconscionable-conduct))


Consumer guarantees

When you are providing goods or services to consumers using their Home Care Package funds you should aim to provide the best quality you can. You should also make sure that the goods or services you deliver meet the needs of the consumer, particularly as the “needs” will be specified in their assessment. Unfortunately, sometimes things go wrong and if they do the ACL provides consumers with rights to help them fix the issue. These rights are called the consumer guarantees.

When **supplying services**, you guarantee that they:

- are provided with acceptable care and skill. You must ensure you don’t cause any loss or damage to the consumer
- are fit for purpose. The services must give the consumer any result that you agreed to. If the services don’t suit the consumer’s needs they may not be fit for purpose
- are supplied within a reasonable time of being purchased, if there is no agreed timeframe.

If services fail to meet a guarantee, a consumer will have rights against you and you will have to provide a ‘remedy’—to put right a fault, deficiency or a failure to meet an obligation. When the problem is minor, the consumer can require you to fix the failure within a reasonable time. You can choose between fixing the problem with the service or offering the consumer a refund. If you refuse to fix the problem or take too long, the consumer can get someone else to fix the problem and recover the reasonable costs from you, or cancel the service (if it is ongoing) and get a refund.

When there is a major failure, the consumer can:

- cancel the services and get a refund for the parts of the service not already consumed
- take action against you for compensation for the difference in value of the services.

The consumer may also take action to recover damages from you for any reasonably foreseeable loss or damage.
When **supplying goods** (like aids or equipment) you guarantee that they:

- are of acceptable quality (safe, lasting, have no faults)
- are fit for any disclosed purpose or the purpose which you said it would be fit for
- do all the things someone would normally expect them to do
- are accurately described and match any sample or demonstration model
- meet any extra promises made about performance, condition and quality, such as lifetime guarantees and money back offers.

If the goods you supply as part of the Home Care Agreement fail to meet a guarantee, a consumer will have rights against you, and in some cases the manufacturer. You will have to provide a 'remedy'—to put right a fault, deficiency or failure to meet an obligation. You cannot, however, refer a consumer who raises a complaint about goods to the manufacturer. The consumer guarantees apply to both major (serious) and minor problems.

The type of remedy, and who must provide it, will depend on the seriousness of the problem and which consumer guarantee was not met.

When the problem is minor, you can choose between providing a repair or offering the consumer a replacement or a refund. If you don’t fix the problem within a reasonable time the consumer has the right to recover reasonable costs to have it fixed.

When there is a major failure, the consumer can:

- ask for the goods to be repaired
- reject the goods and choose a refund or a replacement
- ask for compensation for any drop in value of the goods.

For both goods and services, in certain circumstances a consumer is entitled to terminate the agreement if these guarantees are not met, and, if they do so, you as the provider should not charge an exit amount.

Consumer guarantees don’t apply in some situations (for example, if the consumer changes their mind or misuses the product).

Suppliers also have rights against the company that made the goods (i.e. manufacturer).

**Example**

A home care provider agreed to provide transport services as part of the Home Care Agreement for Mr Daniels. This included transport to appointments.

On a number of occasions the transport was running late, causing Mr Daniels to miss his appointments, though he still had to pay for them. Mr Daniels first attempted to resolve the issue with his provider but this was unsuccessful. Because of these repeated issues, Mr. Daniels then cancelled his Home Care Agreement (under his consumer guarantees rights) without having to pay an exit fee and claimed compensation for the cost of the missed appointments.

There are a variety of ways goods can be provided to consumers under a home care package. You might provide them directly through hire or purchase, you might purchase them for a consumer from a third party or you might arrange a hire agreement with a third party. You should seek legal advice on how these laws apply to your arrangements. For more information on consumer guarantees see: [www.accc.gov.au/business/treating-customers-fairly/consumers-rights-obligations](http://www.accc.gov.au/business/treating-customers-fairly/consumers-rights-obligations)

**Supplying safe goods**

When things go wrong

Handling complaints

Make sure that your complaints management system is not too difficult or complex. Some older consumers can find it challenging to lodge complaints and the process should be properly explained to consumers in a simple, easy to understand way. The process should not impact on the consumer’s care and should comply with the requirements of the Aged Care Act 1997.

