

Personal services

An industry guide to the Australian Consumer Law



This guide was developed by:

- Australian Capital Territory Office of Regulatory Services
- Australian Competition and Consumer Commission
- Australian Securities and Investments Commission
- Consumer Affairs and Fair Trading Tasmania
- Consumer Affairs Victoria
- New South Wales Fair Trading
- Northern Territory Consumer Affairs
- Office of Consumer and Business Affairs South Australia
- Queensland Office of Fair Trading
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Introduction

The Australian Consumer Law (ACL) is Australia's national consumer law, replacing previous consumer protection laws in the Commonwealth, state and territories. The ACL applies at the Commonwealth level and in each state and territory.

This guide provides information on the ACL for businesses that provide personal services; for example, hairdressing and beauty services, furniture removal, photography, or carpet and curtain cleaning.

It covers key aspects of the law such as sales tactics, deposits and refunds, focusing on issues where:

- > industry bodies have requested more detailed guidance for business
- > consumers frequently report problems to national, state and territory consumer protection agencies.

Guides to unfair contract terms for specific industries can also be found at consumerlaw.gov.au.

This guide gives general information and examples – not legal advice or a definitive list of situations where the ACL applies. You should not rely on this guide for complete information on all your obligations under the ACL.

Other ACL guides and information

This guide supplements the ACL guides for business and legal practitioners, available from consumerlaw.gov.au:

- > Consumer guarantees
- > Sales practices
- > Avoiding unfair business practices
- > A guide to unfair contract terms law
- > Compliance and enforcement: how regulators enforce the Australian Consumer Law
- > Product safety.

For more information, view:

Australian Consumer Law website
consumerlaw.gov.au

Australian Competition & Consumer Commission
(ACCC)
accc.gov.au

State and territory consumer protection agencies

Australian Capital Territory: Office of Regulatory Services
ors.act.gov.au

New South Wales: Fair Trading
fairtrading.nsw.gov.au

Northern Territory: Consumer Affairs
consumeraffairs.nt.gov.au

Queensland: Office of Fair Trading
fairtrading.qld.gov.au

South Australia: Consumer and Business Services
cbs.sa.gov.au

Tasmania: Consumer Affairs and Fair Trading
consumer.tas.gov.au

Victoria: Consumer Affairs Victoria
consumer.vic.gov.au

Western Australia: Department of Commerce
commerce.wa.gov.au

Terminology

For the purposes of this guide:

A **supplier** is anyone – including a trader, a retailer or a service provider – who, in trade or commerce, sells products or services to a consumer.

Trade or commerce means in the course of a supplier's or manufacturer's business or professional activity, including a not-for-profit business or activity.

A **consumer** is a person who buys any of the following:

- > any type of products or services costing up to \$40,000 (or any other amount set by the ACL in future) – for example, a haircut or wedding photography
- > a vehicle or trailer used mainly to transport goods on public roads. The cost of the vehicle or trailer is irrelevant
- > products or services costing more than \$40,000, which are normally used for personal, domestic or household purposes.

A person is **not** a consumer if they buy products to:

- > on-sell or resupply
- > use, as part of a business, to:
 - » manufacture or produce something else (for example, as an ingredient)
 - » repair or otherwise use on other goods or fixtures.

Major failure and **minor failure** refer to failures to comply with consumer guarantees. The ACL does not use the term 'minor'; it only makes reference to a failure that is 'major' and 'not major'. However, throughout this guide the term 'minor failure' is used for simplicity and will apply to circumstances where a failure will not be major.

A **representation** is a statement or claim.

Consumer guarantees on services

Under the ACL, you must meet the consumer guarantees of providing services:

- > **with due care and skill**
You guarantee to use an acceptable level of skill or technical knowledge when providing the services, and take all necessary care to avoid loss or damage
- > **which are fit for any specified purpose**
You guarantee that services will be reasonably fit for any purpose specified by the consumer; and any product resulting from the services (for example, spectacles, hair extensions or photographs) are also fit for that purpose. You also guarantee that services, and any resulting products, are of a standard expected to achieve the desired results that the consumer made known to you
- > **within a reasonable time (when no time is set)**
You guarantee to supply the service within a reasonable time. What is 'reasonable' will depend on the nature of the services.

The consumer guarantees apply to services sold in trade or commerce, that:

- > were purchased on or after 1 January 2011
- > cost up to \$40,000 (or any other amount set by the ACL in future), regardless of purpose or use
- > cost more than \$40,000, and are normally acquired for personal, domestic or household purposes – for example, dental veneers or furniture restoration.

