

# Sales practices

A GUIDE FOR BUSINESSES AND LEGAL PRACTITIONERS

This guide was developed by:

- Access Canberra, Australian Capital Territory
- Australian Competition and Consumer Commission
- Australian Securities and Investments Commission
- Consumer Affairs Victoria
- Consumer and Business Services South Australia
- Consumer, Building and Occupational Services, Tasmania
- New South Wales Fair Trading
- Northern Territory Consumer Affairs
- Queensland Office of Fair Trading
- Western Australia Department of Commerce, Consumer Protection

#### Copyright

© Commonwealth of Australia 2016

March 2016

#### Ownership of intellectual property rights in this publication

Unless otherwise noted, copyright (and any other intellectual property rights, if any) in this publication is owned by the Commonwealth of Australia (referred to below as the Commonwealth).

#### Creative Commons licence

With the exception of the Australian Consumer Law logo, photographs and images, this publication is licensed under a Creative Commons Attribution 3.0 Australia Licence.



Creative Commons Attribution 3.0 Australia Licence is a standard form license agreement that allows you to copy, distribute, transmit and adapt this publication provided that you attribute the work. A summary of the licence terms is available from [www.creativecommons.org/licenses/by/3.0/au/deed.en](http://www.creativecommons.org/licenses/by/3.0/au/deed.en). The full licence terms are available from [www.creativecommons.org/licenses/by/3.0/au/legalcode](http://www.creativecommons.org/licenses/by/3.0/au/legalcode)

The Commonwealth's preference is that you attribute this publication (and any material sourced from it) using the following wording: *Source: Licensed from the Commonwealth of Australia under a Creative Commons Attribution 3.0 Australia Licence. The Commonwealth of Australia does not necessarily endorse the content of this publication.*

Inquiries regarding this licence and any other use of this document are welcome at:

Manager  
Communications  
The Treasury  
Langton Crescent Parkes ACT 2600  
Email: [medialiaison@treasury.gov.au](mailto:medialiaison@treasury.gov.au)

# Contents

<b>Introduction</b>	<b>5</b>
About this guide . . . . .	5
About the other guides . . . . .	5
About the Australian Consumer Law . . . . .	6
<b>Unsolicited supplies</b>	<b>7</b>
Summary . . . . .	7
What are unsolicited supplies?. . . . .	7
Requesting payment for unsolicited goods or services . . . . .	8
Must someone who receives unsolicited goods or services pay? . . . . .	8
Requesting payment for unauthorised entries or advertisements. . . . .	9
Unsolicited credit or debit cards . . . . .	10
Penalties . . . . .	10
<b>Unsolicited consumer agreements</b>	<b>11</b>
Summary . . . . .	11
What is an unsolicited consumer agreement? . . . . .	11
Kiosks and stalls . . . . .	12
Fundraising . . . . .	12
Permitted hours for contacting consumers . . . . .	13
Suppliers' obligations when calling on consumers . . . . .	13
Requirements for face-to-face and telemarketing approaches . . . . .	14
When unsolicited consumer agreement laws do not apply . . . . .	19
Supplier responsibility for failing to comply . . . . .	19
Penalties . . . . .	19
<b>Pyramid schemes</b>	<b>20</b>
Summary . . . . .	20
What is a pyramid scheme? . . . . .	20
Marketing scheme or pyramid scheme? . . . . .	20
Penalties . . . . .	21
<b>Pricing</b>	<b>22</b>
Summary . . . . .	22
Multiple pricing . . . . .	22
Penalties—displayed price . . . . .	22
Component pricing . . . . .	22
Penalties—component pricing . . . . .	24
<b>Lay-by agreements</b>	<b>25</b>
Summary . . . . .	25
What is a lay-by agreement?. . . . .	25
Requirements for lay-by agreements . . . . .	25
When a consumer cancels a lay-by agreement . . . . .	25
Termination of lay-by agreements by suppliers. . . . .	26
Penalties . . . . .	26

<b>Referral selling</b>	<b>27</b>
Summary . . . . .	27
What is referral selling? . . . . .	27
Penalties . . . . .	27
<b>Harassment and coercion</b>	<b>28</b>
Summary . . . . .	28
What is harassment and coercion? . . . . .	28
Penalties . . . . .	29
<b>‘Proof of transaction’ and itemised bills</b>	<b>30</b>
Summary . . . . .	30
What is proof of transaction? . . . . .	30
Supplier must provide proof of transaction . . . . .	30
Itemised bills for services . . . . .	30
Penalties . . . . .	30
<b>Warranties, refunds, repairs– ‘consumer guarantees’</b>	<b>31</b>
<b>Glossary and abbreviations</b>	<b>32</b>
<b>Contacts</b>	<b>34</b>

# Introduction

## About this guide

This is one of six guides to the Australian Consumer Law (ACL), developed by Australia's consumer protection agencies to help businesses understand their responsibilities under the law.

This guide will help businesses and legal practitioners understand the sales practices requirements of the ACL.

It covers unsolicited supplies, unsolicited consumer agreements (door-to-door and telemarketing), lay-by agreements, pricing, proof of transaction and itemised bills, referral selling, pyramid schemes, harassment and coercion.

These guides:

- explain the law in simple language but are no substitute for the legislation
- give general information and examples—not legal advice or a definitive list of situations where the law applies
- include examples of the ACL's application by Australian Consumer Protection regulators and by Australian courts.

## About the other guides

Other guides in this series cover:

- **Consumer guarantees**  
Covers supplier, manufacturer and importer responsibilities when there is a problem with goods and services; refunds, replacements, repairs and other remedies.
- **Avoiding unfair business practices**  
Covers misleading or deceptive conduct, unconscionable conduct, country of origin, false and misleading representations.
- **Unfair contract terms**  
Covers what an unfair term is and which contracts are affected by the law.
- **Compliance and enforcement**  
Covers how regulators enforce the ACL.
- **Consumer product safety**  
Covers safety standards, recalls, bans, safety warning notices and mandatory reporting requirements.

Further information and copies of these and other publications are available from the Australian Consumer Law website [www.consumerlaw.gov.au](http://www.consumerlaw.gov.au)

## About the Australian Consumer Law

The ACL aims to protect consumers and ensure fair trading in Australia.

The ACL came into force on 1 January 2011 and replaced the *Trade Practices Act 1974* and previous Commonwealth, state and territory consumer protection legislation. It is contained in Schedule 2 to the *Competition and Consumer Act 2010* (Cth) (CCA) and is applied as a law of each state and territory by state or territory legislation.

Under the ACL, consumers have the same protections, and businesses have the same obligations and responsibilities, across Australia.

Australian courts and tribunals (including those of the states and territories) can enforce the ACL.

The regulators of the ACL are:

- the Australian Competition and Consumer Commission (ACCC), in respect of conduct engaged in by corporations, and conduct involving the use of postal, telephonic and internet services; and
- state and territory consumer protection agencies, in respect of conduct engaged in by persons carrying on a business in, or connected with, the respective state or territory.

Some of the consumer protection provisions in the ACL are mirrored in the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act) in relation to financial products and services. The Australian Securities and Investments Commission (ASIC) is responsible for administering and enforcing the ASIC Act.

# Unsolicited supplies

## Summary

It is unlawful to:

- request payment for unsolicited goods or services
- request payment for unauthorised entries or advertisements
- send unsolicited credit cards or debit cards.

A business or person must not issue an invoice that states an amount to be paid for unsolicited goods or services, unless:

- they reasonably believe they have a right to be paid; or
- the invoice contains the warning required by law, which must be the most prominent text in the document: **'This is not a bill. You are not required to pay any money'**.

The maximum civil and criminal penalties for requesting such payment or failing to include the warning notice on an invoice are:

- \$1.1 million for a body corporate; and
- \$220,000 for an individual.

