



AUSTRALIAN COMPETITION
& CONSUMER COMMISSION

Advertising and selling guide

A guide for business

July 2021



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Australian Competition and Consumer Commission
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Introduction



Most Australian businesses use advertising to promote their goods and services. Whether they advertise through television, radio, the internet or print media, they must ensure that their advertising complies with the law.

The Australian Consumer Law (ACL) is a national law that aims to protect consumers and ensure fair trading in Australia. The ACL is part of the *Competition and Consumer Act 2010* (the Act).

Advertising and selling practices have evolved rapidly. These practices no longer occur solely through traditional print media, television or a shop front. Advertising and selling occurs widely in the online environment, such as through email, social media, apps, online shopping sites, price comparison sites, review platforms and search engines.

Businesses that operate online have the same rights and obligations as those that operate traditional bricks and mortar stores. Businesses need to ensure that their online sales practices comply with the Act.

Good sales practices lead to consumer satisfaction and a more successful business. The rights and obligations set out in the ACL are aimed at ensuring businesses operate on a level playing field when selling goods and services to consumers.

Using and navigating the guide

This guide provides an overview of the key parts of the ACL, including:

- misleading or deceptive conduct
- false or misleading claims
- consumer guarantees
- unfair contract terms
- unsolicited consumer agreements.

This guide also provides examples of conduct that is likely to breach the ACL and practical tips for advertising and selling. It addresses marketing techniques and channels including:

- 'was/now' or 'strike through' pricing
- reviews and testimonials
- online group buying.

It also provides guidance for businesses seeking to make claims on issues such as:

- environmental and organic merits
- country and place of origin.

Lastly, the guide features some information on competition law and product-safety requirements, with links to further information.

The ACCC will update this guide when required. You should check this website periodically for the latest version of this guide.

Who is this guide for?

The ACCC has produced this guide to help businesses of all sizes understand their rights and obligations under the ACL. This guide is for businesses that supply products or services – including suppliers, manufacturers, importers and service providers. This guide is also designed to help people who advise businesses, including accountants, lawyers and marketing professionals.

Related information: Consumers' rights & obligations

Related information: Anti-competitive behaviour

Agents

Businesses often engage advertising agencies, call centres or sales representatives to assist them in selling their goods or services. When a business uses an agent, it will generally be responsible for the agent's conduct. To avoid inadvertently breaching the ACL, a business should take care to supervise the activities of its agents.

Advertisers and the media

Advertising and media operators – newspapers, television, radio and online – must take particular care in relation to the products and services they advertise for their clients. They should know their clients' business and be aware of the requirements under the ACL to minimise the risk of breaching the law.

If media operators are only the vehicle for someone else's misleading message, they may not be liable for breaches of the ACL. But if a media outlet actually adopts or endorses the misleading message, it may also be held responsible.

► **Real case study:** A media firm was approached by an investment company that claimed to have a successful investment model to share with the public. The media firm decided to air the story to promote the investment model and to encourage viewers to invest. The media company made a number of claims on its program about the investment model and its founders which turned out to be false.

Both the marketing company and the investment company were found to have breached the *Trade Practices Act 1974* (now provisions of the ACL).

Case law: [High Court of Australia – \[2009\] HCA 19](#)

Media release: [High Court explains limit of the 'Publisher's Defence'](#)

Are there any exclusions?

The ACL does not apply to financial products and services. However, aspects of the ACL are reflected in the Australian Securities and Investments Commission Act 2001, to protect consumers of financial goods and services. You should direct complaints and enquiries about financial products or services to the Australian Securities and Investments Commission.

Your rights as a business

Businesses also have certain rights and protections under the ACL. It is important you are aware of these and we want to hear from you if you are aware that your competitors, suppliers or other businesses are breaking the law. For example:

1. another business cannot wrongly compare their products to your products in a way that misleads consumers, see [Two-price comparison advertising](#)
2. if you are a small business, you are protected from unfair terms in standard form contracts, see [Unfair contract terms](#)
3. you are entitled to set and raise your prices independently as you see fit, see [Setting prices](#)
4. generally speaking, where your competitors display a price, it should be a total price of the goods or services, see [Pricing](#)
5. your competitors cannot post negative reviews which are not based on a genuine opinion about you on online product review sites, see [Other promotional techniques](#)
6. you have spent money to ensure that your labeling complies with the 'warranty against defects' requirements under the ACL but you notice your competitor has not done so, see [Warranties against defects](#)
7. your competitors cannot make inaccurate premium or credence claims to your disadvantage, see [Marketing claims that require extra care - premium and credence claims](#)
8. you are not obliged to give a customer a refund if they simply change their mind, or find out they can buy the product cheaper elsewhere, see [Consumer guarantees](#)

You can lodge a complaint with the ACCC about these or any other breaches that come to your attention. For more information about your rights and protections under the ACL, visit the ACCC website (www.accc.gov.au) or call the ACCC small business helpline on 1300 302 021.

Avoid misleading or deceptive claims or conduct



Two fundamental rules of advertising and selling are that:

- i. you must not engage in conduct that is likely to mislead or deceive
- ii. you must not make false or misleading claims or statements.

In practice there is overlap between the 2 rules. A particular statement could breach both.

The application of these 2 rules is explored in this section.

It should be noted that this law applies equally to any statements or claims made about products or services in the online environment. Businesses that sell or promote online should ensure that their use of online vehicles does not create any misleading impressions or include false claims.

The information in this guide covers online-specific issues including the use of social media, product reviews and online group buying.

Misleading or deceptive conduct

It is illegal for a business to engage in conduct that misleads or deceives or is likely to mislead or deceive consumers or other businesses. This law applies even if you did not intend to mislead or deceive anyone or no one has suffered any loss or damage as a result of your conduct.

Related information: False or misleading claims

Legislation: Australian Consumer Law section 18

Impressions

It is important to look at how the behaviour of the business affects the audience's impression of a good or service. When deciding if conduct is misleading or deceptive, or likely to mislead or deceive, the most important question to ask is whether the overall impression created by your conduct is false or inaccurate.

While a business is not required to disclose information in all circumstances, there will be situations where a business must provide information to avoid engaging in misleading or deceptive conduct. You should disclose additional information to your customer or another business where it is likely that your other conduct has created a misleading impression, or where it is reasonable to expect that this information will be disclosed.

- ▶ **Example:** A customer is deciding whether to buy a new photo printing device and seeks advice from the electronic section of a department store. The customer mentions the brand of computer they have and buys the photo printing device on the advice of the retailer. However, the device is not compatible with the customer's computer.

The retail assistant knew it was not compatible yet did not advise the customer about this. Their conduct might be considered misleading by silence or omission as they did not disclose information that would have significantly changed the customer's mind about buying the product.

- ▶ **Real case study:** An internet company offered 'unlimited' download plans for users who signed up to their services. However, the plans were subject to major limitations including speed reductions when a certain amount of data was downloaded. The court found that the use of the term 'unlimited' in relation to plans that were subject to major limitations that were not disclosed was misleading and deceptive.

Case law: [Full Federal Court - \[2012\] FCAFC 20](#)

Media release: [Full Federal Court orders internet company to pay \\$3.6 million penalty](#)

'Free'

Businesses should be particularly careful of the use of the word 'free'. The idea of getting goods or services without charge can create keen interest in consumers. Consumers will usually think of 'free' as absolutely free – a justifiable expectation.

Simply put, businesses may get into trouble with free offers if they do not reveal the complete truth, including any conditions that the consumer must comply with.

- ▶ **Example:** A business uses the phrase '10% free' – meaning the price to the consumer is the same but they receive an additional 'free' volume of the product. If the price of the product has been increased this could be misleading, because the additional volume is not actually free.

- ▶ **Example:** A business makes a 'buy one, get one free' offer, but raises the price of the first item to largely cover the cost of the second (free) item. This is likely to be misleading or deceptive.

The circumstances

Whether conduct is misleading or deceptive will depend on the factors surrounding the conduct. This means that all relevant circumstances will be taken into consideration, such as the entire advertisement, product label or statements made by a sales representative. Fine print, contradictory statements and images that obscure or alter written statements are all taken into account.

Know your audience

Whether any marketing and promotional activities are misleading or deceptive may depend on the audience that receives the message. Businesses must remember that the consumers an advertising campaign targets may be very different to the audience that actually receives the message. You should identify your potential audience as this will help you determine the impact of your message. For example, television or radio advertisements are likely to have a wider reach than claims made by your sales staff.

Puffery

Puffery is a term used to describe wildly exaggerated, fanciful or vague claims about a good or service that no one could possibly treat seriously or find misleading. These statements are not considered misleading or deceptive under the ACL.

► **Example:** A restaurant claims it has the 'best steaks on earth' and the 'tastiest food in town'. The restaurant's claims can be considered puffery as they are unlikely to mislead customers.

False or misleading claims

In addition to the prohibition against misleading or deceptive conduct, it is unlawful for a business to make false or misleading claims about goods or services.

A misrepresentation is a claim or statement that is false or misleading made by one party to another. This includes claims or statements that you make in television or radio advertisements, in catalogues, on labels, on websites, in contracts (or during contract negotiations), over the telephone, in correspondence (such as letters or emails) or in person.

Whether a claim or statement is false or misleading will depend on the circumstances.

You must not make false or misleading claims or statements, for example, that goods are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use.

There are also specific rules against making false or misleading claims or statements about services and about the sale of land or employment. Section 29 of the Act sets out the types of claims or statements that may be false or misleading.

Related information: [False or misleading claims](#)

Legislation: [Australian Consumer Law section 29](#)

► **Real case study:** The Federal Court found that a car manufacturer made false or misleading claims in advertisements for one of its vehicles.

The manufacturer represented that the vehicle had 7 seats as a standard feature when in fact 5 seats was the standard configuration.

The manufacturer also represented that the 'drive away' price for the vehicle was \$79,990 when in fact a purchaser would have to pay additional fees or charges for dealer delivery, statutory charges and 2 additional seats.

Case law: [Federal Court of Australia - \[2007\] FCA 1990](#)

Media release: [Court declares motor vehicle advertising misleading](#)

Advertising, selling and promotional techniques



There are some particular obligations that apply when businesses use a number of different advertising or promotional 'techniques' to promote their products or services.

Advertising techniques

Bait advertising and special offers

Bait advertising is the practice of offering items for sale at low prices to attract consumers to a business.

Bait advertising can be a legitimate form of advertising. However, it is illegal to engage in this conduct where goods or services are advertised for sale at a discounted price, and they are not available in reasonable quantities and for a reasonable period at that price.

Legislation: [Australian Consumer Law section 35](#)

You must state clearly if the good is in short supply or on sale for a limited time. For example, if your advertisement makes it very clear that goods are available at the discount price for 'today only', this will limit your obligations to that day.

If there is not a reasonable chance the offer will be available at the advertised price, you may be in breach of the ACL unless you promptly offer a 'rain check', an acceptable substitute product or take other corrective action.

