



Australian
Competition &
Consumer
Commission

Fair trading in the rental car sector



Australian Competition and Consumer Commission
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Contents

| | |
|---|-----------|
| Introduction | 2 |
| What does the law say? | 3 |
| Misleading and deceptive conduct | 3 |
| Special offers and bait advertising | 4 |
| Stating the full cash price | 5 |
| Unconscionable conduct | 6 |
| Areas of concern in the car rental industry | 7 |
| Disclaimers and fine print | 7 |
| Bait advertising | 8 |
| Component pricing | 8 |
| Optional extras, hidden fees and charges | 9 |
| Price advertising—things you should keep in mind | 9 |
| The contract | 10 |
| Unfair contract terms | 10 |
| Complex or confusing contracts | 11 |
| Obscuring important terms | 11 |
| Limited time to understand the contract | 12 |
| Vehicle condition | 12 |
| Vehicle damage—reduction of liability | 13 |
| Disputes about vehicle damage and repairs | 13 |
| Unconscionable conduct | 15 |
| When do I need to take particular care in dealing with consumers? | 15 |
| How can I avoid acting unconscionably towards consumers? | 16 |
| Where can I get more information? | 17 |
| Contacting the ACCC | 18 |

Introduction

The car rental industry plays an important role in the Australian economy. It is a vital part of the travel and tourism sectors and impacts on wider areas of commerce. As many consumers renting cars are tourists and holidaymakers looking to rent a vehicle quickly and simply, it is essential they are provided with upfront and accurate information so they can make informed decisions. Dealing fairly and honestly with consumers helps ensure you have satisfied customers who will return to your business and are happy to recommend it to others.

Not only is this good business practice, it is law. The Australian Consumer Law (ACL), which is contained in a schedule to the *Competition and Consumer Act 2010*, states that businesses must not mislead or deceive consumers in any way. The Australian Competition and Consumer Commission (ACCC) enforces the ACL to ensure that there is a dynamic competitive marketplace with fair trading and truthful and ethical dealings with consumers. The ACCC views misleading and deceptive conduct very seriously and failure to abide by the rules can result in serious penalties.

This guide sets out your obligations under the ACL and provides suggestions and further information on how to avoid breaching any of your obligations.

What does the law say?

Several provisions of the ACL affect the way you conduct your car rental business, and you should keep these in mind when designing both your advertising and your business management practices.

Misleading and deceptive conduct

The ACL contains a broad prohibition of misleading and deceptive conduct. Your business, including your staff and your representatives, must take care not to engage in any conduct that misleads or deceives, or is **likely** to mislead or deceive, consumers with whom it has commercial contact. This conduct can include:

- personal discussions or negotiations
- print advertisements
- information provided by call centres
- terms of contracts and agreements
- descriptions of your service, or even
- silence or omission that 'means something' in a given context.

Basically, the ACL requires your business to be honest and forthcoming in what you say and do commercially.

Overall impression

The most important factor in determining whether conduct may be misleading is the overall impression imparted to the audience. A selling approach that seems clear and well structured to you may sometimes be confusing to your customers. Your customers may be misled because of emphasis placed on different aspects of your offer or by mistaken but understandable (and uncorrected) misapprehension.

Potential audience

Whether something misleads depends on the actual audience that receives the message, which could be different to the target audience you had in mind. The audience is likely to vary in age, education, experience and sophistication. This variation is a factor in whether a message may mislead—even if only the more susceptible members of your audience could be misled, this may still breach the ACL.

Intent

The ACL prohibits not only conduct that misleads or deceives, but also conduct **likely** to mislead or deceive. It does not matter whether the conduct was deliberate or careless and accidental. Unlawful conduct could stem from mismanagement or inadvertence—and this means prevention should be a priority for your business.

Silence

Remember, misleading conduct can also include silence if in all the relevant circumstances there is an obligation to say something or there is a reasonable expectation that something will be disclosed. For example, not making customers aware that they will be charged fees for additional kilometres could be misleading by silence.

Special offers and bait advertising

Special offers are often a good way to attract customers to your business. However, the ACL requires that your customers have a reasonable chance of actually buying the service you offer at the advertised price. The ACL contains rules prohibiting **bait advertising**—advertising a good or service, often at a discounted price, without sufficient stock to enable reasonable supply of the good or service.