**ACL reference: sections 39–43, 161–163**

## What are unsolicited supplies?

'Unsolicited supplies' are goods or services supplied to someone who has not requested to buy or receive them.

Unless a business or person reasonably believes that they have the right to do so, it is unlawful to:

- request payment for unsolicited goods or services, such as books, magazines or DVDs posted to someone who did not request the items
- request payment for unauthorised entries or advertisements, such as sending a bill to a business for an advertisement about its services, if that business did not authorise its publication.

It is also unlawful to send unsolicited credit cards or debit cards.

However, if there is no expectation of payment it is lawful to supply unsolicited goods or services, such as sending a free product sample.

It is unlawful to request payment for unsolicited goods or services.

## Requesting payment for unsolicited goods or services

A business or person does not have a right to be paid just because they have sent goods or provided services to someone.

A business or person must not issue an invoice that states an amount to be paid for unsolicited goods or services, unless:

- they reasonably believe they have a right to be paid; or
- the invoice contains the warning required by the ACL Regulations: **'This is not a bill. You are not required to pay any money'**. This warning must be the most prominent text in the document.

In a dispute, the business or person demanding payment must prove they have a legitimate right to it.

### CASE STUDY

A business and its sole director were ordered to pay penalties of \$50,000 each for a number of contraventions, including asserting a right to payment for unsolicited goods. The business sent demands for payments for ink cartridges, for which the recipients had never agreed to purchase, including by misrepresenting to the recipients' employees that there was an existing supply relationship.

**Legal reference: Australian Competition and Consumer Commission v Artorios Ink Co Pty Ltd (No 2) [2013] FCA 1292**

## Must someone who receives unsolicited goods or services pay?

Someone who receives unsolicited goods or services does not have to pay for those goods or services. They also do not have to pay for any loss or damage to the goods, or due to supply of the service.

However, they may have to pay compensation if they wilfully and unlawfully damage unsolicited goods within three months of receiving them, called the recovery period. The supplier can recover the goods within this time.

The recovery period reduces to one month when the recipient gives written notice to the supplier, which must state:

- the recipient's name and address
- that the goods are unsolicited and the recipient does not want them; and
- where the supplier should collect the items.

The recipient can keep unsolicited goods not collected within the recovery period without any obligation to pay. The supplier cannot take action to recover the uncollected goods.

---

### EXAMPLE

- A tradesperson is hired to replace rotting timber beams supporting a pergola. The tradesperson notices the shed door is also rotting, so replaces it and adds \$250 to the bill. Replacing the shed door was outside the scope of their agreement and unsolicited. The consumer does not have to pay the extra \$250.
  - A packet of Christmas cards arrives in the mailbox of a consumer, who has not asked for them. The envelope is addressed to her and includes a letter that says she can either pay for them or return the packet by post. She does not have to pay for the cards. She also does not have to return them. She needs to keep the cards safe and can give written notice to the sender explaining that the goods were unsolicited and the address where they can be collected. If they are not collected after one month, the cards become hers. If the consumer does not send a notice, the goods become hers after three months if they are not collected by the sender in that time.
-



However, the recipient cannot:

- keep goods they knew were not intended for them—for instance, if the package was clearly addressed to another person
- unreasonably refuse to allow the supplier to collect the goods during the recovery period.

## Requesting payment for unauthorised entries or advertisements

It is unlawful to ask for payment for an entry or advertisement relating to a person or their profession, business, trade or occupation, that was not first authorised by the person or business concerned.

An advertisement or entry is authorised when the person, business or their nominee has signed a document that:

- authorises the entry or advertisement
- specifies the details of the entry or advertisement, the name and address of the person publishing the entry, and the charges that will apply; and
- was provided before payment was requested.

It is possible to send an invoice for an unauthorised entry or advertisement if it contains the warning statement required by the ACL regulations, which must be the most prominent text in the document: **'This is not a bill. You are not required to pay any money'**.

In a dispute, the business or person demanding payment must prove it was reasonable to believe the entry or advertisement was authorised.

## CASE STUDIES

Three men phoned businesses and pressured them to pay for advertising they had not ordered. The men led businesses to believe the advertisements would run in publications supporting worthy causes in the community, but no proceeds went to assist the community or to community-based activities. Businesses were threatened with legal action if they did not pay, and consequently many businesses did pay.

In March 2007, the Federal Court of Australia sentenced the men, who had ignored a court order to stop running an invoice scam, to six months' imprisonment suspended for two years, permanently restrained them from selling advertising in any publication or online, and ordered that they pay costs of \$180,000. The Federal Court order prevents the men involved from engaging in similar operations anywhere in Australia.

**Legal reference: Bauer v Power Pacific International Media Pty Ltd [2007] FCA 349**

A company which purported to sell advertising operated a business where its sales staff made unsolicited phone calls to Australian small businesses about advertising in its publications. The sales staff led the businesses to believe that the publications were widely distributed and had an affiliation with charities and community groups, which was false. After the phone call, even if the business did not agree to take out an advertisement, the company posted a copy of the advertisement as published in their publication with an invoice seeking payment. If the business did not pay the amount outlined in the invoice, the company made follow-up calls demanding payment for the unwanted and unordered advertising.

In March 2013, the Federal Court of Australia ordered the operators behind the scam (the company and two individuals) to pay a total of \$750,000 in penalties.

**Legal reference: Australian Competition and Consumer Commission v Adepto Publications Pty Ltd [2013] FCA 247**

## Unsolicited credit or debit cards

Generally, an issuer must not send a credit or debit card without written authority from the recipient.

An item is a credit card if intended to be used to obtain cash, goods or services on credit.

An item is a debit card if intended to be used to access an account held by the consumer for the purpose of withdrawing or depositing cash or obtaining goods or services.

Issuers must not send anything that could be used as a credit or debit card to someone unless:

- the recipient requested, in writing, the card from the issuer; or
- it is a replacement, renewal or substitution for a card previously sent to the person and used for the same purpose.

An issuer must not enable a credit card to also be used as debit card, or vice versa, unless the recipient has requested this in writing.

More information about unsolicited credit and debit cards is available in *Regulatory Guide 201* by ASIC at [www.asic.gov.au](http://www.asic.gov.au)

## Penalties

The maximum civil and criminal penalties for requesting payment for unsolicited goods or unauthorised advertisements, for failing to include the required warning notice on an invoice, and for sending an unsolicited debit or credit card are:

- \$1.1 million for a body corporate
- \$220,000 for an individual.

...an issuer must not send a credit or debit card without written authority from the recipient.

# Unsolicited consumer agreements

## Summary

Salespeople who make unsolicited contact with consumers in order to sell them goods or services must comply with:

- limited hours for contact with consumers
- disclosure requirements when making an agreement
- criteria for the sales agreement, including that it must be in writing
- restrictions on supplying services, supplying goods above a certain value, and on requesting payment during the cooling-off period.

Consumers have 10 business days to change their mind and cancel the contract (cooling-off period). They can also cancel the contract within three or six months if the supplier has not met certain obligations.

The *Corporations Act 2001* also prohibits unsolicited hawking of securities, certain financial products and managed investment products. More information is available from ASIC at [www.asic.gov.au](http://www.asic.gov.au)

Failing to comply with requirements for unsolicited consumer agreements can lead to maximum civil and criminal penalties of \$50,000 for a body corporate and \$10,000 for an individual.

**ACL reference: sections 69–95, 170–187**

## What is an unsolicited consumer agreement?

An agreement for the supply of goods or services is unsolicited when:

- a supplier, their salesperson or dealer telephones or approaches a consumer at a location other than the supplier's premises, without invitation from that consumer
- the agreement results from those negotiations (even if those were not the only negotiations that led to the agreement); and
- the total value of the goods or services is more than \$100, or the value was not established when the agreement was made.