► **Example:** An electronics retailer runs a campaign advertising 50-inch televisions at a price of \$799 for a week-long sale. The retailer usually sells about 30 televisions of this type every week. The retailer only stocks 2 televisions at the advertised price and refuses to take customer orders.

When customers attempt to buy the television at the advertised price, they are told it is out of stock and offered a more expensive unit for \$999. This is likely to be bait advertising as the retailer does not have a reasonable supply of the advertised television.

Offering rebates, gifts or redemptions

When supplying or promoting goods or services, it is unlawful to offer rebates, gifts, prizes or other free items without intending to provide them. It is also unlawful to fail to provide them as promised. A rebate or gift must be provided within the specified time or, if no time was specified, within a reasonable time.

Legislation: [Australian Consumer Law section 32](#)

If you use this promotional method, you should pay special attention to the detail of the offer to ensure your consumers are not misled.

► **Example:** A retailer offers customers the chance to enter into a draw to win a prize when they spend over \$50 in one transaction. However, the business adds a fictitious name to the draw. The retailer publicises that the fictitious person won the draw. The result is that the prize offered is not actually given to any of its customers. This practice is prohibited by law.

Cash back offers

Cash back offers are a form of discounting. Instead of marking down product prices, manufacturers and retailers maintain the price but offer to return some of the consumer's money after purchase. There are no problems with this marketing approach, but care should be taken in using it. Any conditions, limitations or restrictions should be made clear to the consumer before the purchase.

► **Example:** Certain cans of deodorant have a shrink-wrap packaging carrying the words '\$3 Cash Back'. After returning home and opening the packaging, a consumer finds that the offer is limited to one can per customer, and that in any event the offer expired a week earlier. The consumer has been misled and may not otherwise have made the purchase.

In this situation the packaging is misleading because the bold representation of the cash back offer was made without equally prominent mention of the limitations. As a result the consumer believed the offer applied to each product purchased. This kind of packaging prevents consumers from seeing the limitations on the offer.

► **Example:** An electrical retailer is selling a television with a cash back offer. The price of the television is \$3,000 and consumers that purchase it can claim \$500 cash back after the sale.

When advertising the television, the retailer should advertise the price of the television as \$3,000 (not \$2,500), as this is the price a consumer must pay to acquire the television.

Comparative advertising

Businesses may use comparative advertising to directly promote the superiority of their products over another. The comparison may relate to factors such as price, quality, range or volume.

Comparative advertising is a direct challenge to competitors and before using comparative advertising, you should consider:

- Is the comparison accurate?
- Are the products or services being compared reasonably similar?
- Will the comparison be valid for the life of the promotion?

- **Example:** A battery manufacturer packages its batteries in a pack with a red sticker that claims the batteries will last longer than 2 other high-profile brands of batteries. The claim is supported by independent tests but only against some of the other brands' batteries. The sticker does not identify that the claim does not apply to all of the other brands' batteries. While there is a more precise reference to the comparison on the back of the pack, the sticker on the front still makes the packaging misleading.

You should consider the duration of advertisements planned and the likely reaction of competitors. If a competitor is aware of a comparative campaign they may move quickly to change their product or service, and this could render your campaign misleading.

Advertising through search engines and other online ads

There are a range of online advertising channels that businesses can use through mechanisms such as 'AdSense', 'AdWords' banner ads, pop-up ads and other types of advertisements. Technology may be changing but the requirements of the ACL remain applicable. For example, all businesses involved in placing advertisements on search engines must take care not to mislead or deceive consumers.

- **Real case study:** In the late 2000s, the Google search engine displayed 2 types of search results: 'organic search results' and 'sponsored links'. Organic search results were ranked in order of relevance to the search terms entered by the user. A sponsored link was a form of advertisement, created by or at the direction of an advertiser, who typically paid Google each time a user clicked on the sponsored link.

An advertising agency operated an advertising account with Google on behalf of a classified advertising business and for that account the agency's staff member included a 'keyword' of a magazine that was a competitor to its client. A Google search for the competitor magazine generated a sponsored link that listed the name of the competitor magazine with the website address of the classified ads business below it.

The Federal Court found that the classified ads business made false or misleading claims and engaged in misleading or deceptive conduct.

Media release: [Court decision on Google clarifies misleading advertisements](#)

After appeals on the question of Google's involvement, the High Court held that Google did not contravene the prohibition on misleading and deceptive conduct (now section 18 of the ACL). It held that Google did not author the sponsored links; it merely published or displayed, without adoption or endorsement, misleading claims made by advertisers.

Case law: [High Court of Australia - \[2013\] HCA 1](#)

Media release: [Google appeal upheld](#)

Other promotional techniques

Social media and moderation

Social media refers to any internet based application that facilitates the exchange of user-generated content. Social media gives both consumers and businesses a direct way to interact with each other. A person can provide feedback, respond to articles, post images and generate other forms of content on websites.

There are no specific or different consumer laws in place for social media. The laws which prohibit businesses from making false, misleading or deceptive claims about their products or services apply to social media in the same way they apply to any other marketing channel. Don't make statements on your Facebook page or on other social media that you wouldn't make in any other type of advertising.

Related information: [Social media](#)

- **Example:** XYZ Pty Ltd tweets that they are the first Australian company to offer a 100% environmentally friendly car wash service when they have not done any research to support this. It turns out that GHI Pty Ltd has offered the same service for many years. This tweet is likely to be false, misleading or deceptive.

Businesses using social media channels like Facebook, Twitter and YouTube have a responsibility to ensure content on their page is accurate, irrespective of who put it there. You can be held responsible for posts or public comments made by others on your social media pages which are false or likely to mislead or deceive consumers.

The risks posed by social media are best dealt with through a clear and prominent moderation policy on your business' homepage. A policy provides contributors with expectations around when their posts may be moderated.

In relation to Facebook for example, businesses and 'community managers' should refrain from removing all critical comments about the business posted on their Facebook page. As an open, 2-way forum, there is an expectation that page moderators will only remove comments where necessary; for example offensive, unlawful or clearly untrue material.

To protect themselves, businesses that use social media should display their moderation policy prominently so that consumers have a clear understanding of when and why content will be moderated, whether that be through editing or by removing them.

- **Real case study:** In 2011, a court found that a company accepted responsibility for fan posts and testimonials on its social media pages when it knew about them and decided not to remove them.

Case law: [Federal Court of Australia – \[2011\] FCA 74](#)

Media release: [Firm fined for testimonials by Facebook 'fans' and tweeters](#)

- **Example:** LMN Pty Ltd and DEF Pty Ltd are market leaders in the paint industry. A customer posts on LMN's Facebook page that their paint always lasts much longer than DEF's paint. LMN is unsure if this is true, but decides not to remove the post. It turns out that LMN's paint does not last longer. LMN may be held responsible for this misleading claim.

Monitor your social media pages and remove any posts that are false, misleading or deceptive as soon as you become aware of them. The amount of time you need to spend monitoring your social media pages depends on 2 key factors: the size of your company and the number of fans or followers you have. Keep in mind that social media operates 24 hours a day, 7 days a week, and many consumers use social media outside normal business hours and on weekends.

- **Example:** OPQ Pty Ltd has 300 staff. As larger companies usually have sufficient resources and sophisticated systems, the ACCC would expect OPQ to become aware of false, misleading or deceptive posts on its Facebook page soon after they are posted and to act promptly to remove them.

- **Example:** XYZ Pty Ltd has only 10 staff but more than 50,000 Facebook fans. Given the number of people who could be misled by an incorrect post on XYZ's Facebook page, the ACCC would expect XYZ to devote adequate resources to monitoring its Facebook page and to remove false, misleading or deceptive posts soon after they are posted.

You can respond to comments instead of removing them, but where the comment is false, it is possible that your response may not be sufficient to override the false impression made by the original comment. It may be safer to simply remove it.

You should offer a refund to any customer who made the decision to purchase your product or service based on a false, misleading or deceptive claim they saw on your social media page.

Reviews and testimonials

Reviews and testimonials are popular tools used by businesses to promote their goods and services, particularly online, and can be a useful way for consumers to decide if a good or service is right for them.

Reviews and testimonials are often used in several ways:

- businesses use reviews and testimonials on their own websites or through other promotional material (for example, in a brochure or television advertisement)
- review websites (also known as review 'platforms') allow consumers to leave reviews and ratings about businesses to help other consumers differentiate between a range of similar goods or services
- reviews or opinions can be posted using social media, blogs, comment threads, and other channels of communication.

Regardless of the advertising medium, any review or testimonial should reflect the genuine views and opinions of the person that is represented to have made it. Businesses must not misrepresent consumer opinions to dishonestly promote themselves. A fake review or testimonial is one which does not reflect the genuinely held opinion of the author. Using false or misleading reviews or testimonials in any advertising medium will risk contravening the ACL.

► **Example:** XYZ.com.au sells vacuum cleaners online. It wants to display testimonials on its website attesting to the quality of the product, but it doesn't have many existing customer reviews to use. XYZ.com.au decides to create a few positive testimonials to post on its website and pretends they have been written by customers.

This is misleading or deceptive conduct because the reviews are not genuine customer reviews.

► **Real case study:** One solar panel company published written testimonials on its website and another published video testimonials on YouTube that were not made by genuine customers of the companies. The Federal Court ordered payment of penalties of \$125,000 for publishing fake testimonials and also for making false or misleading representations about the country of origin of the solar panels they supplied.

Case law: [Federal Court of Australia - \[2014\] FCA 6](#)

Media release: [\\$145,000 penalty for fake testimonials and false solar energy country of origin representations](#)

Businesses may be engaging in misleading or deceptive conduct if they:

- use fake reviews, including as a form of false advertising or to damage the reputation of a competitor
- use tactics to influence a consumer to provide a positive review or refrain from a negative review
- selectively remove or edit reviews, particularly negative reviews, for commercial or promotional reasons.

Businesses should check reviews and testimonials carefully and implement good record keeping practices to ensure they are able to show that reviews and testimonials are honest and accurate.

Online review platforms

Online reviews are increasingly being relied upon by consumers as a low cost means of making more informed purchasing decisions. Online reviews can cover both online businesses and traditional bricks and mortar businesses.

As noted above, review websites which allow consumers to leave reviews and ratings about businesses are also known as review 'platforms'. Review platforms generally publish reviews on their own site. Sometimes review platforms are engaged to collect and publish reviews on another's site.

Just as for other advertising mediums, fake online reviews are in breach of the ACL. Businesses or review platforms must not post or publish misleading reviews. Businesses must not write or commission reviews about their own business or a competitor's business which are misleading.

It should also be remembered that omitting negative reviews can be just as misleading as posting fake reviews. Businesses seeking to avoid the risk of misleading consumers should also not engage a review platform to selectively remove or edit negative reviews.

► **Example:** WXY.com.au is a marketing firm that, for a fee, offers to improve the ranking of businesses on review websites. WXY.com.au creates some fake positive reviews and posts them on review websites, securing a more favourable rating for the paying business.

The marketing firm's conduct would breach the ACL because it has misrepresented the reviews to be genuine consumer feedback. The paying business may also have breached the ACL by being involved in the marketing firm's conduct.

