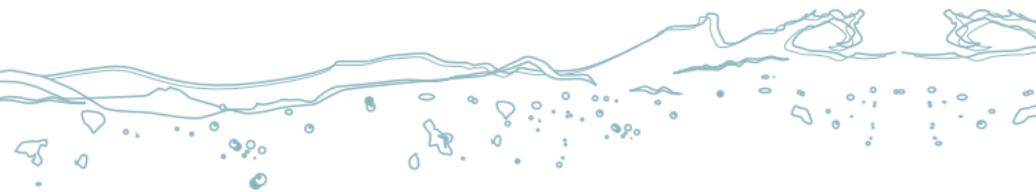




Australian
Competition &
Consumer
Commission

Water brokers and exchanges—your fair trading obligations





Australian Competition and Consumer Commission
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Important notice

Please note that this publication is for general guidance only. The information contained in this publication is a summary designed to give you the basic information you need. The information does not cover all of the relevant legislation and general law principles, nor is it a substitute for professional legal advice. Moreover, because this publication avoids legal language wherever possible, there may be some generalisations about the application of legislation. Some of the provisions referred to in this booklet have exceptions or important qualifications. It is important to note that the particular circumstances of the conduct need to be taken into account when determining the application of the law to that conduct.

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This publication sets out the fair trading obligations water brokers and water exchanges have when dealing with their customers.

Water brokers and exchanges— your fair trading obligations

Water brokers and exchanges play an important role in the market. Fair trading laws contain certain legal obligations that you have when doing business. These obligations are separate from any contractual or other rights and obligations that you may have with your customers.

Legal obligations

The Australian Competition and Consumer Commission (ACCC) enforces the *Competition and Consumer Act 2010* (the CCA). The CCA includes the Australian Consumer Law (ACL).¹

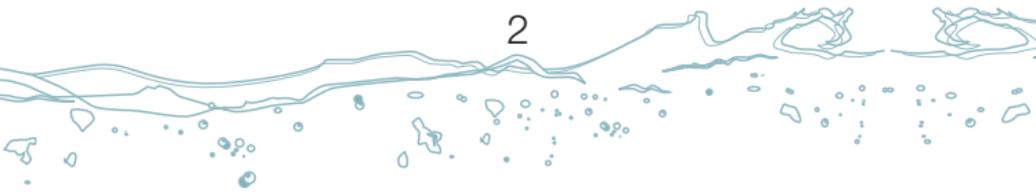
The ACL commenced on 1 January 2011 and applies nationally and in all states and territories, and to all Australian businesses. The ACL states that businesses and individuals—including water brokers and exchanges—**must not**:

- engage in misleading or deceptive conduct
- make false or misleading representations
- accept payment if they are unable to deliver
- engage in unconscionable conduct
- use harassment or coercion.

In some situations the ACL also gives your customers certain guarantees about the quality of services offered by brokers and exchanges.

There are various remedies that may be sought if you fail to meet your obligations under the ACL. These obligations and remedies are discussed in the following pages.

¹ Where the products and services on offer are financial products or services (e.g. financial advice, a water derivative or an option), the consumer protection provisions of the *Australian Securities and Investments Commission Act 2001* (the ASIC Act) would apply. Aspects of the ACL are reflected in these provisions, which are enforced by ASIC.



As well as these ACL obligations, the CCA also prohibits anti-competitive conduct, such as agreements or understandings with other brokers or exchanges regarding prices or who to deal with (you can contact the ACCC for more information about these obligations).

Misleading or deceptive conduct

It is illegal for you to make a claim that is misleading or deceptive, or is likely to mislead or deceive. A common meaning of 'mislead or deceive' is 'to lead into error'. Misleading someone may include:

- lying to them
- leading them to a wrong conclusion
- creating a false impression
- leaving out (or hiding) important information
- making false or inaccurate claims.

Customers will have different levels of knowledge about water trading, so conduct that would not mislead some customers may mislead others and may still be illegal.

Advertising or marketing claims that are vague, or that cannot be easily substantiated, are more likely to be misleading or deceptive. Be cautious if you are making these kinds of claims.

Example: do not 'guarantee' a water trade if it has not yet been approved.

What you do **not** do or tell an irrigator can also be considered misleading or deceptive in some circumstances.

Example: you do not tell a customer that you are buying or selling water on your own behalf when they would want to know this.

False or misleading representations

It is illegal for you to make false representations about yourself, the services you offer or the water that is being traded. In particular, the law prohibits false representations about:

- the standard, quality, value or grade of the service you are offering or the water itself

Example: do not claim that a water entitlement is as reliable as the 'high reliability' water entitlement an irrigator is familiar with when it actually has a lower reliability.

- a particular person agreeing to buy water or use your service in question

Example: do not claim to already have someone lined up and ready to trade with a potential customer if this is not the case.