For example, unsolicited consumer agreements may result from:

- door-knocking households to sell goods or services, or to ask consumers to switch to a different service provider
- telephoning consumers to sell goods or services
- approaching consumers in the common area of a shopping centre to sell goods or services.

A consumer agreement is also considered unsolicited if it is negotiated under the following circumstances:

- the consumer gave his or her contact details to a supplier for one purpose (for example, a competition entry), and the supplier contacts the consumer for another purpose (the negotiation of the sale of goods or services); or
- the consumer returns a missed call from a supplier or responds to any unsuccessful attempt by the supplier to contact the consumer.

A consumer who has invited a supplier to provide a quote for certain goods or services—for example, measuring for blinds—is not soliciting the supplier to actually sell them those goods or services. If the supplier does negotiate a sale at the time the quote is provided, this would be an unsolicited consumer agreement.

---

**EXAMPLE**

- A consumer enters a competition sponsored by a supplier. It is a condition of entry that the consumer agrees to be contacted by the supplier with information about the product. If the supplier contacts the consumer about anything other than the competition or the product, and negotiates a sale, that sale agreement is considered ‘unsolicited’.
- A supplier leaves a quote for the consumer to consider. The supplier does not initiate or negotiate an agreement with the consumer to purchase the goods or services at the time the quote is provided. The consumer approaches the supplier to accept the quote or negotiate different terms, which leads to an agreement. This is not an unsolicited consumer agreement, because the consumer initiated the contact.
- The above agreement would be unsolicited if the supplier had negotiated it with the consumer when they provided the quote.

---

In a dispute, it is up to the supplier to prove that the consumer solicited the agreement.

## Kiosks and stalls

A sale made at a kiosk or stall in a public area such as a shopping centre is unlikely to be an ‘unsolicited consumer agreement’ when:

- the kiosk or stall is the operator’s business or trade premises; and
- the salesperson remains within the kiosk or stall.

If the salesperson were to approach or intercept a consumer and negotiate a sale outside the kiosk or stall, this would be an unsolicited consumer agreement.

A kiosk or stall that is partly or fully enclosed, and subject to an ongoing lease that marks out the area allocated to the kiosk or stall operator, is more likely to be seen as business or trade premises.

A sale made at an unenclosed trestle table or temporary stand may be more likely to be an unsolicited consumer agreement.

## Fundraising

An unsolicited consumer agreement must involve a supply in trade or commerce of goods or services to a consumer. This means donations to charity are not unsolicited consumer agreements—including donations received by a third party or contractor on the charity’s behalf.

However, if a contractor or someone else supplies goods or services worth \$100 or more on behalf of a charity to a donor in return for the donation, and this supply was an express part of the agreement, this will be an unsolicited consumer agreement.

---

**EXAMPLE**

- A consumer is approached on the street by a person collecting donations on behalf of a charity. The consumer provides a donation which includes signing up to an agreement that includes direct debiting monthly payments from the consumer’s bank account. This is not an unsolicited consumer agreement as the money is provided to charity and no goods or services were received in return for the donation.

---

Fundraising is covered by state and territory legislation in addition to the ACL.

## Permitted hours for contacting consumers

Permitted hours for telemarketing are regulated under the *Telecommunications Act 1997* and associated telemarketing standards. The standards do not allow telephone and fax marketing to consumers:

- on a Sunday or a public holiday
- before 9am or after 8pm on a weekday
- before 9am or after 5pm on a Saturday.

Other forms of contact, such as door-knocking, are regulated by the ACL. Under this law, a salesperson must not call on a consumer to negotiate a sale:

- on Sunday or a public holiday
- before 9am or after 6pm on a weekday
- before 9am or after 5pm on a Saturday.

Some states and territories have different hours, contact the relevant consumer protection agency for more information—see **Contacts on page 34**.

A salesperson can visit at any time if an appointment was made beforehand with the consumer's consent. This appointment must be arranged by telephone or in writing—it cannot be made in person.

## Suppliers' obligations when calling on consumers

Salespeople or dealers who call on a consumer, other than by telephone, must:

- explain up-front the purpose of the visit and produce identification
- inform the consumer that they can ask them to leave
- leave the premises immediately if the consumer asks them to do so
- explain to consumers before the agreement is made, and in writing, their right to terminate the agreement within 10 business days (cooling-off)
- provide their contact details in the agreement.

Similar obligations apply when contacting consumers by telephone—see **Requirements for face-to-face and telemarketing approaches on page 14**.

It is unlawful to coerce or unduly harass someone about the supply of, or payment for, goods or services—see **Harassment and coercion on page 28**.

### Disclose purpose and show identification

Before giving a sales pitch, a salesperson or dealer must clearly inform the consumer of the purpose of the visit and provide identification including their name and the supplier they represent, as prescribed in the ACL regulations.

### Cease to negotiate

A salesperson must explain that they are required to leave the consumer's premises upon the consumer's request.

When a salesperson is told to leave, they must not contact the consumer on behalf of the same supplier again for at least 30 days. However, a salesperson can visit the same consumer about the sale of goods or services on behalf of a different supplier.

If a consumer visibly displays a sign on their front door or front gate that states that unsolicited sales calls are unwelcome (a 'Do not knock' sign), this represents a request to leave. If a salesperson ignores such a sign, they are in breach of the ACL and committing trespass. 'Do not knock' signs and 'No door-to-door traders' stickers are available to order for free from consumer protection agencies.

### CASE STUDY

A salesperson acting on behalf of energy company AGL approached a consumer's house that had a 'Do not knock' sign clearly displayed on the front door. The sign had an image of a fist knocking with a line through it and the words 'DO NOT KNOCK Unsolicited door-to-door selling not welcome here'. The salesperson continued to knock on the door and began to negotiate an agreement to supply energy with the consumer. The ACL requires salespeople to leave immediately on the request of the occupier or consumer with whom they are negotiating.

In December 2013 the Federal Court determined that the presence of a 'Do not knock' sign is a clear and unambiguous request to leave the premises without knocking on the consumer's door. The Court also ordered by consent that AGL and its marketing company pay a total of \$60,000 in penalties for illegal door-to-door sales practices and for failing to leave a consumer's premises despite the presence of a 'Do not knock' sign.

**Legal reference: Australian Competition and Consumer Commission v AGL Sales Pty Ltd [2013] FCA 1030; Australian Competition & Consumer Commission v AGL Sales Pty Ltd (No 2) [2013] FCA 1360**

### Contact details

An agreement signed by a salesperson on the supplier's behalf must state:

- that the salesperson is acting on the supplier's behalf
- the salesperson's full name, business or residential address (not a post box); and email address (if they have one).

## Requirements for face-to-face and telemarketing approaches

When a salesperson negotiates an unsolicited consumer agreement:

- the salesperson must inform the consumer of their termination rights before the agreement is made
- the consumer must be given a written copy of the agreement
- the written agreement must meet specific requirements—see **The sales contract on page 15**
- both parties must sign the agreement and any amendments.

Information about the consumer's termination rights must be given to them in writing and must be:

- attached to the agreement
- transparent—expressed in plain language, legible and clear
- the most prominent text in the document, other than the text setting out the dealer's or supplier's name or logo.

During the cooling-off period for an unsolicited consumer agreement, a supplier must not:

- provide any services
- supply any goods with a total value of over \$500
- accept any payment.

This does not apply to sales for the supply of electricity or gas to premises not already connected to such services.

If goods are supplied, and the consumer exercises their cooling-off rights, the goods become unsolicited supplies—see **Unsolicited supplies on page 7**.

## CASE STUDIES

Energy Australia was ordered to pay penalties of \$1.2 million and three marketing businesses engaged by it to conduct its door-to-door sales activities were penalised an aggregate of \$290,000 for multiple breaches of the ACL, including the unsolicited consumer agreement provisions. The Federal Court found that some door-to-door sales representatives had failed to:

- » advise the consumer, clearly or at all, that their purpose was to seek the consumer's agreement to a supply of retail electricity by the energy company
- » advise the consumer, clearly or at all, that they were obliged to leave the premises immediately if the consumer requested they do so
- » in one instance, leave a premises immediately on the request of the consumer, in circumstances where the consumer had a 'do not knock' sign displayed
- » provide information relating to their identity.