► **Real case study:** A removalist created a review website, www.movingreview.com.au, and used fake testimonials posed as genuine consumer testimonials – fake positive testimonials about its own services and fake negative testimonials about the services of its competitors. The removalist also wrote fake testimonials posed as genuine consumer testimonials on third party review websites.

The removalist paid a \$6600 infringement notice and provided a court enforceable undertaking.

Related s. 87B undertaking: [2011 ss. 18, 29\(1\)\(f\) & 29\(1\)\(e\) undertaking](#)

Media release: [ACCC: Removalist admits publishing false testimonials](#)

Related information: [Managing online reviews](#)

Related publication: [Online reviews – a guide for business and review platforms](#)

Qualifications and exclusionary clauses

Businesses sometimes qualify claims or include exclusionary clauses in their advertisements. When using these clauses, businesses should ensure that the limitations they place are legal.

Whether or not something misleads an audience depends on the overall impression created. The exclusions should be considered together with the main offer and what is contained in the headline. The customer is not required to exhaustively search for qualifications and exclusions. The advertiser must clearly direct the consumer's attention to the most significant terms and conditions so that they can make an informed judgment about whether to make a purchase.

► **Example:** A national department store runs a series of advertisements in newspapers and on television about a sale. The television advertisements prominently state that discounts will apply to all clothing. Another series of television advertisements states that discounts will apply to all homewares. In fine print both ads exclude certain brands of clothing and homewares. Related newspaper advertisements do not make any reference to the exclusion of certain brands. A failure to clearly specify the exclusions is likely to mislead customers and therefore breach the ACL.

Offers with disclaimers and fine print

It is common to see advertisements with limitations or disclaimers using an asterisk (*), 'conditions apply' or other requirements to limit the audience's expectations. Fine print is often used in advertisements, contracts, labelling and signs.

These qualifications usually appear close to the lead selling point. If an asterisk appears near the word 'free', for example, a business may be trying to trade on positive reactions to the selling point, while trying to keep within the law by putting the conditions in the fine print. This may not protect that business from breaching the ACL.

The main selling point used for a product or service may make such a strong impression that no disclaimer can dispel it. An advertiser must not make the real terms and conditions of the offer unclear or unreadable by:

- placing text in obscure locations
- using text that is too small
- flashing disclaimers on screen for only a moment
- using voice overs that are too quick or too quiet.

The type and context of the advertisement is relevant as well. For example, it will be harder to ensure that small print conveys the real terms of the offer on a billboard on a highway that cars pass at 100 kilometres per hour, as compared to small print in a newspaper advertisement.

► **Example:** A gardening service offers a special lawn-mowing deal – after 4 paid services, the fifth lawn mowing is half-price. The offer is made through a series of radio advertising segments. At the end of the ad, there is a quick mention that 'terms and conditions apply' without going into further detail. The terms and conditions are in fact quite onerous, requiring the customer to live in a 2 kilometre radius of the business, be a pensioner and applies to lawn mowing on Monday mornings only. The failure to clarify or explain important elements of the offer is likely to mislead customers and therefore breach the ACL.

Claims about the future

A business that makes a claim about future matters (including predictions or projections) must have reasonable grounds for doing so at the time of making the claims. If it does not then the business can be guilty of misleading or deceptive conduct.

It is the responsibility of the business that made the claim to show that it had reasonable grounds to make the statement. It is important that you consider, or adequately address, the range of uncertainties and variables involved when making claims about the future.

► **Example:** A real estate agent claims that a golf course will be developed in the area within the next year as a major selling point to the properties sold. The agent continues to make these claims despite knowing there are no plans to develop a golf course. The agent is misleading potential purchasers by suggesting there are such plans when the agent has no reasonable grounds to do so.

Asserting right to payment and unsolicited supplies

'Unsolicited supplies' are goods or services supplied to someone who has not requested them. Under the ACL it is illegal to request payment for goods or services that the consumer has not agreed to buy.

You must not issue an invoice that states an amount to be paid for unsolicited goods or services unless you reasonably believe you have a right to be paid or the invoice contains a prominent warning including the text 'This is not a bill. You are not required to pay money'. In a dispute, if you are demanding payment, you must prove your legitimate right.

Some businesses may try to place consumers (or other businesses) in a position where they will either:

- inadvertently pay for unsolicited goods or services
- pay for them as a way out of an unpleasant situation.

Such conduct may constitute a contravention of the ACL.

- **Example:** A customer goes to a hairdresser for a haircut and blow dry and is quoted \$70. While washing her hair the hairdresser gives her a conditioning treatment that she did not ask for. She is later charged \$100 for the haircut – \$70 for the cut and blow dry, plus an extra \$30 for the conditioning treatment. This is a contravention by the hairdresser to which a pecuniary penalty applies and the customer is not legally required to pay the additional \$30.

Related information: [Receiving things you didn't ask for](#)
Legislation: [Australian Consumer Law Part 3-1 Division 2](#)

Selling techniques

Referral selling

It is common for a business to seek to persuade a consumer to buy goods or services by promising benefits if they help the business supply goods or services to other consumers. The ACL makes such a practice illegal if receipt of the benefit (for example, a rebate or commission) is dependent on the other consumers also acquiring goods or services. The consumer may never receive the benefit in these circumstances, which is why the practice is illegal.

- **Example:** A sales assistant offers a customer 10 free DVDs to go with their new plasma TV on the condition that they give the business the names of 5 of their friends and that these friends all buy plasma TVs from the business. This type of offer is illegal.

It is not referral selling for a supplier to promise a benefit for simply providing the names of consumers.

Legislation: [Australian Consumer Law section 49](#)

Wrongly accepting payment

A business should not accept payment for goods or services if:

- it does not intend to supply the goods or services at all
- it intends to supply materially different goods or services
- it should have known that it could not provide the goods or services within the specified time or a reasonable time.

- **Example:** A company sells mobile phone plans and accepts payment for mobile telephone services despite knowing it is not able to supply the services as the telecommunications carrier has little or no mobile coverage in the customer's area. This is likely to be a breach of the ACL.

If you do accept payment in advance, you must supply the goods or services within the time you have specified, or within a reasonable time, if no time is specified.

Related information: [Unfair business practices](#)
Legislation: *Australian Consumer Law section 36*

Lay-by sales

An agreement is considered to be a lay-by agreement if it is between a supplier and a consumer, where:

- the consumer does not receive the goods until the total price has been paid
- the price is paid in at least 3 instalments or in 2 instalments if the agreement specifies that it is a lay-by.

Lay-by agreements must be in writing and a copy given to the consumer.

Agreements must also be expressed in plain language, be legible and presented clearly. A consumer can cancel a lay-by agreement but may have to pay a reasonable termination charge. This termination charge must be specified in the agreement.

► **Example:** A customer orders a Christmas hamper in advance and agrees to make regular monthly instalments. This is a lay-by agreement and the supplier must ensure they have met all the lay-by requirements, including providing an agreement in writing to the customer specifying all the terms and conditions and any termination charges that may apply.

Related information: [Lay-by agreements](#)

Legislation: [Australian Consumer Law Part 3-2 Division 3](#)

Online group buying

Online 'daily deals' and group buying websites are channels for consumers to buy goods or services at discount prices. Common complaints about these channels include non-supply and incomplete supply of services, and difficulty in booking services and redeeming vouchers before they expire.

Whether you are providing the platform or the product, the basic principle is that consumers should 'get what they pay for'.

You should:

- consider the potential demand created by advertising 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 your regular and new customers
- ensure that you can deliver services as advertised and not make any false or misleading claims about the services
- ensure that any terms and conditions of sale are fair and clearly expressed
- ensure any price representations are accurate, in particular, any 'was/now' 2-price claims used to promote the product or service.

Things that must be made clear include:

- exactly what goods and/or services are being offered and what is not included
- you must state the total price – including any additional compulsory quantifiable charges – see 'Component pricing'
- all the terms and conditions – such as expiry dates on vouchers and any 'black-out' periods (times or circumstances where the offer is not available – for example, particular days of the week)
- what remedies will be available if there are problems and who will be responsible for providing them.

The group buying platforms and the merchants offering the products and services must not 'oversell' vouchers – that is, sell more than the merchant can honour.

► **Example:** A group buying platform sells vouchers for customers to get 2 bunches of flowers for the price of one at a florist. The site specifies a time limit for redeeming the vouchers but does not indicate any limit on how many vouchers the florist will honour. The florist cannot keep up with a late rush of demand in the last days of the validity period and refuses to honour a number of vouchers. The group buying platform, which has the contract with the consumer, in addition to the merchant, is responsible for providing a remedy under the Act which, amongst other remedies, may include a refund.

Related information: [Online group buying](#)

Marketing claims that require extra care – premium and credence claims



Some marketing claims require extra care and thought, such as ‘premium’ claims and those known as ‘credence’ claims – where the consumer cannot independently verify the claims for themselves and must trust the seller. An example of a credence claim is a claim that a product is ‘environmentally friendly’.

Health claims and other benefits

Advertisements for health and medical services, and the benefits they provide, can have a powerful influence on consumers. It is essential that businesses selling health and medical products and services provide consumers with accurate and truthful information so they can make informed decisions.

- **Real case study:** A business manufactured and sold wristbands that it claimed improved balance, strength and flexibility. It also claimed the wristband worked with the body’s natural energy field. After the ACCC expressed concern about the claims, the manufacturer admitted there was no scientific evidence and therefore no reasonable grounds for making the representations.

The business offered refunds to consumers and provided a court enforceable undertaking to the ACCC that it would publish corrective advertising, remove misleading representations from its website and not make claims about its products that are not supported by independent testing.

Related s. 87B undertaking: [2010 s.52 undertaking](#)

Media release: [Power Balance admits no reasonable basis for wristband claims, consumers offered refunds](#)

- **Real case study:** An allergy treatment provider claimed that it could identify and cure or eliminate a person's allergies or allergic reactions. The company could not do this.

The Federal Court found that the company had engaged in false, misleading or deceptive conduct and that its director was knowingly concerned in or a party to the contraventions.

Case law: [Federal Court of Australia - \[2009\] FCA 960](#)

Media release: [Allergy treatment declared misleading](#)

Premium claims

Businesses often make claims about their products in an attempt to obtain a selling advantage. 'Premium claims' is a broad term used to describe a claim that gives the impression that a product, or one of its attributes, has some kind of added benefit when compared to similar products and services. These claims go beyond generic descriptions of products.

Claims may suggest a product is superior to others in its class ('extra virgin olive oil') or offers a nutritional benefit ('no added colours or preservatives'). The premium claim may also promote a product as being of a perceived quality based on its country of origin ('Swiss chocolate', 'Belgian beer' or 'German engineered').

Businesses commonly use the word 'free' in making 'premium claims' (e.g. 'free from additives'). The word 'free' is powerful and absolute. If the product does in fact contain the thing that it claims to be 'free from', the seller should consider a different claim that accurately describes the product. Food labelled as 'lactose free' should be 100% free of lactose. For environmental-benefit claims, such as '100% recyclable', see Environmental and organic claims.