A bait is an especially attractive special offer made to lure customers to your business premises, such as a heavily discounted rental car rate for a particular make and model of car. When customers arrive, that bait may be gone (either a single car hired out to the first person or perhaps it never existed) and customers are then encouraged to hire other, more expensive, cars. Bait advertising carries serious penalties.

If you advertise a particular car rental at a specific price, you should ensure you have a reasonable number of that model car available for customers to hire for a reasonable period of time. You should be able to show that you made the offer in good faith and had reasonable stocks of the car to meet the likely demand for the length of the promotion. If there is not a reasonable chance that the offer will be available at the advertised price, you may be in breach of the ACL.

Stating the full cash price

Single total price

Component pricing—advertising the cost of a good or service to consumers as the sum of multiple component parts—is not banned under the ACL, but there are some rules on how it can be used.

Where you state part of the price for a good or service, you must also state a **single total price** at least as prominently. The single price should be the **minimum** cost to a consumer for obtaining that good or service that you are able to calculate at the time of advertising.

What must be included?

The total minimum price will include:

- all amounts **imposed by you** that your customer is required to pay to obtain the good or service, including compulsory service charges and administration fees
- all amounts **imposed on you** that you pass on to the customer by building it into the price, including any tax, fee, levy or charge (e.g. goods and services tax or sales tax).

What does not need to be included?

The single price requirement has a number of exceptions, including:

- optional charges or extras
- price representations made exclusively from your business to another business (including a body corporate) as they do not involve advertising to consumers.

What happens if you cannot calculate all the charges at the time of the representation?

Where the final price will be a mixture of quantifiable and non-quantifiable charges, you must state the single figure and indicate that it does not include all components of the price. For example, if you have a surcharge based on the number of kilometres the customer drives, you should add that to the daily rate. Obviously this cannot be quantified at the time of advertising because you do not know how many kilometres the customer will drive. In this example, you would state:

- the single total price, which includes all fees and charges the customer must pay
- in a clear fashion, that a surcharge will be added to the price after calculation and indicate how that calculation will be performed.

Unconscionable conduct

As well as your obligation not to engage in any misleading or deceptive conduct, the ACL prohibits unconscionable conduct by corporations when they supply goods or services to consumers.

Basically, in consumer transactions, the stronger party may not take advantage of its position by behaving in an unfair or unreasonable manner. This prohibition applies to ‘consumer transactions’—when the goods or services are the type normally acquired for personal, domestic or household use.

Rather than specifically define what will be unconscionable, the law lists factors the court may take into account when deciding whether unconscionable conduct has occurred.

These factors are:

- the relative bargaining strengths of the business and the consumer
- whether the business required the consumer to comply with conditions that were not reasonably necessary to protect the legitimate interests of the business
- whether the consumer was able to understand any documents that may have been used
- whether the business used any undue influence or pressure, or any unfair tactics
- the price and terms under which the consumer could have acquired the same or equivalent goods or services elsewhere.

Consider these factors when you review your contracts, your dealings with consumers and your business practices. It is important to note that this list is not exhaustive—the court may take into account any factor it regards as relevant.

Areas of concern in the car rental industry

Disclaimers and fine print

Example

You advertise a headline daily rate for one of your cars of '\$44/day*'. You do not prominently state that to obtain the advertised rate there is a minimum hire for the rental of seven days.

Banner or headline daily rates are often used in the car rental industry to attract customers using one of the most significant considerations: price. However, terms and conditions associated with obtaining that daily rate should also be clearly stated. Otherwise, you risk misleading consumers.

Your advertising may use an asterisk (*), 'Conditions apply' or other terms to limit the expectations of the audience. But putting important qualifications in fine print may risk breaching the ACL. The main selling point used for a product or service may make such a strong impression that no fine-print disclaimer can dispel it. In this situation it is not acceptable for you to make the important facts—the real terms and conditions of the offer—unclear or unreadable.

Remember, an audience relies on the overall impression created. The exclusions or disclaimers must be balanced with the headline offer. The consumer is not required to search exhaustively for those facts. Instead, you must clearly direct the consumer's attention to the most significant terms and conditions. The consumer can then make a reasonable informed judgment about whether to buy.

Bait advertising

Example

You advertise a special offer for a heavily discounted daily rate for a particular type of car. Your business in fact has only one of these cars for hire. All your other cars for hire are not available at the advertised discount rate.