**Legal reference: Australian Competition and Consumer Commission v Energy Australia Pty Ltd [2014] FCA 336**

In 2013, the Magistrates Court in Queensland fined a supplier \$20,000 and ordered it to pay compensation of \$18,724.74 for failing to provide the prescribed notice required for unsolicited agreements and for non-supply of the systems.

The supplier, Cleaner Energy, contacted consumers via unsolicited phone calls to sell solar power systems, panels and inverters. Cleaner Energy encouraged the consumers to sign agreements immediately and requested deposits ranging from \$1500 to \$5000, which were taken at the time of the call or shortly after.

The agreements did not provide the consumers with information about their rights to cancel during the cooling-off period or include the specified text on the front page. On some occasions, Cleaner Energy gave the consumers a timeframe as to when their systems would be installed, however they were never installed.

**Legal reference: Queensland Office of Fair Trading v Aaron Murray as Chief Executive Officer of Cleaner Energy Pty Ltd [2013] MAG-00100572/12(5)**

## The sales contract

Consumers must be given a copy of an unsolicited consumer agreement.

If negotiated in person, the copy must be given to the consumer immediately after it is signed.

If negotiated by telephone, the copy must be given to the consumer:

- in person, by post, or electronically (if the consumer agrees)
- within five business days of the agreement (or longer if the consumer agrees).

The document must be:

- transparent—expressed in plain language, legible and clear
- printed—although any changes to the agreement may be handwritten (and signed by both parties).

The document must clearly state:

- the consumer's cooling-off and termination rights
- the full terms of the agreement
- the total price payable, or how this will be calculated
- any postal or delivery charges
- the supplier's:
  - name
  - business address (not a post box number)
  - Australian Business Number (ABN) or Australian Company Number (ACN)
  - fax number and email address, if they have these.

The front page of the document must include the following text:

- 'Important Notice to the Consumer'
- 'You have a right to cancel this agreement within 10 business days from and including the day after you signed or received this agreement'
- 'Details about your additional rights to cancel this agreement are set out in the information attached to this agreement'.

The front page must also be signed by the consumer and include the date it was signed.

The document must also be accompanied by a notice that the consumer can use to terminate the contract.

### CASE STUDY

In 2014, communications company Startel Communication was ordered to pay penalties totalling \$320,000 for failing to inform consumers that they could terminate the contract within 10 business days, failing to supply documents which would help consumers decide whether they wanted to proceed with the contract, and taking money out of bank accounts during the cooling-off period.

**Legal reference: Australian Competition and Consumer Commission v Startel Communication Co Pty Ltd [2014] FCA 352**

### Attempts to limit termination rights are unlawful

It is unlawful to exclude, limit, modify or restrict:

- the right of the consumer to terminate the agreement
- the effect or operation of the ACL as it relates to unsolicited consumer agreements.

Any attempts to do so in an agreement have no effect.

**ACL reference: section 89**

### CASE STUDY

In March 2013, the Magistrates Court in Queensland fined a supplier \$3000 and ordered it to pay a further \$3000 compensation for breaching door-to-door trading laws.

The supplier visited a consumer's house without invitation, commenced negotiations and provided a quote to spray seal bitumen on a driveway for \$3000. A single page written document outlining the date and the supplier's business details was provided to the consumer. The supplier wrote 'paid' on the document however the consumer had not paid. One part of the document was titled 'Terms of Contract', however no information was completed under this section. Both the supplier and the consumer signed the bottom of the document.

The supplier did not provide the consumer with information on their right to terminate the agreement during the termination period (10 business days) and the supplier did not advise the consumer that payment could not be provided during this period. The prohibited 10 business day period would have commenced on the first business day after the agreement was made. The next day the supplier spray sealed the driveway and requested a \$3000 bank cheque from the consumer as payment. The supplier cashed the cheque on the same day.

**Legal reference: Queensland Office of Fair Trading v Graham Edward Devine [2013] MAG29379/13(1)**

### Waivers not permitted

A consumer cannot waive any rights under the ACL that relate to unsolicited consumer agreements.

**ACL reference: section 90**

It is unlawful for any supplier to persuade, or attempt to persuade, a consumer to do so.



### Cooling-off and termination requirements

Consumers who agree to unsolicited agreements have 10 business days to reconsider, during which they can cancel the agreement without penalty. This is called the ‘cooling-off’ period.

#### ACL reference: sections 76, 82

For agreements negotiated by telephone, the cooling-off period begins on the first business day after the consumer receives the agreement document.

For other agreements, the cooling-off period begins on the first business day after the agreement was made.

A business day is classified as a Monday, Tuesday, Wednesday, Thursday or Friday and does not include public holidays.

A consumer may also terminate an agreement up to three months after it was made (or received, for agreements negotiated by telephone) if the salesperson:

- visited outside permitted selling hours
- did not disclose the purpose of the visit
- did not produce identification; or
- did not leave the premises upon request.

The termination period is extended to six months if the salesperson:

- did not provide information about cooling-off rights
- breached requirements for unsolicited consumer agreements (such as failing to provide a written copy or not including required information)
- supplied goods with a total value of over \$500 during the 10 business days of the cooling-off period
- supplied services during the 10 business days of the cooling-off period; or
- accepted or requested any payment during the 10 business days of the cooling-off period.

A consumer may terminate an agreement verbally or in writing. The termination date is when the consumer gives or sends the notice.

### When a consumer ‘cools off’ or terminates

An agreement terminated by a consumer during the cooling-off period is void—effectively cancelled, or treated as if it never existed.

#### ACL reference: sections 83, 84, 85, 87 and 88

If the consumer terminates an unsolicited consumer agreement, the agreement is void:

- whether or not the supplier receives written notice of termination
- even if the goods or services supplied have been wholly or partly consumed or used.

When a consumer terminates an unsolicited consumer agreement, any related contract or agreement is void. This includes associated credit or finance agreements.

Where goods or services are bought under a credit contract that is tied to the purchase of the goods or services, it is the supplier’s responsibility to contact the credit provider and arrange for cancellation. For more information, contact ASIC at [www.asic.gov.au](http://www.asic.gov.au)

---

#### EXAMPLE

- A consumer approached by a door-to-door trader agrees to buy a washing machine for \$900. The consumer has 10 business days to change their mind. As part of this sale, there is an associated agreement to service the washing machine. If the consumer cools-off on the \$900 contract to buy the washing machine, the related service contract is also cancelled.

---

A supplier must promptly return or refund any money paid under an agreement or related contract when a consumer cools-off.

If the consumer has terminated the unsolicited consumer agreement, the supplier cannot:

- take action against the consumer to recover any money allegedly payable under the agreement or any related contract
- place or threaten to place the consumer’s name on a list of defaulters or debtors.

A consumer who terminates an unsolicited agreement must, within a reasonable time, return any goods that have not been consumed or tell the supplier where to collect them.

If a consumer has not taken reasonable care of the goods, the supplier can seek compensation for the damage to the goods or the drop in value. The consumer does not have to pay compensation for normal use of the goods or circumstances beyond their control.

---

**EXAMPLE**

- A consumer buys an electric mixer from a door-to-door trader who does not tell her about the cooling-off period. Four months later, the consumer realises she had the right to cool-off. She decides that she would not have followed through with the purchase had she known she could cool-off. She writes to the supplier, requests a full refund and asks the supplier to collect the appliance. She has prepared several desserts during the four months, so the mixer blades are not in their original condition. The supplier is not entitled to compensation for the blades, as this was normal use of the mixer.