The Act is complemented by Standard 1.2.7 of the Australia New Zealand Food Standards Code which regulates what nutritional and health claims can be made about certain foods.

- **Real case study:** A company paid 2 infringement notices totaling \$13,200 for labeling products as 'extra virgin olive oil' that ACCC testing indicated were not of that kind.

Media release: [Olive oil producer pays infringement notices for extra virgin claims](#)

Related information: [Olive oil](#)

Premium claims may influence consumers' purchasing decisions if they give the impression that the products are a better choice than those without the claimed added benefit. As consumers are often unable to assess the accuracy of premium claims, you must ensure that the claims you make can be substantiated.

Animal welfare claims

Free range

Free range claims are used to market animal products, such as eggs and meat, that have been farmed in an open range outdoor environment. Free range claims appeal to consumers' personal values and can guide purchasing decisions, as well as attract a premium price.

Businesses must not use free range claims unless those claims are accurate.

Businesses should be careful about what impression may be conveyed by any pictorial representations they use. If a business uses pictorial representations that give the impression that its animals are 'free to roam' or raised outside, when this is not the case, the pictorial representation may be misleading.

- **Real case study:** The ACCC took action against a duck meat producer in relation to false and misleading statements that its duck meat products were open range when the ducks were raised solely in indoor sheds. The producer was found to have made claims on its packaging, website, delivery trucks, signage and merchandise through written and pictorial representations. The producer was ordered to pay costs and penalties of \$375,000.

Case law: [Federal Court of Australia – \[2013\] FCA 570](#)

Media release: [Duck meat producer to pay \\$400,000 arising from false, misleading and deceptive conduct](#)

- **Real case study:** Two businesses in the chicken meat processing and supplying industry made false or misleading claims in breach of the ACL by describing on product packaging and in advertising that its meat chickens were ‘free to roam in large barns’ when this was not the case.

The Federal Court ordered the 2 companies to pay a total of \$400,000 in civil pecuniary penalties.

Case law: [Federal Court of Australia – \[2012\] FCA 19](#), [\[2013\] FCA 665](#) and [\[2013\] FCA 1109](#).

Media release: [Court orders chicken companies to pay \\$400,000 for ‘free to roam’ misleading claims](#)

- **Real case study:** The Federal Court found that a duck meat supplier engaged in misleading or deceptive conduct and made false claims by using words on its packaging, website and brochures that its ducks were ‘grown and grain fed in the spacious Victorian Wimmera Wheatlands’ and/or ‘range reared and grain fed’.

The ACCC argued that these descriptions represented that the ducks, amongst other things, spend a substantial amount of time outdoors when this was not the case.

The company was ordered to pay a penalty of \$360,000 and publish corrective advertising.

Case law: [Federal Court of Australia – \[2013\] FCA 1136](#)

Media release: [Court orders duck meat supplier to pay \\$360,000 for misleading claims](#)

Not tested on animals

Some businesses claim their product has not been tested on animals. These claims can be in the form of pictorial representations (such as an animal with a prohibited symbol) or various phrases such as ‘not tested on animals’ or ‘cruelty free’.

Whether any specific claim of this nature is misleading or deceptive will always depend on the context and how the claim is made.

Businesses should make sure their claims are clear and accurate so that consumers have the ability to make an informed decision about a product.

Businesses should take care when making general claims about their position on animal testing, as this may give consumers an incorrect impression about whether any of the business’ specific products are tested on animals.

For example, claims such as ‘against animal testing’ may be too vague, as it doesn’t clearly communicate to the consumer whether the specific product has been tested on animals. Similarly, claims such as ‘not tested on animals unless required by law’, when the business also sells its products in countries that do require animal testing, may also be unclear or misleading to a consumer.

Businesses that choose to make claims about animal testing should therefore ensure that the claims are as clear and accurate as possible and do not constitute misleading or deceptive conduct or false claims.

Environmental and organic claims

Environmental claims

If you wish to make environmental claims about your business or your product, they should be honest, accurate and able to be substantiated. You should clearly explain, in simple language, the significance of the benefit to the environment.

► **Real case study:** A whitegoods manufacturer provided a court-enforceable undertaking following concerns that it may have misrepresented the energy savings of certain of its washing machines compared with conventional washing machines.

Related s. 87B undertaking: [2013 s87B undertaking](#)

Media release: [Whitegoods manufacturer provides ACCC with undertaking over energy savings claims](#)

Terms such as 'green', 'environmentally safe' and 'fully recycled' are broad terms that may have more than one meaning. For example, the statement 'safe for the environment' could have many meanings depending on the audience – some may believe this means your product is biodegradable or others may infer that it contains non-toxic ingredients. If a consumer's understanding, inferred from the terms used, conflicts with the facts then they may be misled. To avoid misleading consumers, make sure that you explicitly identify and accurately convey any 'green' attributes.

Related publication: [Green marketing and the Australian Consumer Law](#)

► **Real case study:** A manufacturer of plastic bags heavily promoted their bags as biodegradable and therefore environmentally friendly. However, the company could not substantiate these claims.

The ACCC took action against the company and the court declared that it had engaged in false or misleading conduct, misrepresented the benefits and performance characteristics of the bags and misled the public on the nature and characteristics of the bags.

Case law: [Federal Court of Australia, South Australia Registry – SAD92/2010](#)

Media release: [Misleading conduct in relation to plastic bags](#)

Related publication: [News for business – Biodegradable, degradable and recyclable claims on plastic bags](#)

Organic claims

An organic claim is any claim that describes a product, or the ingredients used to make the product, as 'organic'. For example, product labels or marketing materials may claim a product is '100% organic', 'made using organic ingredients' or 'certified organic'. The word 'organic' in the context of food and drink refers to agricultural products that have been farmed according to certain practices.

Consumers cannot easily verify for themselves whether a product is organic and should be able to trust that any 'organic' claim is accurate. While organic certification is not legally required for a product supplied in Australia to be described as organic, businesses must be able to substantiate any such claims.

There are several Australian standards that relate to organic or biodynamic claims. For example the *Australian Standard (AS) 6000–2015 Organic and biodynamic products* is a voluntary standard which sets out the requirements to be met by growers and manufacturers wishing to label their products as 'organic' and/or 'biodynamic' in accordance with that standard, within Australia. As it is a voluntary standard, businesses do not necessarily have to meet the requirements of this standard in order to label and sell their products as 'organic' within Australia.

Businesses may also choose to become certified by an organic certification body, with certification standards based on the National Standard for Organic and Biodynamic Produce. This standard is owned by the Department of Agriculture, Water and the Environment and is mandatory for products intended for export, where Australian producers wish to label their exported products as organic or biodynamic.

If you claim that your produce is organic in line with any standard, your produce or product must meet requirements outlined in that standard or you risk making a misleading claim.

For further information, visit the Standards Australia website www.standards.org.au or the Department of Agriculture website www.agriculture.gov.au.

All organic claims, whether they reference a standard or not, should be able to be substantiated.

- **Real case study:** An egg packer and supplier was found to have substituted and sold non-organically produced eggs as organic eggs over a 2 year period. This was a breach of the ACL.

Case law: [Federal Court of Australia - \[2007\] FCA 1246](#)

Media release: [Court finds egg packer substituted organic with conventional eggs](#)

- **Real case study:** The ACCC negotiated with 7 suppliers of bottled water to remove 'organic' claims from labelling and marketing material.

Organic standards acknowledge that water cannot be organic so any claim that water is organic would therefore be false or misleading.

Media release: [ACCC negotiates removal of misleading 'organic' water claims](#)

Related information: [Organic claims](#)

Country and place of origin claims

Country of origin claims

Country of origin claims are representations about where a product's ingredients or components came from and/or where it has undergone processing. Country of origin claims can be made using words and/or pictures. Common country of origin claims are that a product was 'made', 'produced' or 'grown' in a certain country.

If you supply food products in Australia, it is likely that you will be required to comply with the *Country of Origin Food Labelling Information Standard 2016*. The Standard was made under the ACL and requires mandatory origin labelling for certain foods.



If you believe you sell or supply food that may be covered by the Food Labelling Information Standard, you should refer to our [Country of origin food labelling guide](#) for information on how to comply.

The ACL doesn't require non-food products to carry country of origin labelling, although other laws may do so. Businesses can however, choose to make country of origin claims about these goods.

All businesses, whether they are legally required or choose to display country of origin labelling, are prohibited from making false or misleading representations or engaging in misleading or deceptive conduct about the origin of goods (both food and non-food).

If a reasonable conclusion from the use of particular words or images is that a good was grown, made or produced in a particular country when that is in fact not the case, there is a risk of breaching the ACL. It's your responsibility to ensure you have a reasonable basis for any and all claims you make about goods. It's not a defence, or an excuse, to say that you 'didn't know' your country of origin claim was misleading.

To help businesses that wish to make country of origin claims regarding their goods, the ACL provides defences ('safe harbours') for certain claims. The defences relate to claims a product:

1. was 'Made in' a particular country
2. is the 'Product of' or 'Produce of' a particular country
3. was 'Grown in' a particular country
4. carries a text and graphic country of origin label (referred to as a 'mark') under an Information Standard relating to country of origin labelling¹.

If a business is able to meet one of the 'safe harbours', then the relevant claim is automatically deemed not to be false, misleading or deceptive.

Related publications:

- For more information on country of origin food labelling, see our dedicated guide on the Information Standard: www.accc.gov.au/publications/country-of-origin-food-labelling
- For more information on the application of the safe harbour defences, see our 'Country of origin claims and the Australian Consumer Law' guide: www.accc.gov.au/publications/country-of-origin-claims-and-the-australian-consumer-law

'Made in' claims

These claims are about production process rather than content. A product with a 'Made in Australia' label will not necessarily contain Australian ingredients or components. To establish the safe harbour defence the goods must have been substantially transformed in the country of origin being claimed.

A product is 'substantially transformed' in a country if:

- it was 'grown' or 'produced' in that country or
- as a result of one or more processes in that country, the end product is **fundamentally different** in identity, nature or essential character from all of its imported ingredients or components.

It will not be sufficient for the purposes of the ACL for a product to be *somewhat different* from its imported parts. Mere changes to the form or appearance of imported goods will not satisfy the substantial transformation test.

'Product of' claims

Traders who wish to alert consumers that their good is the 'Product of' or 'Produce of' a country can establish a safe harbour defence by demonstrating that each significant component or ingredient of the goods originated in the country, and all, or virtually all, of the production processes took place in the country.

When determining whether something is a significant ingredient or component, businesses should consider the importance of the ingredient or component to the nature or function of the product. An ingredient or component does not have to be a certain percentage to be 'significant'.

'Grown in' claims

To establish the 'Grown in' safe harbour defence, a business would need to demonstrate that each significant ingredient or significant component was grown in the country of the claim and all, or virtually all, of the production or manufacturing processes happened in that country.

¹ To date, the *Country of Origin Food Labelling Information Standard 2016* is the only relevant Information Standard that has been made.