- the sponsorship, approval, performance characteristics, accessories, uses or benefits (of the water itself or your services)

Example: do not claim to be accredited by a government agency or industry association if you are not.

Example: do not claim that a client's money will be held 'in trust' while the trade is finalised, if you do not use a genuine trust account.

- the price of your services or of the water itself

Example: do not make false claims about the commission your customer will have to pay if a water trade takes place, or the price (per megalitre) of the water.

- the need for the service or the water itself

Example: do not claim that an irrigator has to trade through you or your exchange if this is not the case.

Accepting payment without being able to supply

You must not accept a payment (including a deposit) from a customer if you:

- do not intend to supply the service, or intend to supply a service that is materially different from the one paid for by an irrigator; or
- are aware (or should be aware) that you will not be able to supply the service within the promised timeframe, or (if no timeframe is offered) a reasonable time.

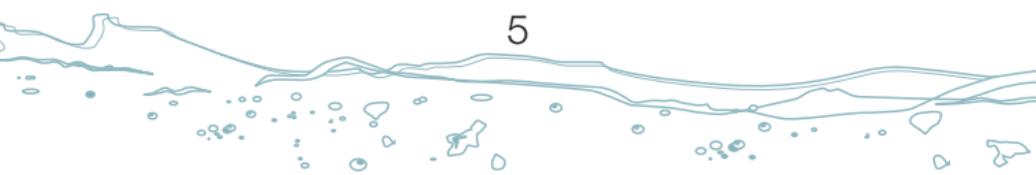
Example: as a broker, you request a deposit from a customer knowing that you are unlikely to be able to arrange a suitable trade for them within the time you have specified (or, if no time is specified, within a reasonable time).

Harassment and coercion

The ACL prohibits brokers or exchanges from using physical force, undue harassment or coercion to make a consumer use their services, or to pressure a consumer to pay for any services that have been provided in certain circumstances. Undue harassment may occur when repeated approaches are made or repeated pressure is applied, going beyond what is acceptable or reasonable.

Example: do not call a customer several times a day or very late at night to demand payment of their fees or to ask if they want to trade water.

Generally, this law will only apply if the amount involved is no greater than \$40 000 (for the services of the broker or exchange, not including the cost of the water itself).



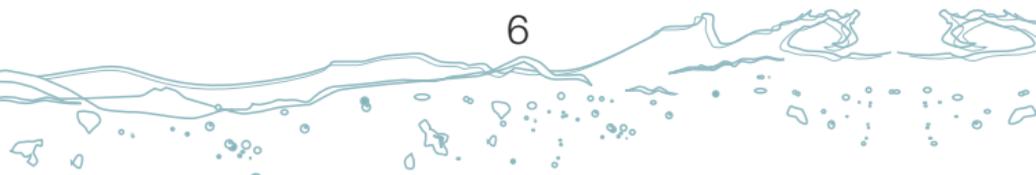
While the ACL sets out limited circumstances where a trader may not harass or coerce a customer, customers have other rights even where the ACL does not apply. You should seek legal advice if you are unsure about what is acceptable behaviour.

Unconscionable conduct

Unconscionable conduct occurs when a business engages in unreasonable conduct that goes against good conscience. It may involve conduct that is bullying, oppressive or otherwise lacking in good faith. The ACL prohibits any unconscionable conduct in connection with the supply or acquisition of goods or services.

Unconscionable conduct is not a static concept. The ACL does not define unconscionable conduct but lists a number of factors that the court may take into account when deciding if the conduct is unconscionable:

- the relative bargaining strength of the parties
- whether the stronger party imposed conditions that were not necessary to protect their legitimate business interest
- the use of undue influence, pressure or unfair tactics
- whether the weaker party could obtain supply on better terms elsewhere
- whether the stronger party made adequate disclosure to the weaker party
- the willingness of the stronger party to negotiate
- the extent to which each party acted in good faith
- the requirements of any relevant industry code.



The ACL also gives the court the freedom to take into account any other matters it deems to be relevant.

Remember that the unconscionable conduct provisions will not apply to situations where one party has simply made a poor deal.

For more information on unconscionable conduct, see the ACCC's Guide to unconscionable conduct (available from the ACCC website and Infocentre).

Guarantees

In most cases when a water trade occurs through a broker or exchange, the ACL provides the customer with an automatic guarantee that the service will be both:

- carried out with 'due care and skill'
- 'fit for purpose' — that is, your service meets the client's needs.