---

If a supplier does not collect the goods within 30 days after a contract was terminated, and the consumer told the supplier where to collect the goods, the goods become the consumer's property.

If an agreement is terminated after the cooling-off period, and a service has been provided to the consumer in that time, the consumer may have to pay for the service.

---

**EXAMPLE**

- A telemarketer sells a carpet cleaning package to a consumer. The package includes a clean every three months for a special price. The salesperson fails to tell the consumer about his cooling-off rights. After the first clean, which occurred three weeks after agreement was entered into, the consumer realises the salesperson did not provide information about his rights and decides to end the agreement. The consumer must pay for the carpet cleaning already carried out, but is released from the contract and any obligation for the remaining two cleans.
- 

**Supplying goods or services during the cooling-off period**

During the cooling-off period, a supplier must not:

- supply any goods priced over \$500 relating to the agreement
- supply services relating to the agreement
- accept or require any form of payment.

**ACL reference: section 86**

However, during the cooling-off period, goods priced up to \$500 may be supplied. An energy supplier can also provide electricity or gas to premises not already connected to such services, or where there is already a connection but no supply.

**CASE STUDY**

In 2014, the Federal Court ordered a telecommunications company, which entered into agreements with consumers following negotiations by telephone, to pay a penalty of \$225,000 after it found that the company had breached the unsolicited consumer agreement provisions of the ACL by:

- » failing to provide consumers with a copy of their contract within five business days
- » failing to provide consumers with an agreement that clearly stated the company's address and informed consumers of their cooling-off rights
- » failing to provide consumers with a notice to cancel the contract and
- » supplying services to consumers during the 10 day cooling-off period.

**Legal reference: Australian Competition and Consumer Commission v Zen Telecom Pty Ltd [2014] FCA 1049**

## When unsolicited consumer agreement laws do not apply

Unsolicited consumer agreement laws do not apply in some instances, including:

- where a person does not meet the definition of a consumer under the ACL, that is, in cases where the good or service exceeds \$40,000 and is not of a kind ordinarily acquired for personal, domestic or household use
- discontinued negotiations, where a consumer asks a dealer or supplier to leave but later contacts the supplier
- party plan events, when the host makes it clear that a consumer is invited to the party to be sold something, and at least three people are invited to the event
- renewal of contracts, when a business contacts a consumer and asks if they want to renew an existing contract (for example, a home telephone contract)
- when the agreement is not with a consumer—for example, the agreement is with someone who is buying goods to on-sell or to use to manufacture something else
- subsequent contracts with the same consumer for the same kind of goods or services.

When a consumer enters into an unsolicited consumer agreement with a particular supplier or dealer, and those goods or services are actually supplied, the supplier or dealer does not need to comply with the unsolicited consumer agreement provisions for any other sales of the same kind to that consumer during the next three months.

However, these extra sales must not add up to more than \$500.

Any unsolicited approach for sale of goods or services over the \$500 limit must comply with the laws on unsolicited consumer agreements—as must any unsolicited approach made after three months from the date the goods or services were supplied under the initial agreement.

For other exemptions, see **Regulation 81** of the ACL regulations.

## Supplier responsibility for failing to comply

A supplier cannot enforce an unsolicited consumer agreement if the supplier or the supplier's dealer—for instance, a telemarketer or door-to-door salesperson—has breached the law on unsolicited consumer agreements.

Both the supplier and their salesperson or dealer may be liable for the breaches.

Suppliers are responsible for ensuring their salespeople and other representatives are fully aware of their legal obligations when using unsolicited marketing approaches.

**ACL reference: sections 93, 77**

## Penalties

Failing to comply with unsolicited consumer agreement requirements can lead to maximum civil and criminal penalties of \$50,000 per contravention for a body corporate and \$10,000 per contravention for an individual.

# Pyramid schemes

## Summary

Pyramid schemes make money by recruiting people rather than by selling a legitimate product or providing a service.

Pyramid schemes are illegal. A business or person must not participate in, or persuade others to participate in, a pyramid scheme.

A court can consider several factors to identify a pyramid scheme.

Criminal and civil penalties apply.

**ACL reference: sections 44, 46**

## What is a pyramid scheme?

Pyramid schemes make money by recruiting businesses or people rather than by selling a legitimate product or providing a service—even if they are also selling a product.

New participants make a payment, known as a ‘participation payment’, to join. They are promised payments for recruiting other investors or new participants. Pyramid schemes inevitably collapse when they fail to attract new members to join. New members rarely make money; they usually lose the money they have paid to participate.

It is unlawful to participate in, or to persuade someone to participate in, a pyramid scheme.

There are two payments associated with a pyramid scheme:

- a participation payment (to one or more existing participants in the scheme) to join
- a recruitment payment, promised when a member recruits others.

These payments may be a financial or non-financial benefit, paid either to the new participant or to someone else.

The recruitment payment helps define a pyramid scheme—it must be the only, or main reason, a member joins.

A pyramid scheme may also have any or all of the following characteristics:

- participation payments may (or must) be made when joining the scheme
- a participation payment may not be the only requirement for taking part
- a new investor may not have a legally enforceable right to the promised recruitment payments
- arrangements are not usually in writing
- the scheme may involve promoting and selling goods or services (or both).

## Marketing scheme or pyramid scheme?

To distinguish between a pyramid scheme and other promotions that may be legitimate, a court considers:

- the value of the participation payments compared with any goods or services that participants are entitled to receive under the scheme
- the emphasis placed on participants’ entitlement to receive goods or services under the scheme, compared with the emphasis on their entitlement to receive future recruitment payments
- whether recruitment payments are the only or main reason a new participant becomes involved.

The ACL does not limit the matters a court can consider when working this out.

---

## EXAMPLE

- A consumer must pay \$1000 upfront to participate in a new internet business. This payment entitles him to 1000 shares, which can only be sold back to the company or to other participants after 12 months.

The consumer is promised \$100 in cash immediately for recruiting new people to the scheme. He attends a 90-minute promotional seminar about the scheme. The presenter spends 70 minutes on how to recruit new investors and 20 minutes on the internet business.

The following characteristics help to define this as a pyramid scheme:

- the shares are frozen for 12 months
- it pushes recruitment very hard
- recruitment payments are a substantial reason to join.

---

## Penalties

A business or person must not participate in, or attempt to persuade others to participate in, a pyramid scheme.

The maximum civil and criminal penalties are \$1.1 million for a body corporate and \$220,000 for an individual.

**ACL reference: sections 44, 164**

## CASE STUDIES

Three individuals participated in a company in the direct-selling industry which claimed to bring consumers superior travel and hospitality products and services. These individuals were actively and heavily promoting the company to consumers through websites and Facebook, encouraging people to participate in the scheme. People who wished to participate were required to pay a membership fee of \$330. Once an individual had paid the \$330, they received a 'travel certificate' and the opportunity to receive commission payments for recruiting other people into the scheme. It was found that the vouchers were of little to no value and that the only way a person could earn income from their participation in the scheme was from recruiting new members. The three individuals were fined penalties totalling \$200,000.

**Legal reference: Australian Competition and Consumer Commission v Jutsen (No 4) [2012] FCA 503**

A business operated in Australia as the owner of an exclusive distribution licence for etching products which it claimed would safeguard vehicles and home contents from theft. The business was active in several states, under a model whereby investors were given the title of state director, who would then incorporate a company within that state with rights to distribute the products. Further employees were then recruited and were required to make recruitment payments to the director, even if no products had been sold. The director of the business was banned from managing a company or promoting business activities or opportunities for five years.

**Legal reference: Australian Competition and Consumer Commission v Stott [2013] FCA 88**

# Pricing

## Summary

### Multiple pricing

A supplier who displays multiple prices for the same goods must either:

- sell the goods for the lowest ‘displayed price’
- withdraw the goods from sale until the price is corrected.