- **Real case study:** The Federal Court ordered a Queensland retailer to pay \$55,000 in penalties after it admitted it made false or misleading claims that sheepskin and wool bedding products:
- were made in Australia when they were not made in Australia
 - contained 100% sheep wool when the products were made of a blend of wool and polyester
 - contained 100% alpaca wool when the products only contained up to 20% alpaca wool.

Case law: [Federal Court of Australia - \[2012\] FCA 1123](#)

Media release: [Gold Coast retailer pays penalty for false or misleading Australian made and 100% wool claims](#)

Providing additional information

A business may choose to provide additional information and make other claims about a product on its packaging. This could include a breakdown of where individual ingredients or components were grown or produced, a non country place of origin claim (e.g. 'Made in Byron Bay') or a claim about the ownership of the business that made it (e.g. '100% Australian owned').

Businesses are entitled to make additional representations on their packaging label. However, if they do so, they must ensure the representations are accurate, truthful and compliant with the law. Furthermore, any additional claims or representations should not negate or contradict the information contained in the product's country of origin label.

- **Tip:** It is important to note that the safe harbour defences in the ACL do not apply to non-country place of origin claims.

Certification schemes

A number of schemes exist to give customers confidence in claims made about goods. Many products carry a logo or other trademark to show they are certified by a particular scheme or have a recognised standard of quality or performance. Credible schemes will provide detailed information about the basis on which they make claims, such as recognised standards.

Related information: [Certification trademarks: the role of the ACCC](#)

Pricing



Setting prices is a key element of selling goods or services. Complaints and disputes often arise when consumers agree to the cost of a product or 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, including pricing, to the consumer before they agree to purchase a product.

Component pricing

When you present prices to your consumers, you should state the total price. This applies to advertising across all mediums. If you promote a price that is only part of the total price of goods or services, you must also include the total price (as a single figure) at least as prominently as the part price. It is also illegal to represent to consumers that the price of a component or components is the total price.

The single price must include any tax, duty, fee, levy or other additional charges (e.g. GST or airport tax). It should also include any optional fees or charges pre-selected for the consumer during the purchasing process unless and until they are de-selected by the consumer.

Legislation: [Australian Consumer Law section 48](#)

► **Example:** A ticket seller prices its tickets at \$40. The seller also pre-selects \$5 ticket insurance, and imposes a mandatory booking fee of \$3 per ticket on all customers whether they purchase over the phone, internet or in person. A purchase also attracts 10% GST.

This could be advertised as:

- **\$52.80** (including \$5 ticket insurance, \$3 booking fee and 10% GST)
- $\$48 + \$4.80 \text{ GST} = \textbf{\$52.80}$
- $\$40 + \$5 \text{ ticket insurance} + \$3 \text{ booking fee} + \$4.80 \text{ GST} = \textbf{\$52.80}.$

A prominent single price is one that is clear and stands out so that it is easily noticed by a consumer. What is 'prominent' may vary on a case-by-case basis and you should consider factors such as the advertising medium, size, placement, colour and font of the price, as well as the background of the advertisement. For example, in print advertising, if a single price is smaller or in a colour that is harder to read than any component price, then this is likely to mean that it is not as prominent.

The single price requirement has some exceptions, including:

- optional charges or extras that cannot be quantified (converted into a dollar amount) at the time of making the representation
- price representations made exclusively by your business to another business (being a body corporate) as they do not involve advertising to consumers.

An optional charge or extra is something a consumer must elect to include as part of a product or service (i.e. it is not part of the standard product).

► **Real case study:** The Federal Court imposed a penalty of \$200,000 against an airline for contravening the single pricing provisions. The airline, for 10 months, did not display on its website some airfare prices inclusive of all taxes, duties, fees and other mandatory charges in a prominent way and as a single figure.

Case law: [Federal Court of Australia - \[2012\] FCA 1413](#)

Media release: [Airline pays \\$200,000 penalty for breaching the Australian Consumer Law](#)

Exemption for restaurants and cafés

The ACL provides a conditional exemption from the component pricing requirements to cafés and restaurants. Café and restaurant menu surcharges are not required to adhere to the component pricing requirements so long as certain conditions are met:

- the menu displays a surcharge for the supply of food or beverage on specified days by the restaurant or café
- the menu displays the following words ‘a surcharge of [percentage] applies on [the specified day or days]’
- the prescribed words are displayed in a transparent and prominent manner on the menu.

The term ‘transparent’ is defined under the ACL and requires information about pricing to be expressed in reasonably plain language, legible, presented clearly and readily available to the target audience. The term ‘prominent’ is not defined but has been interpreted as requiring information to be conspicuously or noticeably displayed.

Restaurants and cafés that rely on the exemption must ensure that a consumer who looks at a price on a menu can immediately determine that the price displayed is not actually the final price that they will be charged.

Restaurants and cafés should note that the exemption does not apply to any other form of advertising, which must continue to display the single price of the goods and services including any surcharge or other compulsory fee. The exemption also does not cover goods other than food or beverages, services such as corkage or cover charges that are included on a menu. A single price for these services must be displayed at all times.

The exemption also applies to room service menus and menus for banquets and other events if the food and/or beverages delivered or provided are not expected to be consumed at a later time.

Legislation: [Competition and Consumer Regulations regulation 80A](#)

Multiple pricing - price displays

Sometimes a business may have 2 different prices on display for the one item. A business that displays more than one price for the same good must either:

- sell the goods for the lowest displayed price, or
- withdraw the goods from sale until the price is corrected.

Related information: [Displaying prices](#)

Legislation: [Australian Consumer Law section 47](#)

What is a displayed price?

A displayed price is a price, or any price representation, that:

- is attached to or on the goods, anything connected or used with the goods, or anything used to display the goods
- is published online, in a catalogue, brochure, poster or flyer available to the public – when the deadline to buy at that price has not passed, the catalogue is not out of date, or the price applies only to the goods at a specific location or region, or
- appears to apply to the goods, including a partly obscured price.

What is not a displayed price?

A price will not be a displayed price when it is:

- entirely covered by another price
- a unit of measurement shown as another way of expressing the price
- not in Australian currency
- in a catalogue that is out of date, the deadline to buy at that price has passed, or a retraction has since been published (a retraction must be to a similar circulation or audience as the original advertisement).

► **Example:** A business operates 3 different stores in Brisbane. One of the stores publishes an advertisement in their local newspaper listing a number of specials. The specials are only applicable to that store. The advertisement does not say that the specials are limited. Consequently some customers shopping at the other 2 stores purchase the products expecting to pay the special price.

The business must publish a retraction advertisement in the local newspaper, withdraw the items from sale or sell them at all stores at the lower price.

Two-price comparison advertising

Businesses often make comparisons between the prices they are currently charging for a product and:

- the business' own previous pricing (including 'was/now' or 'strike through' pricing or by specifying a particular dollar amount or percentage saving)
- the 'cost' or 'wholesale' price
- a competitor's price
- the recommended retail price (RRP).

Businesses that use such statements must ensure that consumers are not misled about the savings that may be achieved.

Comparisons with own previous pricing ('was/now' or 'strike through' pricing)

The use of 'was/now' or 'strike through' price statements (such as 'was \$150/now \$100' or '\$150 now \$100') is likely to represent that consumers will save an amount (being the difference between the higher and lower price advertised) by purchasing the product during the sale period.

In determining whether the represented saving will be achieved, a critical issue is whether relevant consumers would have paid the 'was' or 'strike through' price to purchase that item for a reasonable period before the sale commenced.

What's considered to be a reasonable period in the circumstances will vary from case to case and will depend of the type of product or market involved and usual frequency of price changes for that product or in that market².

Statements such as 'was \$150/now \$100' or '\$150 now \$100' are likely to be misleading if the product had not been offered for sale at the specified 'was' or 'strike through' price of \$150 before the sale commenced, but had instead been offered for sale at a lower price. In such circumstances, a consumer would not make the represented saving of \$50 by purchasing the product for \$100 during the sale.

Offer prices are not, however, the end of the enquiry. If a business offered a product for sale at a certain price before the sale, but **rarely or never** sold the product at that price, it should still exercise caution when deciding whether to use 'was/now' or 'strike through' pricing for this product. Using the 'was' or 'strike through' price could be misleading, unless the business is able to show in some other way that the relevant consumers **would have** bought the product at the 'was' or 'strike through' price.

This could be very difficult to do, particularly if the business has an established practice of discounting its products because, intuitively, this would suggest that no or very little of its products are ever sold at the 'was' or 'strike through' price.

The business would need to point to other indicators that suggest that the relevant consumers **would have** bought products at the 'was' or 'strike through' price.

Every case will turn on its facts and it's important to bear in mind that using 'was/now' or 'strike through' pricing, where there were very little or no sales at the 'was' price, is likely to be a risky choice of advertising for businesses. It is recommended that businesses seek legal advice before doing so or alternatively, to consider some other way of promoting and selling their products.

The guidance above applies equally when a business uses a dollar or percentage amount (such as '60% off') that a consumer will save if they purchase the product at the time the representation is made.

Other price comparisons

Comparisons between the sale or retail price and the 'cost' or 'wholesale' price can be misleading if the specified 'cost' or 'wholesale' price is greater than what the business paid for the products. Consumers may be enticed to buy products if the gap between the 'cost' or 'wholesale' price and sale or retail price is perceived to be small. If this is not actually the case, consumers are likely to be misled.

Price comparisons can also be misleading where, for example, a business uses a competitor's price for identical goods, but the competitor's price is taken from a different market or geographical location.

Businesses using statements such as 'savings' or 'discounts' when comparing a sale price to the RRP of goods and services may convey to potential customers that they are getting a good deal because the sale price is less than the RRP. If the product has never been previously sold at the RRP, or the RRP does not reflect a current market price, then this type of comparison may, depending on the circumstances, misrepresent the savings that may be achieved.

It is good business practice and fair trading risk management to keep records substantiating any 2-price comparison claim, as you may be required at some later point to substantiate such a claim to an ACL regulator, including the ACCC. The ACL regulators have the power to compel you to substantiate such claims.

It is also important to remember that a 'sale' or 'discounted' price should only be available for a limited period. This is because if a reasonable amount of time has elapsed and an item is still 'on sale', the discounted price effectively becomes the new selling price, so it may be misleading or deceptive to continue to call it a 'discount' or 'sale' price.³

2 If the goods were offered for sale at the 'was' price but there were no actual sales of the goods at all, then using a 'was' price may not necessarily be considered misleading. The issue is whether the goods would have been purchased at the 'was' price before the sale period and consumers would actually achieve a saving.

3 Note in *ACCC v Jewellery Group Pty Ltd* the Federal court considered that it was appropriate to have regard to a period of 4 months before a sale. Notwithstanding this decision, every case will be different and it would be open to the Court to find in another case, depending on the particular factors, a different period.