This could constitute bait advertising. Your customers must have a **reasonable** chance of actually being able to hire a car at the special price you have offered. If you have only limited numbers of an advertised vehicle available for hire, your advertisement must make this clear.

What is 'reasonable'? This will depend on the particular circumstances—on the type of product you are advertising and the length of the sale. It may also depend on the terms of your advertising and your previous sales experience.

Be upfront about limited supply

When advertising specials, be upfront if the particular car for the deal is in short supply or on sale for a limited time—state this in a highly visible, clear and specific manner. You can nominate the time for which your offer is available, but any restriction must be clearly stated.

For example, statements like 'TODAY ONLY', 'WEEKEND SPECIAL' or 'ONLY UNTIL (some stated date)' are acceptable but must be clear to the consumer. A statement like 'WHILE STOCKS LAST' may seem innocent enough, but it may be considered bait advertising if you do not have sufficient stock of the car model referred to in the advertisement to cater for the likely demand your advertising will bring.

Component pricing

Example

You advertise a daily rate of '\$34/day + fees and charges'. You have a mandatory service charge and administration fee you charge all customers hiring a vehicle.

As discussed, where you state part of the price for your service, you must also state a **single total price** at least as prominently. This single price must be the **minimum** cost to the customer as calculated at the time of advertising.

In the above example, because the mandatory fees and charges are known to you and must be paid by the customer to obtain your service, they should be stated upfront and included in the single total price.

From the same example, if your administration fee is \$55 and your mandatory service charge of \$7 per day is added to the daily rate of \$34/day, you would advertise '\$41/day + \$55 administration fee'.

For goods and services or sales taxes, '\$65 + \$6.50 GST per day for a total price of \$71.50 per day' is a legitimate use of component pricing.

Optional extras, hidden fees and charges

Truly optional charges and extras do not need to be included in the single cash price requirement imposed by component pricing rules of the ACL. However, additional fees or charges that in some circumstances may not be truly optional need to be identified and communicated to consumers (e.g. a fee imposed if a vehicle is returned to a different site to that from where it was collected). Failing to clearly communicate the imposition of that fee could risk misleading consumers.

Similarly, the method of calculating the fees and charges to be applied to a rental contract should be made clear to consumers. If, for example, a consumer elects to purchase a global positioning system as an 'extra' but the cost of that GPS will be added to the base rental price for the purposes of calculating an airport recovery fee, that should be clearly expressed.

Price advertising—things you should keep in mind

- Key vehicle rental contract terms or qualifications **should not be** contained in fine print.
- If you do use fine print, you should draw it to the attention of consumers by using an asterisk or some other symbol or descriptor. You must make sure that fine print is not used to make the real terms, cost or conditions of an offer unclear, or to alter the impression created by more prominent representations.
- If you do advertise a special rental offer, ensure you have the resources to supply this to a reasonable number of consumers for a reasonable period. If this is not the case, you need to clearly advise consumers.
- All mandatory component costs should be included in the advertised single price.
- Any optional charges excluded from this total must be **truly** optional in nature. You should also ensure the price shown for any optional extra includes all relevant components for which the consumer will be charged. For example, if you offer a GPS as an optional extra from an airport site, you should include any relevant additional taxes or levies (such as an **airport recovery fee**) in the price shown.
- If you are unable to calculate a component cost because it will vary between consumers, you should outline a minimum cost (if possible) and the way in which the amount will be calculated.

The contract

Unfair contract terms

When establishing your policies and creating or reviewing your hire contracts, you should note that the ACL protects consumers from unfair terms in consumer contracts. The new provisions do not apply to contracts between two businesses.

Under the ACL:

- unfair terms in consumer contracts are void
- action can be taken by the ACCC, ASIC and state and territory consumer protection agencies if they believe a term is unfair
- businesses are responsible for ensuring their contracts do not contain any unfair terms.

A term in a standard form consumer contract is unfair if:

- it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
- the term is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term; and
- it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

When deciding whether a term is unfair, the court must also consider the contract as a whole, and how transparent the term is within the contract.

Complex or confusing contracts

Despite the Unfair Contract Term provisions that exist within the ACL, you should also ensure your contract and associated documents are in plain English and are simple and easy to understand. It is important that your customers know what they are signing—and if your contract is complex and confusing, you could be at risk of misleading your consumers.