A price published in a catalogue or advertisement is a ‘displayed price’.

Mistakes in catalogues and advertisements can be fixed by publishing a retraction in a publication with a similar circulation to the original advertisement.

### Component pricing

A supplier must not promote or state a price that is only part of the cost, unless also prominently advertising the single price.

**ACL reference: sections 47–48, 165–166**

### Multiple pricing

A supplier who displays the same item with more than one price—‘multiple pricing’—must sell it for the lowest displayed price or withdraw the goods from sale until the price is corrected. This applies regardless of where the price is displayed—for example, in a catalogue, online or in a television advertisement. The supplier is not obliged to sell the goods at the lowest price as they have the option of withdrawing them from sale until the price is corrected.

The ‘displayed price’ is a price:

- attached to or on:
  - the goods
  - anything connected or used with the goods
  - anything used to display the goods

- published in a catalogue available to the public, when:
  - the deadline to buy at that price has not passed
  - the catalogue is current
- that reasonably appears to apply to the goods, including a partly-obscured price; or
- displayed on a register or scanner.

A price is not a ‘displayed price’ when it is:

- entirely obscured by another price
- a price per unit of measure and shown as an alternative means of expressing the price
- not in Australian currency, or unlikely to be interpreted as Australian currency.

A price published in a catalogue or advertisement ceases to be a displayed price when a retraction is published to a similar circulation or audience.

If a supplier specifies that a catalogue price applies only in a particular region, they can display a different price in a catalogue for another region.

### Penalties—displayed price

Failing to sell goods for the lowest displayed price can lead to maximum civil and criminal penalties of \$5000 for a body corporate and \$1000 for an individual.

### Component pricing

A supplier must not promote or state a price that is only part of the cost, unless also prominently advertising the single (total) price.

This applies to the supply and promotion of goods or services usually used for personal, domestic or household use or consumption.

---

### EXAMPLE

- An electrical goods retailer advertises a 60cm LCD television for \$1990\*\*. In fine print at the bottom, it states this price excludes commission and warehouse retrieval fees.

The commission is \$100 and warehouse retrieval fee is \$50. These are known costs and part of the single price.

The television should have been advertised for either a single price of \$2140, or with each extra cost listed along with the total. The single price should be as prominent as the component prices.

---

A component price is one that is represented to be only part of the cost. If a business represents that part of the cost is the total cost, then this may contravene other provisions such false or misleading representations in relation to the price of goods or services.

The single price must be:

- clear at the time of the sale
- as prominent as the most prominent component of the price.

The single price is the total of all measurable costs and includes:

- any charge payable; and
- the amount of any tax, duty, fee, levy or charges (for example, GST).

### CASE STUDY

The Federal Court imposed a penalty of \$200,000 against AirAsia for contravening the single pricing provisions. For 10 months, AirAsia 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.

**Legal reference: Australian Competition and Consumer Commission v AirAsia Berhad Co [2012] FCA 1413**

A single price is not required when advertising exclusively to a body corporate—see **Glossary and abbreviations on page 32**.

A single price for services supplied under a contract that allows periodic payments does not have to be displayed as prominently as the component prices.

Components that do not need to be included in a single price are:

- optional extras—additional charges that a consumer may choose to pay. However, if an optional extra is depicted in the advertisement, you must include the price for that optional extra
- 

### EXAMPLE

- A supplier advertises lounge suites for sale. At the point of sale consumers can pay extra for fabric protection, which does not form part of the single price because the consumer can choose whether to pay the extra charge.
- 

- sending/delivery charges—while mandatory charges for sending or delivering products need to be specified in the advertisement, they do not have to be included in the total price (unless the supplier is aware of a minimum charge that must be paid). You could, however, choose to do so. It is important to note that in the regulators' view, 'dealer delivery' as currently imposed within the motor vehicle industry would be considered as a component of the single price
- any components which are not quantifiable at the time the representation is made
- amounts your business pays to a third party that are not passed on to the consumer
- amounts a consumer is required to pay directly to a relevant authority (such as in used vehicle sales).

### Determining whether a component is quantifiable

An amount is quantifiable if, at the time the representation is made, it is able to be readily converted into a dollar amount. If a total price is comprised of a number of components, each component must be quantified and added up to the extent that it is possible.

Where a total price involves:

- a combination of quantifiable and non-quantifiable components; or
- a component amount that fluctuates or varies (e.g. changes in foreign currency)

the total price is calculated using those components that are quantifiable at the time.

Consumers must also be clearly advised of the basis on which the amounts were calculated, and that they may change as not all components were able to be included in the single price.



## Penalties—component pricing

The maximum civil and criminal penalties for failing to comply with single price requirements are:

- \$1.1 million for a body corporate
- \$220,000 for an individual.

### CASE STUDY

A motor dealer in Queensland placed advertisements in a local newspaper as part of a four week campaign promoting new vehicles for sale. The advertisements had a picture of the vehicle with the price above the picture in large colourful font. Next to the vehicle price was a caret (^), with further details provided at the bottom of the advertisement in small, white font. E.g. Holden VE Series 11 SV6 Sedans \$24,990^. The statement at the bottom of the advertisement next to the caret (^) advised that the prices excluded on-road costs, government statutory charges and transfer fees. The motor dealer was advertising vehicle prices that were only part of the total vehicle price, with no prominent reference to the single price. As on-road costs, government statutory charges and transfer fees constitute additional costs, they must be included in the single price.

In May 2013, the Queensland Office of Fair Trading issued a civil penalty notice of \$2040 to the motor dealer.

## Exemption for restaurants and café menus

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 these conditions are met:

- the menu displays a surcharge for the supply of food or beverage on specified days by the restaurant or café; and
- the menu displays the following words ‘a surcharge of [percentage] applies on [the specified day or days]’; and
- 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 on specified days.

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.

Restaurants and cafés should note that the exemption applies only to menus. It 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
- cover goods other than food or beverages. If any service charges are applied, such as corkage or cover charges that are included on a menu, they must have a single price displayed for them at all times.

**ACL reference: Regulation 80A**



# Lay-by agreements

## Summary

Lay-by agreements must be in writing, expressed in plain language, legible and clearly presented.

A consumer can cancel a lay-by agreement but may have to pay a termination charge.

A supplier may only cancel a lay-by agreement under certain circumstances.

**ACL reference: section 96–99**

## What is a lay-by agreement?

An agreement is a ‘lay-by’ if the consumer:

- pays for the goods in at least three instalments (when the agreement is not stated as ‘lay-by’) or in two or more instalments (when the agreement states it is ‘lay-by’); and
- does not receive the goods until the full price has been paid.

Any deposit paid by the consumer is an instalment.

---

### EXAMPLE

- A consumer orders a Christmas hamper in advance and agrees to pay for it by weekly instalments over 11 months. This is a lay-by agreement.

---

Lay-by agreements that are standard form contracts may be covered by unfair contract terms provisions.

**ACL reference: Part 2–3**

## Requirements for lay-by agreements

Suppliers must ensure a lay-by agreement offered to a consumer:

- is in writing
- specifies all terms and conditions, including any termination charge
- is transparent, which means that it must be expressed in plain language, legible and clearly presented.

A lay-by agreement may not be transparent if, for example, terms and conditions are hidden in fine print or schedules, phrased in legal jargon, or given in complex or technical language.

A supplier must give a copy of the agreement to the consumer.

## When a consumer cancels a lay-by agreement

The consumer can cancel the lay-by agreement any time before delivery of the goods. If the consumer cancels, the supplier must refund all amounts paid by the consumer, less any termination fee that was clearly specified in the lay-by agreement.

There is no set amount or percentage for a termination fee, but it must not be more than the supplier’s ‘reasonable costs’ relating to the agreement—for example, storage and administrative costs, and the loss in value of the goods between the time when the lay-by agreement was entered into and when it was terminated. What is ‘reasonable’ will depend on the circumstances, and suppliers should be prepared to justify claims for reasonable costs.