Home care providers also have a responsibility to ensure that consumers are aware of their right to raise complaints with an independent complaints body. If your customers have any concerns about aged care services provided by you, they can raise their concerns by calling 1800 550 552 or www.agedcarecomplaints.gov.au

Businesses have rights too

Small business and unfair contract terms

Many businesses operating in the home care sector have formal agreements or contracts in place with other subcontracted businesses (e.g. larger providers outsource to smaller providers, for services, equipment etc.). It is important to remember that irrespective of any agreement in place between businesses, the approved provider is still responsible for the consumer’s care and the quality of service they receive. So if a provider contracts other businesses to provide services to the consumer, the provider is still responsible for the service.

The unfair contract term laws apply where small businesses enter into standard form contracts, which are described above. Examples of standard form contracts may include shop leases, advertising agreements, equipment lease or hire purchase agreements.

A small business contract is an agreement:

- where at least one of the parties is a small business
- the upfront price payable is up to $300,000 (or $1 million if the contract is for more than 12 months)
- is for the supply of goods or services or the sale or grant of an interest in land.

Just like with consumer unfair contract terms, if a term in a small business contract is unfair then it cannot be relied on. Only a court can determine if a term is unfair.

**Example**

A large home care provider outsources its home care cleaning services to a small cleaning business.

Under a term of the contract, the large home care provider has the right to vary any term or condition of the contract, including fees it pays to the small cleaning business, if notice is given in writing. The small business however does not have the right to end the contract without penalty, even if the provider decreases the amount it pays to the small business for the cleaning services (e.g. by 20 per cent).

The term is likely to be unfair under the unfair contract terms law as it allows the home care provider to unilaterally decrease the amount it pays to the small cleaning service.

If an additional term were included stating that, if the price or services change, the small business is able to immediately cancel the contract without consequence, the original term would be less likely to be unfair.

Unconscionable conduct and misleading or deceptive conduct

Just like consumers, a business can be misled or treated so unfairly by another business that it is unconscionable and against the law. The consumer law applies similarly to business-to-business behaviours.

If you feel you have been misled or treated unconscionably you should try to resolve the dispute with the other business. If that is unsuccessful seek legal advice or, if your state has one, contact your state based small business commissioner’s office. If your state does not have one, you can contact the Australian Small Business and Family Enterprise Ombudsman.

Competing fairly

When you trade in a market, the law forbids certain practices that may limit or prevent competition. Anti-competitive conduct can increase prices, reduce innovation and prevent small businesses from entering the market. The end result is higher prices and reduced choices for consumers.

It is important for businesses who service the aged care sector (including not-for-profit businesses, community organisations and private providers) to understand what practices to avoid under the Competition and Consumer Act 2010 (CCA). The ACCC enforces compliance with the CCA.

Collusion

You must not enter into contracts, arrangements or understandings with competitors (a competitor is an unrelated business selling the same or similar goods or services) about how you will or won’t compete with each other. These agreements are referred to as anti-competitive agreements. Cartel agreements are a category of anti-competitive agreements.

If businesses agree on any of the following they have entered into a cartel agreement:
- the price they will charge
- the quantity of goods or services they will supply
- where they will sell or who they will sell to.

Businesses might enter into a cartel agreement because they think it is the best way to help consumers in the home care sector. However, the motive for the agreement does not matter; it is still considered illegal.

There are significant penalties for breaching these laws, including imprisonment.

Example

A number of home care providers in the same area form an industry association. During the course of one of the association meetings, the CEOs of two of the members agree to match prices for Home Care Package level 2 services. Making this agreement is anti-competitive behaviour and a breach of the competition laws.
Example

Three not-for-profit organisations all supply services to home care package recipients in north east Victoria. Several employees of the companies became friends and met for lunch regularly. At one of these lunches, they agreed which regions they would each service, and agreed not to compete for customers outside their region. Making such agreements is prohibited under the competition laws.

Exclusive dealing

Exclusive dealing takes place when a business forces some restrictions on a consumer or business’ freedom to choose with whom, in what, or where they deal. Exclusive dealing is not automatically illegal; rather it depends on the impact of the action on competition.

In some instances, you can seek permission from the ACCC to engage in exclusive dealing conduct, through a notification or authorisation, particularly if there is a public benefit that outweighs any detriment.