► **Real case study:** The Federal Court and Full Federal Court on appeal found that the Jewellery Group Pty Ltd (Zamel's) made false or misleading representations by use of its 2-price advertising such as 'Was \$275 Now \$149' or '\$99 \$49.50' in catalogues and a flyer. The court relevantly found that:

- the catalogues were directed to consumers who were unaware of their ability to obtain discounts outside Zamel's sales periods
- the 2-price statements conveyed to those consumers that they would save the difference between the 2 prices if the jewellery item was purchased during the sale period when that was not the case because:
 - Zamel's had not sold the item at or near the 'was' or 'strike through' price, or had sold it in limited numbers at or near that price, in the 4 months prior to the sale period² (or a shorter period in circumstances where an item appeared in a previous sale and the period between the ending of a previous sale and the beginning of the next was less than 4 months)
 - Zamel's had a vigorous discounting policy outside sale periods which meant the 'was' or 'strike through' price was rarely paid by a Zamel's customer.

Zamel's was penalised \$250,000 and the court also ordered that Zamel's publish corrective notices in newspapers and on its website, implement a trade practices compliance program and pay the ACCC's costs.

Case law: [Federal Court of Australia - \[2012\] FCA 848](#)

Media release: [Court finds Zamel's misled consumers](#)

Case law: [Full Federal Court of Australia - \[2013\] FCAFC 144](#)

Media release: [Full Federal Court confirms false or misleading representations by Zamel's](#)

Case law: [Federal Court of Australia - \[2013\] FCA 14](#)

Media release: [Zamel's ordered to pay \\$250,000 for misleading consumers](#)

Unit pricing – a mandatory code of conduct

Unit pricing means displaying the price of a grocery item as a standard unit of measurement alongside its selling price. It allows your consumers to quickly compare the value of products of varying size and brands.

The Unit Pricing Code is mandatory for:

- retailers – who sell a minimum range of food-based groceries in premises that are used primarily for the sale of those items and has more than 1000 square metres of floor space
- online retailers – who sell the minimum range of food-based grocery items.

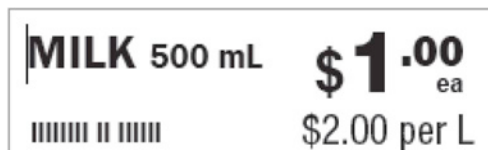
Unit pricing information must be:

- prominent – it must stand out so that it is easily seen
- proximate – it must be positioned close to the selling price for the grocery item
- legible – it must not be difficult to read
- unambiguous – the information must be accurate and its meaning clear.

Some items are exempt from the Unit Pricing Code, including books, flowers, manchester, toys and some marked-down products.

The unit pricing requirements apply to advertisements in the print media but do not apply to advertisements on television, radio or other electronic media (other than a website).

Example:



Related information: [Unit pricing code](#)

Related publication: [Unit pricing – a quick guide](#)

Related publication: [Unit pricing – a guide for grocery retailers](#)

Legislation: [Trade Practices \(Industry Codes – Unit Pricing\) Regulations 2009](#)

Receipts and itemised bills

Receipts

Businesses must always provide a receipt or proof of purchase for anything over \$75. If you don't provide one, a consumer has the right to ask for one. Consumers also have the right to request a receipt for anything under \$75 and you must provide the receipt within 7 days of being asked.

A receipt or proof of purchase must include the:

- supplier's name and ABN or ACN
- date of supply
- product or service
- price.

Itemised bills for services

Consumers have the right to ask a service provider for an itemised bill or account up to 30 days after receiving the bill. You must provide this free of charge and within 7 days of the request.

An itemised account must show:

- how the price was worked out
- if relevant, the number of labour hours and hourly rate
- if relevant, a list of materials used and the amount charged for them.

Legislation: [Australian Consumer Law section 100 and 101](#)

Unsolicited consumer agreements – door to door sales and telemarketing



The ACL includes rules on unsolicited sales practices, including door to door selling, telemarketing and other forms of direct selling.

With unsolicited door to door or telemarketing, the ACL allows a 10-day cooling off period for consumers to change their mind and cancel the contract. They can also cancel the contract within 3 or 6 months if the supplier has not met certain obligations.

The ACL also sets out the disclosure obligations when making an unsolicited agreement. The business must:

- provide a copy of the agreement to the consumer after it is signed, if the agreement is made in person
- provide a document evidencing the agreement to the consumer within 5 business days after the agreement is made (or a longer period agreed by the parties), if the agreement is made by telephone. This document can be delivered personally, by post or, with the consumer's consent, by email.

Permitted hours for telephone sales are regulated under the Do Not Call Register Act 2006 and associated telemarketing standards. To find out more about the Australian Do Not Call Register visit www.donotcall.gov.au

The ACL provides that when door knocking, sales agents cannot visit consumers:

- on Sundays or public holidays
- before 9 am or after 6 pm on weekdays
- before 9 am or after 5 pm on Saturdays.

A salesperson can visit at any time if an appointment has been made. The appointment must be arranged by telephone or in writing, not in person.

Door to door salespeople are also required to:

- clearly explain the purpose of the visit and produce identification
- explain to consumers their cooling off rights
- leave the premises upon request.

A request to leave the premises can be either verbal or written. A 'Do Not Knock' sign is a request to leave the premises. If a salesperson sees a 'Do Not Knock' sign, they should leave the premises immediately.

► **Example:** A door to door salesperson travels between suburbs selling alarm systems. The salesperson sells several alarm systems but does not provide customers with a copy of the agreement. Three days after entering into an agreement a customer wishes to cancel the agreement and is told this is not possible.

This would be a breach of the ACL as customers must receive a copy of the agreement and are entitled to a 10-day cooling off period during which they can cancel the agreement for any reason whatsoever, including that they have changed their mind.

► **Real case study:** The Federal Court ordered 2 companies, by consent, to pay a total of \$1.55 million for illegal door to door selling practices. The breaches included a failure to leave the homes of consumers when requested.

The Court's decision confirms that consumers can use a sign, such as a 'Do Not Knock' sign, to request uninvited salespeople to leave their premises and do not need to meet the salesperson face to face to ask them to leave.

Case law: [Federal Court of Australia - \[2012\] FCA 1357](#)

Media release: [Energy retailer ordered to pay \\$1.5 million for illegal door to door sales practices](#)

Case law: [Federal Court of Australia - \[2013\] FCA 1030](#)

Media release: [Court confirms salespeople must not ignore 'do not knock' signs](#)

The provisions of the ACL relating to misleading and deceptive conduct also apply to all forms of direct selling. In the case of door to door selling, success usually depends on signing up consumers on the spot. In this situation businesses must ensure their sales staff or contracted sellers do not stray from truthful claims to make a sale.

Related information: [Door to door & telemarketing sales](#)

Related publication: [Sales practices – a guide for businesses and legal practitioners](#)

Legislation: [Australian Consumer Law Part 3-1 Division 2](#)

Legislation: [Australian Consumer Law Part 3-2 Division 2](#)

Rules for gift cards

To ensure that gift card consumers are able to use their gift card and are not charged fees to access the funds on their gift card, the ACL requires that most gift cards must:

- have a minimum 3 year expiry period
- clearly show the expiry date
- not contain post-supply fees.

Three year expiry period

Most gift cards sold on or after 1 November 2019 must be redeemable for at least 3 years after the date they were supplied or purchased.

However this requirement does not apply to gift cards that are:

- able to be reloaded or topped up
- donated for promotional purposes (e.g. a business handing out \$15 vouchers to passers-by for its grand opening)
- available only for a specified period (e.g. performance of a visiting ballet company)
- supplied at a genuine discount (e.g. \$60 card for a massage valued at \$100)
- part of an employee reward scheme
- part of a customer loyalty program
- second-hand gift cards
- part of a temporary marketing promotion (e.g. customers buy a certain product from Business A, which provides a \$50 voucher to use at Business B)
- supplied to certain charities or government agencies.

Disclosure of expiry information

Gift cards supplied from 1 November 2019 must also prominently display the expiry date as either the full date, or as a period of time.

If the expiry date is shown as a period of time it must also include the date it was supplied to the customer, so the expiration date can be determined. For example: 'Gift cards expire 4 years from the issue date. Date of issue: March 2020'.

If there is no expiry date, this must be stated on the gift card.

This display requirement does not apply to gift cards that are:

- able to be reloaded or topped up
- supplied as a second-hand good
- supplied to certain charities and government agencies.

Post-supply fees

Businesses cannot charge post-supply fees for the use of gift cards supplied from 1 November 2019. A post-supply fee is a fee or charge that the gift card recipient has to pay in relation to a gift card after it has been supplied.

Businesses also cannot have terms and conditions on the use of the gift cards that allow them to charge post-supply fees.

Post-supply fees do not include fees and charges that:

- are booking fees, where those booking fees are the same, or substantially the same, as fees or charges for making a booking using a payment method other than a gift card
- are for exchanging currencies
- relate to the reissue of a gift card that has been lost, stolen or damaged
- are [payment surcharges](#).

The post-supply fees requirements do not apply to gift cards that are:

- able to be reloaded or topped up
- supplied as a second-hand good
- supplied to certain charities and government agencies.

Related information: [Rules for gift cards](#)

Legislation: [Australian Consumer Law Part 3-1 Division 3A](#), [Competition and Consumer Regulations 2010 regulations 89A – 89C](#)

Consumer guarantees



Businesses should be aware that all goods and services purchased automatically have consumer guarantees attached to them under the ACL. Consumer guarantees replace the implied conditions and warranties which previously existed in national, state and territory laws.

Consumer guarantees give consumers a basic, guaranteed level of protection for the goods and services they buy that is standard across Australia. While many businesses may offer extra warranties or promises – often called voluntary or extended warranties – in relation to their goods or services, the consumer guarantees apply regardless of any other warranty offered by a seller or manufacturer of goods or services.

What are the guarantees?

Consumers have the following guarantees in respect of goods:

- goods are of acceptable quality – that is, they are safe, durable and free from defects, are acceptable in appearance and finish and do what they are ordinarily expected to do (ACL section 54)
- goods are fit for any purpose specified by the consumer or supplier (ACL section 55)
- goods match any description given to them, either verbally or on packaging or labelling (ACL section 56)
- goods match any sample or demonstration model (ACL section 57)
- repair facilities and spare parts will be reasonably available for a reasonable time (ACL section 58)
- any express warranty given will be complied with (ACL section 59)
- they will have clear title to the goods (ACL section 51)
- they will have undisturbed possession of the goods (ACL section 52)
- there will be no undisclosed securities or charges attached to the goods (ACL section 53).

Consumer guarantees apply whether the goods are new, 'seconds' or second-hand. The consumer guarantees will also generally apply to goods purchased online.

Generally, the consumer guarantees do not apply to goods sold by auction. The only consumer guarantees that do apply to goods sold by auction (including online auctions) are that the consumer will have clear title to the goods, undisturbed possession of the goods and there will be no undisclosed securities or charges attached to the goods. The other consumer guarantees listed above do not apply.

Consumers have guarantees that services provided to them will be:

- provided with due care and skill
- fit for any purpose specified by the consumer
- provided within a reasonable time, where no time has been agreed.