Services **not** covered by consumer guarantees include:

- > services bought before 1 January 2011. These are covered by statutory implied conditions and warranties under the *Trade Practices Act 1974* and state and territory legislation in force before 1 January 2011
- > services costing more than \$40,000, which are usually for commercial use – for example, fit-out of a beauty salon
- > transportation or storage of goods for the consumer's business, trade, profession or occupation.

Consumer guarantees cannot be excluded, even by agreement.

Major vs minor failures

When a service fails to meet a consumer guarantee, your obligations depend on whether the failure is major or minor.

A major failure with services is when:

- > a reasonable consumer would not have acquired the services if they had known the nature and extent of the problem. For example, a reasonable consumer would not pay to have acrylic nails attached if they knew the nails would fall off within an hour
- > the services are substantially unfit for their normal purpose and cannot easily be made fit, within a reasonable time. For example, a carpet-cleaning service changes the colour of the consumer's carpet in some places
- > the consumer told the supplier they wanted the service for a specific purpose but the services, and any resulting product, do not achieve that purpose and cannot easily or within a reasonable time be made to achieve it. For example, a consumer tells a photography company they want formal wedding photos for an album to give to their parents and elderly, conservative relatives, but the photographer's choice of lighting and angles makes the resulting pictures risqué and unsuitable for this purpose
- > the consumer told the supplier they wanted a specific result but the services, and any resulting product, do not achieve that result and cannot easily or within a reasonable time be made to achieve it. For example, a consumer tells a therapist at a medical laser clinic she wants several skin tags removed; however, the therapist arranges the timing of the consumer's treatments in such a way that the specified result cannot be achieved
- > the supply of the services has created an unsafe situation. For example, a curtain cleaner uses the wrong cleaning fluid on a consumer's curtains, causing them to give off hazardous fumes.

When there is a major failure, the consumer can:

- > cancel the services and get a refund for any unconsumed services, or
- > keep the contract and get compensation for the difference in value between the service delivered and what they paid for.

The consumer gets to choose, not the supplier.

When the problem is minor, the consumer cannot cancel and demand a refund immediately. They must give you an opportunity to fix the problem:

- > free of charge, and
- > within a reasonable time.

If you refuse or take too long to fix the problem, the consumer can get someone else to fix the problem and ask you to pay reasonable costs, or cancel the service and get a refund.

For more information on consumer guarantees applying to services, refer to *Consumer guarantees: a guide for business and legal practitioners*, available from consumerlaw.gov.au.

Common issues

Group buying and daily deals

Group buying websites – also referred to by some people as ‘daily deals’ or ‘deal of the day’ – sell vouchers or coupons for products and services with big discounts. In some cases, the vouchers are offered on the condition that a minimum number of buyers take up the deal.

Common issues encountered by consumers include non-supply and incomplete supply of services, and difficulty in booking services and redeeming vouchers.

If you offer these deals you need to be aware of the potential demands and risks. You should consider the potential demand created by advertising your services through group buying websites and whether your business can deliver those services on time and in a reasonable manner. For example, you may want to limit the deal offered so it doesn’t restrict your ability to serve both regular and new customers.

You should also work with the group buying website to:

- > ensure that you can deliver services as advertised and that the terms and conditions of sale are fair and clearly expressed
- > ensure any terms and conditions are clear; for example, if you only intend to offer the services on certain days of the week or for a limited time
- > make sure any price representations are accurate.

Example:

A laser hair removal business sold vouchers for \$4000 worth of treatments (equivalent to 10 sessions) through a group buying website. The business claimed its vouchers, sold for \$400, were only valid for six months. Subsequently, consumers complained that it was not possible to have enough treatments within the six-month time frame to receive the advertised value because you had to wait at least 4 to 6 weeks between sessions and were not informed of this when they purchased the vouchers.

High-pressure sales tactics

Complaints and disputes often arise after salespeople use high-pressure tactics to induce a consumer to enter into a sales agreement they do not want or do not fully understand.

Conduct such as pressuring a consumer to sign a contract, or taking advantage of a vulnerable person, can amount to unconscionable conduct by a business.

You must not act unconscionably when selling or supplying products and services to a consumer.

Generally, ‘unconscionable conduct’ is conduct so unreasonable it goes against good conscience. What is considered unconscionable conduct depends on the circumstances, which can include:

- > the relative strengths of the bargaining positions of the supplier and the consumer
- > whether, as a result of conduct engaged in by the person, the consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier
- > whether the consumer was able to understand any documents relating to the supply or possible supply of the goods or services
- > whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the consumer or a person acting on behalf of the consumer by the supplier or a person acting on behalf of the supplier in relation to the supply or possible supply of the goods or services
- > the amount for which, and the circumstances under which, the consumer could have acquired identical or equivalent goods or services from a person other than the supplier.

Harassment and coercion

The ACL makes it illegal to coerce or unduly harass someone about the supply of, or payment for, products or services.