If the consumer’s lay-by payments do not cover the termination charge, the supplier can recover the outstanding amount as a debt. This should be stated clearly and legibly in the lay-by agreement, along with any other details of termination fees. Failing to do so may breach the requirement that lay-by agreements be transparent.

---

### EXAMPLE

- In June, a consumer enters into a lay-by agreement to buy a \$600 winter coat and pays instalments totalling \$150. In August, she decides to cancel the agreement and asks for a refund of all payments. As retailers discount winter coats to half-price in July, the supplier can now only sell the coat for \$300.

The termination charge could include an amount to make up for the need to discount the coat to \$300. However, the details of the termination charge would have to be set out clearly and legibly in the lay-by agreement so that the consumer is aware that they may have to pay for such an amount.

---

The supplier cannot charge a termination fee if the consumer cancelled because the supplier breached the agreement. For example, after the consumer has paid all instalments, the supplier advises that the consumer's goods were damaged while in storage.

A supplier who cancels the lay-by agreement cannot charge a termination fee.

Apart from the termination charge, a supplier is not entitled to damages or any other remedy for the termination of the lay-by.

### Termination of lay-by agreements by suppliers

Suppliers must not terminate a lay-by agreement, except when:

- the consumer has breached a term of the agreement. For example, they failed to make a scheduled payment on time
- the supplier is no longer engaged in trade or commerce; or
- the goods are no longer available due to circumstances outside the supplier's control (not because the supplier decided to withdraw the goods from sale).

### Penalties

A supplier will contravene the lay-by provisions if they:

- enter into a lay-by agreement without putting it in writing
- do not give the consumer a copy of the written agreement
- refuse to refund all of the consumer's money (except for the termination charge)
- charge a termination fee that is higher than the reasonable costs associated with the agreement, or when the supplier has breached the lay-by agreement.

Each contravention has maximum civil and criminal penalties of \$30,000 for a body corporate and \$6000 for an individual.

### CASE STUDY

In October 2012, a consumer entered into a written agreement with a supplier to buy a three-horse float and accessories for \$25,100. The consumer paid a deposit of \$6800 with periodic instalments to be made weekly with final payment due and payable on 19 November 2012. There was no termination charge stated in the agreement.

On 6 November 2012 the consumer decided to cancel the agreement and asked for a refund of the deposit. The supplier refused to refund the deposit and the consumer lodged a complaint with the Queensland Office of Fair Trading.

The court found the written agreement entered into was a lay-by agreement and if the supplier wished to retain the deposit, the termination charge would have to be set out clearly and legibly in the agreement so that the consumer was aware of the amount to pay if the agreement was cancelled.

In 2013, the Magistrates Court in Queensland fined the supplier \$1500 and he was ordered to pay \$6800 compensation for failing to refund the consumer the deposit.

**Legal reference: Queensland Office of Fair Trading v Bruce Kalf trading as North Queensland Horse Float Sales [2013] MAG-00063826/13(8)**

# Referral selling

## Summary

It is unlawful to induce a consumer to buy goods or services by promising benefits for assisting the supply of goods or services to other customers if the benefit depends on other events, such as subsequent sales.

**ACL reference: section 49**

## What is referral selling?

Referral selling is when:

- a consumer is induced to buy goods or services by promises of a rebate, commission or other benefit for supplying information that helps the trader sell to other consumers; and
- the consumer does not get the promised benefit unless some other event happens after the agreement is made—for example, other consumers also buying goods or services from the same supplier.

It is not ‘referral selling’ for a supplier to promise a benefit for simply providing the names of consumers or helping the trader supply goods, where the benefit is not conditional upon any other event occurring. For example, a supplier may offer a gift voucher to consumers who provide the names of their friends that may be interested in the supplier’s product. The gift voucher must not be offered on the condition that it will only be given to the consumer if one of their friends makes a purchase.

## CASE STUDY

The promoters of a worm farm investment scheme breached the prohibition on referral selling because the scheme involved membership of a profit sharing scheme, under which monthly payments were made. The level of profit shared amongst members depended upon the growth of the scheme membership and on the number of new members which existing scheme members could introduce to the scheme.

**Legal reference: Australian Competition and Consumer Commission v Bio Enviro Plan Pty Ltd [2003] FCA 232**

## Penalties

The maximum civil and criminal penalties for referral selling are \$1.1 million for a body corporate and \$220,000 for an individual.

# Harassment and coercion

## Summary

It is unlawful to use physical force, coerce or unduly harass someone about the supply of, or payment for goods or services.

**ACL reference: section 50**

## What is harassment and coercion?

It is unlawful to use physical force, coercion or undue harassment in connection with the:

- supply or possible supply of goods or services
- payment for goods or services
- sale or grant, or the possible sale or grant, of an interest in land; or
- payment for an interest in land.

Undue harassment means unnecessary or excessive contact or communication with a person, to the point where that person feels intimidated, tired or demoralised.

Coercion involves force (actual or threatened) that restricts another person's choice or freedom to act. Unlike harassment, there is no requirement for behaviour to be repetitive in order to amount to coercion.

Financial institutions are entitled to attempt to collect debts but their conduct may be undue harassment or coercion when it involves frequent unwelcome approaches and requests or threats for payment. Laws relating to privacy, harassment and misleading or deceptive conduct apply to all businesses—including debt collection agencies.

---

## EXAMPLES

- A woman went into arrears on her credit card debt when she lost her job and had to care for her ill mother.

The bank sold the debt to a debt collection company. The company told the woman that, if she left Australia, she would not be able to return while the debt was unpaid.

The company also obtained details and other information about the woman's family. They did this by contacting her friend, pretending the woman had applied for a home loan and seeking information to verify her home loan application.

The company used this information to embarrass the woman and continued to call her, despite her request that they contact her through her financial counsellor.

The company's actions could be considered harassment.

- A retirement village was sold by its owners. This led to a change in management. During the transfer of ownership, an energy company salesperson visited residents.

The door-to-door salesperson explained to all residents that because the management of the complex was changing, their power would be cut off unless they changed energy supplier. This would have to happen immediately to maintain their power supply.

Almost all of the residents signed with the new supplier. This created confusion for the residents, causing issues with payment plans, concessions, and multiple bills.

The salesman's statements could be considered coercion.

---

### CASE STUDIES

In 2012, a parking business was found to have engaged in undue harassment when it threatened to take a motorist to court for failing to make payment following the issue of 'payment notices' where the parking business was not able to issue a penalty or fine and threatened court action.

**Legal reference: Director of Consumer Affairs Victoria v Parking Patrols Vic Pty Ltd [2012] VSC 137**

A debt collection agency was found to have engaged in undue harassment and coercion when some of its employees personally abused and threatened debtors and threatened to reveal their position as debtors to their relatives, friends, employers and neighbours.

**Legal reference: ASIC v Accounts Control Management Services Pty Ltd [2012] FCA 1164**

For more information about acceptable debt collection practices, see *Debt collection guideline: for collectors and creditors*. This joint publication by the ACCC and ASIC is available from [www.accc.gov.au](http://www.accc.gov.au)

## Penalties

The maximum civil and criminal penalties for harassment and coercion are \$1.1 million for a body corporate and \$220,000 for an individual.

# ‘Proof of transaction’ and itemised bills

## Summary

Suppliers must provide proof of transaction to consumers for goods or services valued at \$75 or more. A GST tax invoice is sufficient proof of transaction.

Consumers may request an itemised bill if the value of the goods or services is less than \$75.

**ACL reference: sections 100–101**

## What is proof of transaction?

Proof of transaction for supply of goods or services to a consumer is a document that states the:

- identity of the supplier of the goods or services
- supplier’s ABN or ACN
- date of the supply
- goods or services supplied to the consumer
- price of the goods or services.