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

- any type of products or services costing up to \$100,000, 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 \$100,000 that are normally used for personal, domestic or household purposes.

Consumer guarantees cannot be excluded by contract.

Where goods 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 any of:

- the replacement of the products or the supply of equivalent products
- the repair of the products
- the payment of the cost of replacing the products or acquiring equivalent products
- the payment of the cost of having the products repaired.

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.

What happens if the guarantees aren't complied with?

If any of these guarantees are not complied with, the consumer may take action to obtain a remedy from the supplier or, in some cases, the manufacturer or importer. The remedies are generally a repair, replacement, refund or having an unsatisfactory service performed again.

Generally, if a failure to comply with a guarantee is minor and can be remedied, the supplier can choose whether they wish to repair or replace goods or fix problems with services. However, when a failure to comply with a guarantee is major, the consumer can choose their preferred remedy.

A consumer may get compensation from the supplier if he or she suffered any loss or damage because of the failure and it was reasonably foreseeable that they would suffer loss or damage because of the failure.

► **Example:** A customer purchases a desk for \$800 from a furniture store and specifies that they need it to hold a computer and other electronics equipment. When the customer puts their computer on the desk the legs snap and the computer is damaged.

In this case, the consumer guarantees regarding acceptable quality and fitness for purpose have not been met, as a reasonable customer would expect an expensive desk to hold a computer without breaking. This is likely to be a major failure where the consumer would be entitled to a refund or replacement and compensation for the damage to the computer.

Legislation: [Australian Consumer Law Part 5-4](#)

Related information: [Consumers' rights & obligations](#)

Related publication: [Consumer guarantees – a guide for businesses and legal practitioners](#)

Who is liable for what?

The consumer guarantees must be honoured by 'suppliers' and 'manufacturers'.

A **supplier** is anyone – including a trader, a retailer or a service provider – who, in trade or commerce, sells, exchanges, leases, hires or provides products or services.

A **manufacturer** is a person or business that makes or puts products together or has their name on the products. It includes the importer, if the maker does not have an office in Australia.

To use the example of motor vehicles:

5. Suppliers and manufacturers guarantee that motor vehicles are of acceptable quality (ACL section 54).
6. A supplier guarantees that motor vehicles will be reasonably fit for any purpose the consumer or supplier has specified (ACL section 55).
7. Suppliers and manufacturers guarantee that their description of motor vehicles (for example, in a catalogue or television commercial) is accurate (ACL section 56).
8. A supplier guarantees that motor vehicles will match any sample or demonstration model (ACL section 57).
9. Suppliers and manufacturers guarantee that motor vehicles will satisfy any extra promises – or 'express warranties' – made about them (ACL section 59).
10. A supplier guarantees they have the right to sell the motor vehicle (clear title), unless they alerted the consumer before the sale that they had 'limited title'. Note that licensing laws in some states or territories may require motor car traders to guarantee clear title (ACL section 51).
11. A supplier guarantees 'undisturbed possession' or that no one will try to repossess or take back motor vehicles, or prevent the consumer using them, except in certain circumstances (ACL section 52).
12. A supplier guarantees that motor vehicles are free of any hidden securities or charges and will remain so, except in certain circumstances (ACL section 53).
13. Manufacturers or importers guarantee they will take reasonable steps to make spare parts and repair facilities available for a reasonable time after purchase (ACL section 58).

When there is a major failure, the consumer can either:

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

Where a consumer rejects the goods, he or she must return the rejected goods to the supplier but can ask the supplier to collect the rejected goods if the goods cannot be returned without significant cost to the consumer.

► **Example:** A customer buys a heavy steel bicycle pack-rack online from interstate, gets it in the mail and finds that one key part is missing and another broken. The supplier agrees to provide a replacement but wishes the customer to post the original item back. The postage will be about half the cost of the rack. The customer posts back the rack and the supplier sends out a new rack for free, while also refunding the customer the amount she paid to return the defective rack. The supplier has complied with their obligations under the consumer guarantees.

Sometimes motor vehicle suppliers have 'linked credit providers' – for example, a finance company to which they regularly refer people, under an agreement with that company. These credit providers can be jointly liable with the suppliers under the ACL for the loss or damage someone suffers when that supplier fails to comply with certain consumer guarantees.

Misleading consumers about their rights

Consumer guarantees for goods or services cannot be altered or waived by sellers or consumers. Any term in a contract which tries to limit or exclude consumers' rights under the consumer guarantees will be void. This means that the business cannot rely on it to avoid providing consumers with a remedy. That is, contracting out of the guarantees is not permitted.

Further, if a business attempts to restrict or limit consumers' rights under the guarantees, it is likely to also breach the provisions on misleading or deceptive conduct and false or misleading claims.

► **Example:** A computer repairer offers a computer repair service. When customers engage with the repairer, they are required to sign a form which contains the terms and conditions that stipulate that any damage caused by the repair would not be the responsibility of the repairer. This is not allowed under the ACL.

Be very careful about what you say to consumers about their refund rights. This includes the wording of any signs, advertisements or any other documents. Signs that state 'no refunds' are unlawful, because they imply it is not possible for consumers to get a refund under any circumstance – even when there is a major problem with a product. For the same reason, the following signs are also unlawful:

- 'No refund on sale items'
- 'Exchange or credit note only for return of sale items'.

However, signs that state 'no refunds will be given if you have simply changed your mind' are acceptable.

- **Real case study:** The Federal Court ordered that a manufacturer and retailer of computer hardware pay a \$3 million civil pecuniary penalty for making false or misleading representations to consumers and retailers regarding consumer guarantee rights, including that:
- the remedies available to consumers were limited to the remedies available at the business' discretion
 - consumers were required to have their product repaired multiple times before they were entitled to a replacement
 - the warranty period for products was limited to a specified express warranty period
 - consumers were required to pay for remedies outside the express warranty period
 - products purchased online could only be returned at the business' discretion.

Case law: [Federal Court of Australia – \[2013\] FCA 653](#)

Media release: [IT company to pay \\$3 million for misleading consumers and retailers](#)

[Compliant refund-policy signs](#) are available free to download from the ACCC website.

Warranties against defects

As a supplier or manufacturer, you may provide promises to consumers about what you will do if something goes wrong with a product or service. These promises are often referred to as voluntary warranties or manufacturers' warranties. Under the ACL, these are called 'warranties against defects'.

A warranty against defects is a representation communicated to a consumer that as a business if the goods or services (or part of them) are defective you will:

- repair or replace goods (or part of them)
- resupply or fix a problem with services (or part of them)
- provide compensation to the consumer.

► **Example:** A consumer buys a car that comes with a 'manufacturer's warranty'. The warranty says the manufacturer will repair the vehicle if it has a serious mechanical failure within 3 years of the purchase date. This is a 'warranty against defects' under the ACL.

A representation will only be a warranty against defects if it is made at or around the time that products or services are supplied.

To ensure consumers understand the warranty and know how to make a claim the ACL requires that all documents 'evidencing' a warranty against defects for goods or services provided to consumers must:

- be presented in a certain way
- include specific information
- include mandatory text.

A key point to remember is that a warranty against defects is provided in addition to consumer guarantees and does not limit or replace them.

The mandatory text for the supply of goods is:

Our goods come with guarantees that cannot be excluded under the ACL. You are entitled to a replacement or refund for a major failure and for compensation for any other reasonably foreseeable loss or damage. You are also entitled to have the goods repaired or replaced if goods fail to be of acceptable quality and the failure does not amount to a major failure.

The mandatory text for the supply of services is:

Our services come with guarantees that cannot be excluded under the Australian Consumer Law. For major failures with the service, you are entitled:

- to cancel your service contract with us
- to a refund for the unused portion, or to compensation for its reduced value.

You are also entitled to be compensated for any other reasonably foreseeable loss or damage.

If the failure does not amount to a major failure, you are entitled to have problems with the service rectified in a reasonable time and, if this is not done, to cancel your contract and obtain a refund for the unused portion of the contract.

The mandatory text for the combined supply of goods and services is:

Our goods and services come with guarantees that cannot be excluded under the Australian Consumer Law. For major failures with the service, you are entitled:

- to cancel your service contract with us
- to a refund for the unused portion, or to compensation for its reduced value.

You are also entitled to choose a refund or replacement for major failures with goods. If a failure with the goods or a service does not amount to a major failure, you are entitled to have the failure rectified in a reasonable time. If this is not done you are entitled to a refund for the goods and to cancel the contract for the service and obtain a refund of any unused portion. You are also entitled to be compensated for any other reasonably foreseeable loss or damage from a failure in the goods or service.

A consumer may be entitled to a remedy under the consumer guarantees after a warranty against defects period has expired. No set timeframes apply to the consumer guarantees – how long they apply depends on the nature of the good or service in question.

You must note the difference between promises made to consumers via voluntary warranties and your responsibilities under the consumer guarantees.

► **Example:** A consumer purchases a laptop computer with a written warranty against defects that states the manufacturer will replace or repair the computer if any fault arises within 12 months of purchase. If the laptop breaks down after 18 months, the manufacturer cannot automatically advise the consumer that he or she has no entitlement to a remedy as the warranty has expired. Depending on the circumstances, the consumer may still be entitled to a remedy under the consumer guarantees imposed under the ACL.

Warranties against defects may set out requirements that consumers must comply with. For example, a warranty against defects on a motor vehicle may require the consumer to ensure any servicing is carried out:

- by qualified staff
- according to the manufacturer's specification
- using appropriate quality parts where required.

If you wish to seek to restrict a customer's freedom to choose, for example, who they use as a repairer, you should get advice on the prohibitions on 'exclusive dealing' found in the Competition and Consumer Act 2010. Exclusive dealing broadly involves a trader imposing restrictions on a person's freedom to choose with whom or in what or where they deal.

Related information: [Exclusive dealing](#)

Related information: [Warranties against defects](#)

Other prohibited sales practices



Your business must not include unfair terms in its 'standard form' consumer contracts and it must not act 'unconscionably'. Harassment or coercion and pyramid selling are also illegal.

Unfair contract terms

Under the ACL, a term of a 'standard form consumer contract' has no effect at law if the term is unfair.

Standard form consumer contracts are used widely by businesses as a cost effective way to set out the key terms and conditions for providing a product or service. However, businesses need to bear in mind some key obligations when preparing standard form consumer contracts, to avoid unfair contract terms.

A court may determine that a term of a standard form consumer contract is unfair and therefore void. Importantly, the contract itself remains binding on the parties to the extent it can operate without the unfair term.

There is a 3-step test to determine whether a term is unfair. This includes an assessment of whether the term:

- would cause a significant imbalance in the parties' rights and obligations
- is reasonably necessary to protect legitimate interests of one of the parties
- would cause detriment if applied or relied on.

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

- cancel, avoid, renew or limit performance of the contract, vary the terms of the contract, or renew the contract, but not 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).