Many of your customers who are travelling or on holiday may not have English as their first language. It is essential that your contract is as simple and easy to understand as possible, and that you ensure your customers understand the contract's key terms and conditions before they sign it. Avoid using inconsistent, confusing or complex terminology that will confuse and possibly mislead consumers.

Written contracts can be the last stage in which representations about an offer are made before the consumer agrees to purchase—usually after other representations such as advertisements, brochures or discussions with your sales representatives. Consumers can be misled when the contract has terms or conditions such as exclusions that conflict with earlier representations made.

You should draw the consumer's attention to any details that differ between the original representations and the final contract.

Obscuring important terms

Example

Your rental contract contains a clause that the customer accepts the car in good condition and that any damage appearing on the car once they drive away is their responsibility. The clause is not prominent but is buried at the back of the contract in small print.

Obscuring an important term like this at the back of a contract in the fine print could risk misleading consumers. You should ensure that important clauses are upfront and easy to understand; you should even have your sales staff draw customers' attention to important clauses to ensure they understand what they are agreeing to.

Limited time to understand the contract

When customers arrive to rent a car from you, they may not have time to thoroughly read the contract and examine it for fine print—there may be a queue of customers waiting behind them or they may have a hotel check-in deadline and may hurry into signing.

Your customers will often rely on the verbal representations of your sales staff rather than reading a complex contract if they feel rushed for time. Customers may then be misled if representations made by your staff differ from those in the contract.

As discussed earlier, you should ensure that your sales staff alert customers to the important terms and conditions, and do not give customers a false impression of what the contract contains.

Placing your terms and conditions on your website along with additional consumer information can also help alleviate these concerns. Customers will be able to access the contract and familiarise themselves with its key terms and conditions before they hire a car from your company.

Vehicle condition

Example

A customer tells you they are driving to a national park and intend to take the car off-road. You recommend and provide a small car that is unlikely to make it through a national park.

From 1 January 2011 all consumer goods sold, hired or leased and consumer services provided come with a number of consumer guarantees. These guarantees require that goods must be of acceptable quality, fit for any disclosed purpose and match the description, sample or demonstration model. Services must be performed with care and skill, be fit for any disclosed purpose, achieve any disclosed result and must be provided within a reasonable time if no timeframe is agreed. In the instance above, a number of consumer guarantees have not been met as the vehicle supplied to the consumer is unlikely to do what the consumer needs it to.

You should also ensure your fleet of vehicles is in good condition and fit for the purpose for which the vehicles are supplied—getting customers from A to B. Even when a vehicle is supplied in good condition and is appropriate for its intended purpose, you should provide information about any breakdown service offered—including contact details, what to do (or not do) in the event of a mechanical breakdown or accident and any assistance that you will provide.

Vehicle damage—reduction of liability

It can be challenging for consumers to understand the possible liability they will incur if they have an accident in a rental car—there may be confusion over definitions, extent of cover and any exclusions they may face. Many consumers would be unaware that car rental ‘insurance’ is very different to the insurance they purchase for their private vehicle—or that in many cases excesses are much higher. Liability for damage should always be made clear to consumers and any gaps in coverage should be disclosed.

As mentioned, any exclusion (e.g. single vehicle accidents) should be made clear to the consumer and should not be buried in the contract or fine print. Ensure that the language used to explain the coverage and its limitations is simple and easy to understand and that liability is clearly spelled out.

For example, if single vehicle accidents are excluded, ensure customers understand the difference between single vehicle accidents and multiple vehicle accidents, and what each constitutes. Liability in either situation should be clearly stated. If you charge an administration fee for all accidents, this should be disclosed to customers too.

If you offer consumers additional methods of reducing their liability—for example, by paying an additional amount per day—you need to clearly explain what is included, and not included, in that new level of cover.

Disputes about vehicle damage and repairs

It is common in the car rental industry for vehicles to be assessed for any damage after the customer has left—often the car is left at a checkpoint and is inspected later when it is prepared for the next customer. This means customers can then be charged for alleged damage at your discretion.

Your customers should be made aware that their credit card may be later debited for the cost of any repairs to the vehicle. Consumers should be made aware of the terms and conditions they are agreeing to.