Undue harassment means repetitive, unnecessary or excessive contact or communication with a person, to the point where they feel intimidated or demoralised.

Example:

An elderly consumer booked a carpet cleaner for her home. After carrying out the requested service, the cleaner kept making unsolicited visits to the consumer's home, claiming it was time for the carpet to be cleaned again. Under pressure from the repeated visits, the consumer did not feel able to tell him to leave.

Coercion involves force (actual or threatened) that restricts a person's choice or freedom to act. Unlike harassment, coercion does not have to involve repetitive behaviour.

Harassment and coercion can also arise in relation to requests for payment. When requesting payment from a consumer, you must comply with acceptable debt collection practices. For more information, see *Debt collection guideline: for collectors and creditors*, a joint publication by the ACCC and the Australian Securities and Investments Commission (ASIC), which is available from accc.gov.au or asic.gov.au.

Door-to-door sales

If you use door-to-door sales to sell your services to consumers, you must comply with ACL provisions covering unsolicited consumer agreements which apply to door-to-door selling.

Door-to-door salespeople must comply with a range of requirements, which include:

- > limited hours for contact with consumers
- > an obligation to leave the premises immediately if the consumer asks them to
- > criteria for the sales agreement, including that it must be in writing
- > disclosure requirements when making an agreement, including an obligation to provide consumers with information on their right to terminate the agreement during the cooling-off period
- > restrictions on supply and requesting payment during the cooling-off period.

For more information about door-to-door sales as well as sales practices generally, see *Sales practices: a guide for businesses and legal practitioners*, available from consumerlaw.gov.au.

Misleading representations

You must not make false or misleading representations about your services when supplying, offering to supply, or promoting them to consumers.

For instance, you must not make false or misleading representations about:

- > the standard, quality, value or grade of services
- > a particular person agreeing to acquire services
- > testimonials by any person relating to services
- > the sponsorship, approval, performance characteristics, accessories, benefits and uses of services
- > the price of services
- > a buyer's need for the services
- > any guarantee, warranty or condition on the services
- > the requirement to pay for any guarantee, warranty or condition on the services.

Whether a representation is considered false or misleading will depend on the circumstances of each case. A representation that misleads one group of consumers may not necessarily mislead another group.

For example, people concerned about their body image may be more vulnerable to claims about a beauty service. Whether a representation about a beauty service was misleading would depend on whether it would mislead a reasonable person within this group.

Example:

A consumer sought treatment at a hair loss clinic. The supplier assured him that the restored hair would be his, not a wig, and would grow normally. The consumer asked questions about the claims that were being made for this treatment, was happy with what he was told, and paid a \$3000 deposit.

Shortly after the procedure, he realised the new 'hair' was actually a wig stuck to his head.

The consumer complained to the supplier, saying he had been misled about the procedure. The supplier booked him in to have the wig removed, but refused to give a refund.

The consumer was entitled to a refund. He had suffered loss (that is, the cost of the treatment) because the supplier provided a service that was different from what was represented.

Unfair contract terms

If you use standard form contracts for the supply of services to consumers, you must ensure these comply with national unfair contract terms laws. These laws are part of the ACL.

Unfair contract terms laws protect consumers against contract terms that:

- > would cause a significant imbalance in their rights and obligations under a contract
- > are not reasonably necessary to protect the business
- > would cause detriment (financial or otherwise) to a consumer.

Examples of terms that may be unfair include those allowing the business to:

- > cancel or vary the terms of the contract, without allowing the consumer to do the same
- > make the consumer liable for things that would normally be outside the consumer's control
- > prevent the consumer from relying on representations made by the business or its agents
- > charge the consumer's credit card without giving the consumer notice or an opportunity to dispute the charges
- > forfeit a security bond for any breach of the contract, that is, even if there is no causal link between the breach and the forfeiture
- > avoid liability for negligence
- > increase the fees and charges payable without the right for the consumer to terminate (free of any penalty).

To comply with unfair contract terms laws, you must ensure your contracts do not contain any unfair terms. It is not enough that you consider that applying your policies, procedures and discretion will ensure consumers are dealt with fairly in your view.

If a court finds a term is unfair, that term is treated as if it never existed. If the contract can operate without the unfair term, it will otherwise still be binding.

Example:

A consumer rents a carpet cleaning unit for use at her home. The rental business requires her to sign a standard form agreement acknowledging that if the cleaning unit is faulty and in using the cleaning unit the consumer's carpet is damaged, the consumer cannot sue the rental business.

This is likely to be an unfair contract term, and the rental company would not be able to enforce it in the event of a dispute.

The unfair contract terms laws do not apply to a contract to supply products or services from one business to another.