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

► **Example:** A fitness company offers 12-month gym memberships to customers who wish to join their gym. These contracts are non-negotiable and offered to every customer who wants to join. The contract stipulates that the company is able to change the weekly rates charged to members at their discretion without justifying or notifying the customers, and without an accompanying right for the customer to end the contract. Such a term is likely to be considered to be unfair and risks being declared void.

Related information: [Unfair business practices](#)

Related publication: [A guide to the unfair contract terms law](#)

Legislation: [Australian Consumer Law Part 2-3](#)

Unconscionable conduct

Conduct may be unconscionable if it is particularly harsh or oppressive. To be considered unconscionable, conduct must be more than simply unfair – it must be against conscience as judged against the norms of society. It can occur between businesses and consumers or business to business.

There are a number of factors a court will consider when assessing whether certain conduct is unconscionable:

- the relative bargaining strengths of the parties
- whether any conditions were imposed on the weaker party that were not reasonably necessary to protect the legitimate interests of the stronger party
- whether the weaker party could understand the documentation used
- the use of undue influence, pressure or unfair tactics by the stronger party
- the price, or other circumstances, under which the weaker party would be able to buy or sell equivalent goods or services
- the requirements of applicable industry codes
- the willingness of the stronger party to negotiate
- whether the stronger party has the right to unilaterally change contract terms
- the extent to which the parties acted in good faith toward each other
- any other factor indicating that the stronger party acted with little or no regard to conscience.

► **Real case study:** A mobile phone company was found to have engaged in unconscionable conduct in relation to its sales methods used to induce customers to enter into contracts, the terms of the contracts and the company's enforcement of the contractual terms.

The company relied upon and enforced a 'day cap' clause in its mobile contract, which in some cases only allowed a customer to make an approximately 2 minute call per day before being charged fees in excess of the monthly contract charge. The structure of the contracts meant that customers were very likely to incur high excess usage charges as the operation of this term was not adequately disclosed.

The Federal Court also found that a \$75 cooling off fee that customers were required to pay, as well as a \$195 charge imposed for returning a damaged phone, even if only the box was damaged were also unconscionable.

The company was ordered to pay penalties totalling \$455,000, and its 2 directors were ordered to pay penalties and were disqualified from managing a corporation for periods of 3 and 2 and a half years respectively.

Case law: [Federal Court of Australia – \[2013\] FCA 350](#)

Media release: [Court finds mobile phone company acted unconscionably](#)

Case law: [Federal Court of Australia – \[2013\] FCA 1267](#)

Media release: [Court orders mobile phone company to pay \\$455,000 for engaging in false, misleading and unconscionable conduct](#)

Related information: [Unconscionable conduct](#)

Related publication: [Business snapshot: unconscionable conduct](#)

Legislation: [Australian Consumer Law Part 2-2](#)

Harassment and coercion

Businesses may sometimes push consumers to agree to a purchase or encounter consumers from whom it is difficult to obtain payment. The ACL prohibits coercion, undue harassment or physical force in connection with the supply or possible supply of goods or services, or the payment for them.

Harassment means persistent disturbance or torment. Undue harassment is where the frequency, nature or content of unwelcome approaches is such that they are calculated to intimidate or demoralise, tire out or exhaust a person.

The provision is quite broad and may apply to:

- a prolonged visit by a sales representative who ignores requests to leave
- unwanted persistent telephone calls
- debt collectors who make repeated and relentless calls to a debtor about a debt
- use of particularly over-the-top methods of hard selling.

Coercion can occur in the course of aggressive selling. A seller may try to exploit known facts about, circumstances of, or statements made by a consumer, to force them to agree to a purchase.

► **Example:** A debt collector makes an excessive number of telephone calls to debtors over the course of 2 days. The tone of the calls is threatening, abusive and aggressive. The collector gives false information to debtors and others about debt recovery procedures and the consequences of non-payment. This conduct is likely to contravene the harassment provisions of the ACL.

A business is entitled to take reasonable steps to pursue a debt. In such circumstances a debtor is entitled to be treated fairly, with respect and courtesy, and not be unduly harassed or coerced.

Related publication: [Debt collection guideline for collectors and creditors](#) – ACCC/ASIC joint guide

Legislation: [Australian Consumer Law section 50](#)

Pyramid schemes

Pyramid schemes make money by recruiting people rather than by selling actual products or services, even if the scheme includes the selling of a product. These schemes work by asking new participants to make a payment, known as a 'participant payment', in order to join. New members are promised payments for recruiting other investors or new participants.

Pyramid schemes are closely related to referral selling schemes. The main difference between the 2 is that the revenue from pyramid selling schemes is based on recovering a portion of the participant payment, while referral selling usually involves the sale or resale of products or services with the promise of a commission for subsequent sales to other parties.

► **Example:** A scheme or game based on an imaginary airliner has 4 levels of players comprising the pilot, 2 co-pilots, 4 crew and 8 passengers. New players enter as passengers and pay a fee directly into a trust account. When all seats are filled the plane 'takes off', the pilot leaves with the winnings, the flight splits into 2 games, and everyone left is 'promoted'.

The reality of pyramid selling is that it tends to heavily reward the very top of the pyramid at the expense of everyone below. The vast majority who join the scheme later are led to believe that they will also benefit financially, when this is often not the case.

Legislation: [Australian Consumer Law Part 3-1 Division 3](#)

What happens if I don't comply with the Australian Consumer Law?

Consumers – or other businesses – that believe they have been misled by a business and suffered damages as a result can pursue the party who has breached the law for damages.

Just as you must adhere to the ACL, so must your competitors. As a business, you also have a right to take action against a competitor if you feel you have suffered loss or damage as a result of them breaching the ACL.

The ACCC, the state and territory consumer protection agencies and any other individual or group can take legal action against businesses for contraventions of the ACL. The ACCC's enforcement powers are extensive – for some contraventions it can seek remedies such as:

- criminal or civil pecuniary penalties to the greater of \$10 million, 3 times the value of the benefit received, or where the benefit cannot be calculated, 10% of annual turnover in the preceding 12 months for corporations
- criminal or civil pecuniary penalties of up to \$500,000 for individuals
- infringement notice penalties of up to \$133,200 for publicly listed companies, \$13,320 for corporations and up to \$2,664 for individuals
- disqualification orders
- injunctions to prevent ongoing conduct
- corrective advertising orders.

In determining whether to take action, the ACCC gives enforcement priority to matters that demonstrate one or more of a range of factors such as whether the conduct is of significant public interest or concern, is conduct resulting in a substantial consumer (including small business) detriment, is unconscionable conduct, particularly involving large national companies or traders, or is conduct demonstrating a blatant disregard for the law.

While the ACCC may not take action on all matters, many state or territory agencies are well placed to address issues relating to local advertising and selling practices. For small businesses, the Australian Small Business Commissioner or the state-based Small Business Commissioners (in some states) may be able to assist with a dispute or problem.

Related information: [ACCC Compliance and Enforcement policy](#)

Legislation: [Australian Consumer Law Chapter 5](#)

Competition and anti-competitive behaviour

Certain business practices that limit or prevent competition are against the law. If you are concerned about conduct you are considering or about the conduct of others in the marketplace, you can get information from the ACCC and advice from your professional advisors. This guide is not intended to offer comprehensive advice on competition law. However, 2 issues to note are resale price maintenance and cartels.

Resale price maintenance

Resale price maintenance (RPM) occurs if a supplier pressures a business not to sell products below a certain price.

RPM can manifest in several ways, including if the supplier makes it a condition of supply that the business must (or threatens to withdraw supply if the business does not):

- sell at a certain price
- not sell below a certain price
- only discount to an extent that is 'agreed' or not discount at all
- comply with a recommended retail price (RRP) or not price a certain percentage below it.

Ultimately, RPM can lead to higher prices paid by consumers.

Businesses must not engage in RPM and it is prohibited outright by law. RPM may be authorised in some circumstances.

It is important that suppliers do not attempt to use RPM to constrain businesses, particularly with the growth of online retailing.

► **Example:** An online retailer enters the bicycle market and prices its bicycles cheaper than its bricks and mortar competitors. The online retailer and the bricks and mortar retailers have the same supplier. Several bricks and mortar retailers complain to the supplier that the online retailer's bicycles are too cheap and threaten to stop placing orders for those products. The supplier asks the online retailer not to price below the RRP and threatens to cut supply unless the online retailer agrees. This is RPM and is prohibited under the Act.

Businesses should know their rights and be assertive if they feel a supplier is attempting to maintain certain prices for goods or services. If businesses feel they have been subjected to RPM they should contact the ACCC.

Related information: [Imposing minimum resale prices](#)

Legislation: [Competition and Consumer Act 2010 Part VIII](#)

Cartels

Businesses that make agreements with their competitors to fix prices, rig bids, share markets, restrict outputs (all 'cartel conduct') or otherwise agree to act together instead of competing with each other, are breaking the law.

Individuals found guilty of cartel conduct could face criminal or civil penalties, including up to 10 years in jails and/or fines or civil pecuniary penalties, and be disqualified from managing a corporation.

Maximum penalties for companies, per offence, are \$10 million, 3 times the value of the benefit obtained from the cartel or 10% of the previous year's turnover, whichever is greater.

Parties involved in a cartel can apply for immunity from prosecution in exchange for helping with the ACCC's investigations.

Related information: [Cartels](#)

Legislation: [Competition and Consumer Act 2010 Part IV](#)

Product safety

Under the ACL, Commonwealth, state and territory ministers can regulate consumer goods and product-related services by implementing mandatory safety standards, banning products temporarily or permanently, issuing safety warning notices or issuing a compulsory recall notice to suppliers.

As a business:

- You cannot sell banned products.
- You must ensure that your products or product-related services comply with relevant 'mandatory safety and information standards' before they are offered for sale.
- If you are aware of a death, serious injury or illness associated with a product you supply, you must report it to the ACCC within 2 days, which is known as mandatory reporting.

Businesses should also consider whether there is a need to conduct a 'voluntary' product recall if a product or service presents a safety risk or is non-compliant with a mandatory standard or ban. A voluntary recall occurs when the supplier for a consumer product initiates the recall and voluntarily takes action to remove it from distribution, sale and/or consumption.

Related information: [Product safety](#)

[Product Safety Australia website](#)

[Product Safety Recalls Australia](#)

Related publication: [Consumer Product Safety Recall Guidelines](#)

Related publication: [How to conduct a successful recall](#)

Contact details for the Australian Consumer Law Regulators

Contact: [State & territory consumer protection agencies](#)

Contact: [Industry ombudsmen & dispute resolution](#)

Related information: [Information for small business](#)

Contact details for the Small Business Commissioners

Australian Small Business and Family Enterprise Ombudsman
1300 650 460 www.asbfeo.gov.au

Victorian Small Business Commission
13 8722 www.vsbic.vic.gov.au

NSW Small Business Commissioner
1300 795 534 www.smallbusiness.nsw.gov.au

Western Australian Small Business Commissioner
Small Business Development Corporation Western Australia
13 1249 www.smallbusiness.wa.gov.au

South Australian Small Business Commissioner
1800 072 722 www.sasbc.sa.gov.au



AUSTRALIAN COMPETITION
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