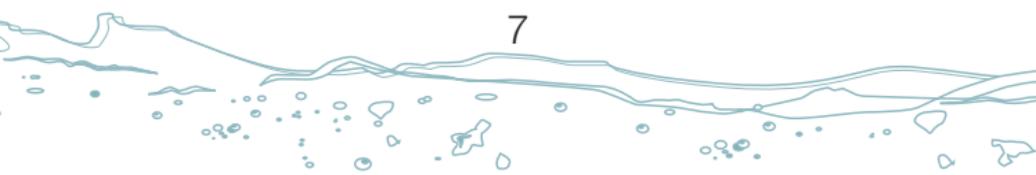
Example: if you mishandle the paperwork for a trade, leading to delays or refusal, you may not be exercising 'due care and skill'.

Example: if you confirmed that you can arrange all necessary approvals for a trade, but then you failed to do so—the service may not be 'fit for purpose'.

These guarantees may not apply if a customer:

- did not make clear what they wanted done (and it was not obvious to you)
- insisted on having the service carried out in a particular way and did not like the result.

These guarantees apply where the value of a broker or exchange's service (excluding the cost of the water itself) is less than \$40 000. These guarantees cannot be cancelled by you or signed away. They apply whether or not there



is a written contract. If you provide your own warranty or guarantee, you must honour it **and** the ACL guarantees.

If you do not meet these requirements, customers may be able to take action to have the service performed again, or for payment of the cost of having the service performed again, and compensation for any related loss or damage.

Why comply?

A strong compliance culture can help you minimise the risk of breaking the law and can improve your business performance and quality of service, enhance your business reputation and strengthen consumer trust.

A poor compliance culture may expose your business to negative consequences such as adverse publicity and substantial financial and human resource costs.

Misconduct by some brokers and exchanges can reduce confidence in the market and cause significant hardship. Therefore, the ACCC will vigorously pursue water brokers and water exchanges that breach the ACL.

The ACCC can take legal action against a trader for breaches of the ACL. It particularly targets conduct that is widespread, blatant, occurring in more than one state or involving serious detriment to consumers.

Remedies and penalties

The ACCC or any other person can seek injunctions (for example, to stop certain conduct) or other court orders if they believe a breach of the ACL has occurred.

Any person suffering loss or damage as a result of this conduct can seek damages or other orders from a court.

A number of penalties may also be available depending on the offence. These include infringement notices up to \$6600 for companies (\$66 000 for listed companies) and \$1320 for individuals, and civil and criminal penalties up to \$1.1 million for businesses and \$220 000 for individuals.

The ACCC

The ACCC is a national agency responsible for enforcing the ACL. The ACCC can provide information on the fair trading rights and obligations that you and your customer have, and the best way to resolve any disputes.

You can call the ACCC Infocentre on 1300 302 502.

- For languages other than English call 13 1450 and ask for 1300 302 502.
- Speak and Listen users phone 1300 555 727 and ask for 1300 302 502.
- Internet relay users connect to the NRS (see www.relayservice.com.au) and ask for 1300 302 502.

ACCC staff are available to answer your call during normal business hours.

ACCC website: www.accc.gov.au

Other useful contacts

Offices of fair trading/consumer affairs

If you want more information about your obligations and how to negotiate a resolution to a customer dispute, contact your local office of fair trading/consumer affairs:

New South Wales

13 3220

www.fairtrading.nsw.gov.au

Victoria

1300 558 181

www.consumer.vic.gov.au

Queensland

13 1304

www.fairtrading.qld.gov.au

South Australia

13 1882

www.ocba.sa.gov.au

Western Australia

1300 304 054

www.docep.wa.gov.au

Tasmania

1300 654 499

www.consumer.tas.gov.au

Australian Capital Territory

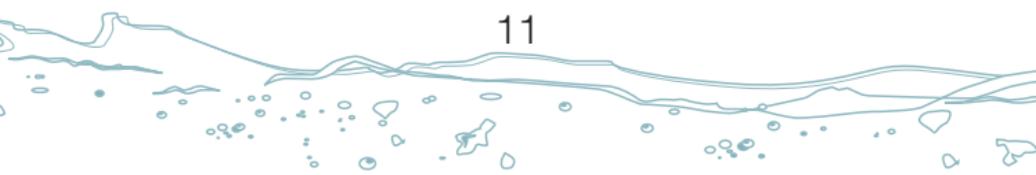
02 6207 0400

www.ors.act.gov.au/fairtrading

Northern Territory

1800 019 319

www.nt.gov.au/justice/consaffairs



State/territory water departments and authorities

If you have an inquiry about the trading process itself, contact your local water authority or the relevant department in your state or territory.

The Australian Securities and Investments Commission (ASIC)

ASIC enforces consumer protection laws for conduct in relation to financial products and services (which could include financial advice, water options products and water derivatives).

Telephone: 1300 300 630

Website: www.asic.gov.au

The Office of the Privacy Commissioner

If you have concerns that your personal information has been mishandled by a broker or exchange, you can contact the Office of the Privacy Commissioner to lodge a complaint or find out more about your privacy rights.

Telephone: 1300 363 992

Website: www.privacy.gov.au