For more information about authorisations and notifications see: www.accc.gov.au/business/exemptions

Misuse of market power

If you have a high degree of power in a market, you are not allowed to use it for the purpose or with the effect of substantially lessening competition in the market. Examples of this can include, creating barriers to entry for new businesses, substantially undercutting a competitor’s prices to drive them out of business or an unreasonable requirement for customers to acquire all services from you. This behaviour is referred to as ‘misuse of market power’.

If you breach the Competition and Consumer Act 2010 or the Australian Consumer Law

The consequences of a court finding that you have breached the CCA or ACL may include significant penalties, for example:

- financial penalties, such as:
  - maximum penalties of $10 000 000 (or more, depending on the benefit obtained from the conduct or the turnover of the corporation) for corporations for most forms of anticompetitive conduct
  - maximum penalties of $11 000 000 for corporations for false or misleading conduct or unconscionable conduct.
  - lesser penalties apply for other breaches of the ACL
- imprisonment (criminal cartel offences)
- community service orders
- ban from managing corporations
- compensation orders.

For more detailed information on penalties for breaching the CCA or the ACL see: www.accc.gov.au/business/business-rights-protections/fines-penalties#australian-consumer-law
For more information

**Aged care legislation and funding**

For more information about aged care legislation and funding see the Department of Health’s website [www.agedcare.health.gov.au](http://www.agedcare.health.gov.au). You can also contact them through their website.

**Aged care quality standards**

For information about the aged care quality standards, contact the Australian Aged Care Quality Agency on 1800 288 025 or through their website [www.aacqa.gov.au](http://www.aacqa.gov.au).

**Competition and consumer laws**

For more information on competition and consumer laws the ACCC has a number of publications which are available on [www.accc.gov.au](http://www.accc.gov.au). The ACCC also has resources for consumers to help them understand their consumer rights in home care see [www.accc.gov.au/agedcare](http://www.accc.gov.au/agedcare).

If you have an enquiry or would like to report a problem about a business you can submit an online form at [www.accc.gov.au/contact-us](http://www.accc.gov.au/contact-us).


The ACCC takes action on reports of misconduct in accordance with our compliance and enforcement policy.

**Older Persons Advocacy Network (OPAN)**

The OPAN is a free service to help support older people and their families. If you aren’t able to resolve a dispute with a customer you should encourage them to contact OPAN, as they will be able to help advocate on behalf of your customer to help resolve the dispute more quickly and to everyone’s satisfaction.

For more information go to [www.opan.com.au](http://www.opan.com.au) or phone 1800 700 600.

**Translating and interpreting service (TIS)**

If a customer speaks a language other than English, you should encourage them to use TIS on 131 450. They will be able to help your customer in speaking with you, contacting OPAN or any other organisation. Costs may apply.

**National Relay Service**

If a customer is hearing impaired contact the National Relay Service: visit [www.relayservice.gov.au](http://www.relayservice.gov.au) to choose your preferred access point or call the NRS Helpdesk on 1800 555 660.
Consumer and competition laws—A good practice checklist to assist home care businesses

Ensuring consumers can make an informed decision

1. Are you giving consumers complete and accurate information? □
2. Do you give consumers time and space to look over the Home Care Agreement and make decisions? □
3. Do you suggest to consumers they seek help from someone else, like family/friends or an advocate or a power of attorney? □
4. Do you know your obligations when selling door-to-door or over the phone? □
5. Do you regularly review your Home Care Agreements to check for terms that may be unfair? □

Ensuring your products/services are of good quality and meet any promises made

6. When supplying products and services:
   - Are the products you supply safe for your customers (meeting all standards), durable and free of faults? □
   - Are your services provided with acceptable care and skill? □
   - Most companies understand their own warranties, but do you understand how and when you must provide a remedy under the consumer guarantees? □
   - Have you trained your complaint handling staff about the remedies they must provide to comply with the law? □

Ensuring you have good business processes in place

7. Do you have a clear process for handling consumer complaints? □
8. Do you provide regular consumer law training to your staff? □
9. Have you considered the way you remunerate your staff, this includes avoiding commission based selling, which leads to poor selling practices? □

Dealing with other businesses

10. Do you know what anti-competitive behaviour looks like and train your staff to avoid it? □

Small business rights and protections

11. If you are a small business, do you know about your rights and protections when dealing with other businesses? □