For more information, see *A guide to the unfair contract terms law*, available from consumerlaw.gov.au.

Damage or loss caused by services

You guarantee your services are provided with due care and skill. This means you must:

- > use an acceptable level of skill or technical knowledge when providing the services
- > take all necessary care to avoid loss or damage when providing the services.

A consumer may also seek compensation from you for any consequential or associated loss or damage resulting from failure to meet the consumer guarantees. The loss or damage must have been reasonably foreseeable.

Example 1:

A consumer asked a cleaning service to machine wash two bedspreads. The items were clearly labelled as not suitable for dry cleaning. On receiving the bedspreads back, the consumer noticed their colour had faded, and suspected they had been dry cleaned. The supplier admitted the items had been dry cleaned twice.

The consumer successfully sought a refund for the cleaning cost, and negotiated an additional amount as compensation for the damaged bedspreads. The consumer was entitled to compensation to make up for that loss and damage, not just a refund for the cleaning service.

Example 2:

A consumer engaged a furniture removal company to help him move house.

As part of the agreed service, the removalists wrapped a large mirror ready for transport, but because they did this poorly, the mirror broke during the move.

The consumer sought a partial refund for the services on the basis that the removalists had not met the consumer guarantee of due care and skill in a major way, as well as compensation for the cost of replacing the mirror.

Changes to agreed costs

Complaints and disputes often arise when consumers agree to the cost of a service before it is provided, but the price they eventually pay is more than they expected.

You can help avoid this type of dispute by clearly explaining your terms and conditions to the consumer before they agree to the sale. If you do not, this may be considered misleading or deceptive conduct or unconscionable conduct (see 'High-pressure sales tactics' on page 5).

Example:

A furniture removal company quoted \$125 per cubic metre to move a consumer's household goods. The company provided a written agreement saying the total amount would be calculated on the day of pickup, when the removalists would measure the items.

On loading the truck, the removalists indicated the goods filled 20 cubic metres, pointing to a line on the truck, and the consumer paid them accordingly.

Before unloading the truck at the consumer's new home, the removal company contacted the consumer, saying the quote and final price provided by the removalists was incorrect, and due to a subsequent price increase, she owed them a further \$1100. They refused to complete the contract until this was paid. However, the consumer was only obliged to pay the amount that was originally agreed.

Non-supply or delayed supply of services

A contract or agreement for the supply of services usually states when the services will be provided and the date they will be completed.

If not, you guarantee to supply the service within a reasonable time.

What is 'reasonable' will depend on the nature of the services. For example, the time needed to create a 20-page photograph album will be longer than the time required to produce one small photographic print.

In addition, you must not accept payment for services:

- > if you do not intend to supply
- > if you intend to supply materially different services
- > if you know, or should have known, you would not be able to supply the services in a timely manner.

For example, a furniture removalist contracts to move a consumer's furniture and accepts payment, knowing that all their trucks are unavailable at the time of the agreement.

This part of the law is not intended to affect businesses who genuinely try to meet supply agreements and fail, where:

- > the failure to supply was due to something beyond the business's control, and
- > it exercised due diligence and took reasonable precautions to avoid a failure.

Example:

A consumer engaged a photographer for her wedding and paid \$4000 for a package which included an album and digital files on disc.

The photographer attended the wedding and took photographs. However, six months later, they had not provided the consumer with the album or digital files.

Having accepted full payment, the photographer must supply the album and digital files within a reasonable time. The consumer can require performance of the contract, in this instance.

Businesses as consumers

Under the ACL, a business has certain consumer rights when it purchases products or services. You cannot refuse a remedy to a customer simply because their purchase was made for or on behalf of a business.

A business is protected by consumer guarantees if it buys:

- > products or services that cost up to \$40,000
- > products or services that cost more than \$40,000 and are of a kind ordinarily acquired for domestic, household or personal use or consumption
- > a vehicle or trailer primarily used to transport goods on public roads.

Example:

A small business owner engages a carpet cleaner to steam clean the carpets in her newly rented office, specifying she wants the carpets to be completely dry by the date she moves in to the premises. The cleaner examines the carpets and advises a suitable date for the work to be done, to achieve the business owner's purpose.

However, on the day the business owner arrives to move in, the carpets are still extremely damp and she cannot move furniture in to the premises without damaging both it and the carpet. Consequently, her business incurs the cost of furniture storage and a loss of income while the new office remains closed.

The business owner is entitled to a remedy, as the service did not meet the consumer guarantee of being fit for a specified purpose.

Where services are not normally acquired for personal, domestic or household purposes, liability for failure to comply with a consumer guarantee can be limited by contract to:

- > supplying the services again, or
- > paying the costs of having the services supplied again.

For more information, contact your local consumer protection agency.

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