It is good practice to ensure that your pre- and post-rental inspection procedures are clearly explained and easily accessible to consumers—for example, published on your website, not just provided at the time a vehicle is collected. It is also good practice to provide your customers with pre- and post-rental inspection reports and to have a thorough procedure for verifying responsibility for vehicle damage.

If customers are to be held liable, you should ensure they are aware not only of their potential liability but also of the length of time after the rental that damage can be charged to their card. You should also provide customers with an itemised assessment of the damage, have some form of dispute resolution available and provide them with the addresses of state and territory offices of fair trading.

Processes for complaints and dispute resolution should also be clearly communicated to consumers—many of whom will have moved on to a new destination or returned home by the time the dispute arises. When establishing your policies and creating or reviewing your hire contracts, you should also note the rules for unfair terms in consumer contracts under the ACL that apply nationally.

Unconscionable conduct

It is important that you are aware of the unconscionable conduct provisions in the ACL when you evaluate your consumer contracts, your customer policies and your business management practices.

When do I need to take particular care in dealing with consumers?

Some situations involve a greater risk of unconscionable conduct on your part. For a range of reasons, some consumers may be more vulnerable than others and you should be particularly cautious in these situations. Situations with a high risk of unconscionable conduct include where:

- a consumer has a particular disability (e.g. intellectual impairment or physiological, psychiatric or psychological disability)
- a consumer's age, health or social situation makes them particularly vulnerable to promotions regarding certain products or services
- a consumer has difficulty understanding your advertising or contract
- a consumer may feel intimidated or threatened
- a consumer has limited alternatives because of location, socioeconomic situation or market conditions
- a consumer is from a non-English speaking background
- key terms and conditions are not clearly disclosed.

How can I avoid acting unconscionably towards consumers?

The best way to avoid problems is to treat your customers fairly. Operating in an open, honest manner not only will help you avoid breaking the law but will also strengthen your reputation among consumers as an honest trader—which will ultimately benefit your bottom line.

You can take several simple steps at each stage of your business operation to help avoid treating consumers unconscionably. Many of these concepts are similar to those discussed in relation to misleading and deceptive conduct. You should be familiar with these provisions and ensure you do not risk breaching the ACL.

When advertising your service:

- **Consider your audience**—you should consider the likely audience of your marketing message and the impact it may have on them.
- **Use plain English** as much as possible to help your customers understand the agreement they are entering into.
- **Do not use** any harsh or oppressive terms in your agreements or contracts, particularly terms that:
 - are not reasonably necessary to protect the legitimate interests of your business
 - could give rise to an unfair situation between your business and the customer
 - try to give your business the right to change key aspects of the agreement without telling the customer or gaining their agreement
 - attempt to limit or cancel rights the customer normally has under the law.

If a dispute arises, you may not be able to rely on these kinds of terms and any attempt to enforce them may be considered unconscionable.

- **Clearly set out** all key terms of the agreement—make consumers aware of all key terms and conditions in the agreement. If a key term of your agreement is buried at the back of a long contract or is hidden in fine print, it may not be enforceable. You should ensure that any supporting documentation referred to in the contract is also made available to the consumer.

When negotiating with customers:

- **Make full and frank disclosure**—this means bringing the agreement's key terms to the customer's attention and ensuring they understand them, especially any unusual or important terms.
- **Ensure** your customers understand the agreement and all other relevant documentation.

If you are concerned that a customer does not understand the implications of an agreement, suggest they seek some independent advice.

- **Avoid** high pressure sales tactics. Remember, conduct that may be appropriate for some consumers may threaten or intimidate others.

After sales service:

- **Have an effective complaints handling system**—enable customers to easily raise disputes and have them resolved. You should ensure your customers are aware of how to raise any disputes.
- **Be willing to negotiate**—if an agreement's key terms change or if it appears your business may have engaged in unconscionable conduct, be prepared to negotiate or set the agreement aside if appropriate.

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 new consumer law regime operating across Australia. Detailed guidance on sales practices, consumer guarantees, product safety and unfair contract terms is available from this site.

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

Contacting the ACCC

Infocentre: 1300 302 502

Small business helpline: 1300 302 021

Callers who are deaf or have a hearing or speech impairment can contact the ACCC through the National Relay Service: www.relayservice.com.au.

Voice-only (speak and listen) user—phone 1300 555 727 and ask for 1300 302 502.

Website: www.accc.gov.au

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



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