Examples of proof of transaction include a:

- GST tax invoice
- cash register receipt
- credit card or debit card statement
- handwritten receipt
- lay-by agreement
- confirmation or receipt number provided for a telephone or internet transaction.

## Supplier must provide proof of transaction

A supplier must give proof of transaction when a consumer:

- buys goods or services worth \$75 or more (excluding GST), as soon as practicable after the transaction
- asks for proof of transaction for goods and services costing less than \$75, within seven days.

## Itemised bills for services

A consumer can ask a supplier for an itemised bill that shows:

- how the price was calculated
- the number of labour hours and the hourly rate (if relevant)
- a list of the materials used and the amount charged for them (if relevant).

This request must be made within 30 days of whichever happens later:

- the services are supplied
- the consumer receives a bill or account from the supplier for the supply of the services.

The supplier must give the consumer the itemised bill without charge, within seven days of the request. It must be expressed in plain language, legible and clear.

## Penalties

The maximum civil penalties for failing to provide consumers with a proof of transaction, or not providing it within the required time, are \$15,000 for a body corporate and \$3000 for an individual.

# Warranties, refunds, repairs – ‘consumer guarantees’

The ACL sets out protections for consumers who buy goods and services from suppliers, manufacturers and importers—the ‘consumer guarantees’.

These consumer guarantees are a comprehensive set of rights and remedies that apply when goods and services are defective in certain ways. A consumer has these rights regardless of any other warranty provided by the supplier or manufacturer.

For more information, see another guide in this series—*Consumer guarantees: a guide for businesses and legal practitioners*, available from [www.consumerlaw.gov.au](http://www.consumerlaw.gov.au)

This guide includes:

- what consumer guarantees apply to certain goods and services
- who is responsible for satisfying the requirements of the consumer guarantees
- when to offer a remedy, such as a refund, repair or replacement.

# Glossary and abbreviations

TERM	DEFINITION
body corporate	includes a company registered under the <i>Corporations Act 2001</i> (Cth), an incorporated association, a co-operative or an owners corporation.
business day	Monday to Friday, except public holidays.
buy	to take possession of something by hiring, leasing or buying it, or by exchange or gift.
consumer	<p>a person who buys:</p> <ul style="list-style-type: none"> <li>any type of goods or services costing up to \$40,000 (or any other amount stated in the ACL Regulations)</li> <li>goods or services costing more than \$40,000, which would normally be for personal, domestic or household use; or</li> <li>goods which consist of a vehicle or trailer used mainly to transport goods on public roads.</li> </ul> <p>Australian courts have said that the following are not normally used for personal, domestic or household purposes:</p> <ul style="list-style-type: none"> <li>an air seeder—<i>Jillawarra Grazing Co v John Shearer Ltd</i> [1984] FCA 30</li> <li>a large tractor—<i>Atkinson v Hastings Deering (Queensland) Pty Ltd</i> [1985] 6 FCR 331</li> <li>an industrial photocopier—<i>Four Square Stores (QLD) Ltd v ABE Copiers</i> [1981] ATPR 40–232 at 43,115.</li> </ul>
goods	<p>include, among other things:</p> <ul style="list-style-type: none"> <li>animals, including fish</li> <li>gas and electricity</li> <li>computer software</li> <li>second-hand goods</li> <li>ships, aircraft and other vehicles</li> <li>minerals, trees and crops, whether on or attached to land</li> <li>any component part of, or accessory to, goods.</li> </ul>
liability	an obligation to put right a problem—for example, fixing a defective product, providing compensation or taking other action.



TERM	DEFINITION
manufacturer	includes a person who: <ul style="list-style-type: none"> <li>• grows, extracts, produces, processes or assembles goods</li> <li>• holds him/herself out to the public as the manufacturer of goods</li> <li>• causes or permits his/her name, business name or brand mark to be applied to goods he/she supplies</li> <li>• permits him/herself to be held out as the manufacturer by another person; or</li> <li>• imports goods into Australia where the manufacturer of the goods does not have a place of business in Australia.</li> </ul>
remedy	an attempt to put right a fault, deficiency or a failure to meet an obligation.
regulator	the Australian Competition and Consumer Commission or state/territory consumer protection agencies.
services	include duties, work, facilities, rights or benefits provided in the course of business, for example: <ul style="list-style-type: none"> <li>• dry cleaning</li> <li>• installing or repairing consumer goods</li> <li>• providing swimming lessons</li> <li>• lawyers' services.</li> </ul>
supplier	someone who, in trade or commerce, sells goods or services and is commonly referred to as a 'trader', 'retailer' or 'service provider'.
supply	includes: <ul style="list-style-type: none"> <li>• in relation to goods—supply (including re-supply) by way of sale, exchange, lease, hire or hire-purchase</li> <li>• in relation to services—provide, grant or confer.</li> </ul>

### Abbreviations

<b>ACCC</b>	Australian Competition and Consumer Commission
<b>ACL</b>	Australian Consumer Law
<b>ASIC</b>	Australian Securities and Investments Commission
<b>ASIC Act</b>	<i>Australian Securities and Investments Commission Act 2001</i> (Cth)
<b>CCA</b>	<i>Competition and Consumer Act 2010</i> (Cth)
<b>FCA</b>	Federal Court of Australia
<b>MAG</b>	Magistrate Court
<b>VSC</b>	Victorian Supreme Court

# Contacts



Australian  
Competition &  
Consumer  
Commission

## Australian Competition and Consumer Commission

GPO Box 3131  
Canberra ACT 2601  
T. 1300 302 502  
[www.accc.gov.au](http://www.accc.gov.au)



Access  
Canberra.

## Australian Capital Territory Access Canberra

GPO Box 158  
Canberra ACT 2601  
T. 13 22 81  
[www.act.gov.au/accessCBR](http://www.act.gov.au/accessCBR)



Fair  
Trading

## New South Wales NSW Fair Trading

PO Box 972  
Parramatta NSW 2124  
T. 13 32 20  
[www.fairtrading.nsw.gov.au](http://www.fairtrading.nsw.gov.au)

NORTHERN TERRITORY



## Northern Territory Northern Territory Consumer Affairs

PO Box 40946  
Casuarina NT 0811  
T. 1800 019 319  
[www.consumeraffairs.nt.gov.au](http://www.consumeraffairs.nt.gov.au)



Queensland  
Government

## Queensland Office of Fair Trading

GPO Box 3111  
Brisbane QLD 4001  
T. 13 QGOV (13 74 68)  
[www.qld.gov.au/fairtrading](http://www.qld.gov.au/fairtrading)



**Government  
of South Australia**

Attorney-General's  
Department

## **South Australia** **Consumer and Business Services**

GPO Box 1719  
Adelaide SA 5001  
T. 131 882  
[www.cbs.sa.gov.au](http://www.cbs.sa.gov.au)



**Tasmanian  
Government**

## **Tasmania** **Consumer Building and Occupational Services**

PO Box 56  
Rosny Park TAS 7018  
T. 1300 654 499  
[www.consumer.tas.gov.au](http://www.consumer.tas.gov.au)



## **Victoria** **Consumer Affairs Victoria**

GPO Box 123  
Melbourne 3001  
T. 1300 55 81 81  
[www.consumer.vic.gov.au](http://www.consumer.vic.gov.au)



Government of **Western Australia**  
Department of **Commerce**  
**Consumer Protection**

## **Western Australia** **Department of Commerce**

Locked Bag 14  
Cloisters Square WA 6850  
T. 1300 30 40 54  
[www.commerce.wa.gov.au](http://www.commerce.wa.gov.au)



**ASIC**

Australian Securities & Investments Commission

## **Australian Securities and Investments Commission**

PO Box 9827 (in your capital city)  
T. 1300 300 630  
[www.asic.gov.au](http://www.asic.gov.au)

