

Sales practices

A guide for businesses and legal practitioners



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A guide for businesses and legal practitioners

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
- 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.

Aside from compliance and enforcement by ACL regulators, the ACL creates private rights such as consumer guarantees that persons can enforce through Commonwealth, state and territory courts and tribunals.

Objectives of the Australian Consumer Law

The Intergovernmental Agreement for the Australian Consumer Law states that the objective of the national consumer policy framework is to:

- improve consumer wellbeing through empowerment and protection
- foster effective competition
- enable the confident participation of consumers in markets in which both consumers and suppliers trade fairly.

This is supported by six operational objectives:

- to ensure that consumers are sufficiently well-informed to benefit from and stimulate effective competition
- to ensure that goods and services are safe and fit for the purposes for which they were sold to prevent practices that are unfair
- to prevent practices that are unfair
- to meet the needs of consumers who are most vulnerable or are at the greatest disadvantage
- to provide accessible and timely redress where consumer detriment has occurred
- to promote proportionate, risk-based enforcement.

The ACL replaced previously separate legislation, which means that:

- a trader who operates across jurisdictions has a single set of rules and responsibilities to comply with (in addition to any jurisdictional legislation that covers their particular industry)
- a consumer moving between jurisdictions or buying from interstate will have the same set of protections as in their home jurisdiction.

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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 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 3 or 6 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.

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 (including a public place), without invitation from that consumer
- the agreement results from those negotiations (even if those were not the only negotiations that led to the agreement)
- 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)
- 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
- 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.

Contact details

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

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

Requirements for face-to-face and telemarketing approaches

When a salesperson negotiates an unsolicited consumer agreement:

- When a salesperson negotiates an unsolicited consumer agreement:

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

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

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

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

The supplier must inform consumers before the agreement is made that they are prohibited from doing any of the above.

These requirements do 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 4.

CASE STUDY

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

CASE STUDY

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

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.

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

Waivers not permitted

ACL reference: section 90

Cooling-off and termination requirements

- visited outside permitted selling hours
- did not disclose the purpose of the visit
- did not produce identification
- 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
- 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.

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.

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
- 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



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.

The recruitment payment helps define a pyramid scheme – it is 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.

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

- the greater of \$50 million, three times the value gained from the conduct or 30% of the adjusted turnover during the breach turnover period for a body corporate
- \$2.5 million for an individual.

ACL reference: sections 44, 164

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 5 years.

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



Multiple pricing

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

ACL reference: sections 47–48, 165–166

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.

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.

ACL reference: section 165

Optional extras do, however, need to be included in the single price if the supplier pre-selects these options for consumers.

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.

- a combination of quantifiable and non-quantifiable components
- 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.

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

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

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

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 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.

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.

- 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.

Sales practices



Gift cards purchased on or after 1 November 2019 must be redeemable for at least **3 years** after the date of purchase.

A supplier cannot charge post-supply fees for the use of gift cards.

Given the ACL requirements regarding false or misleading representations, and misleading or deceptive conduct, gift cards should also clearly state any conditions and restrictions on the use of the gift card, including but not limited to, the activation expiry date (for cards that require activation to be used), any limits on the number of transactions, and whether it can be reloaded or topped up, etc.

A gift card (or gift voucher) is preloaded with an amount of money that is redeemable by the recipient for goods or services to the value of the amount on the card. It may be in physical or electronic form.

Gift cards purchased from 1 November 2019 must:

- be valid for at least three years from the date of purchase (although there are some exceptions to this requirement).
- prominently display the expiry date as either the full date (being a date at least three years from the date of purchase), or as a period of time, including the date it was purchased (e.g. 'Gift card expires 5 years from the issue date. Date of issue: January 2021'. If there is no expiry, this must be stated on the gift card.
- not contain post-supply fees, i.e. a fee or charge that the gift card recipient is required to pay in relation to the gift card after it has been supplied or purchased. Note that this does not apply to fees and charges that:
 - are booking fees that would be applied when using another payment method
 - are for foreign currency transactions
 - relate to the reissue of a gift card that has been lost, stolen, or damaged
 - are payment surcharges (within the meaning of section 55A of the Competition and Consumer Act 2010).

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: sections 96–99

What is a lay-by agreement?

An agreement is a 'lay-by' if the consumer:

- pays for the goods in at least 3 instalments (when the agreement is not stated as 'lay-by') or in two or more instalments (when the agreement states it is 'lay-by')
- 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. Please see the Unfair Contract Terms Guidance for more details.

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.

CASE STUDY

Between January 2011 and December 2013, a supplier selling a range of Christmas hampers and other gift items made false or misleading representations that customers could not cancel a lay-by agreement after making their final payment. However, under the ACL consumers have the right to cancel a lay-by agreement at any time prior to delivery of the goods, including after paying their final lay-by instalment. In 2016 the Federal Court fined the supplier \$200,000.

Legal reference: Australian Competition and Consumer Commission v Chrisco Hampers Australia limited [2015] FCA 1204

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
- 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 three horse floats 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
- 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.

EXAMPLE

A consumer signs up for a music streaming service because of its promotional offer. The streaming service is offering a 10% discount on her subscription at the end of the month if she provides the contact details of three friends and all three friends take out a subscription for that service.

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.

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.

It is also not 'referral selling' if consumers who have already purchased the goods or services (existing customers) are later offered a rebate, commission or other benefit by the supplier for referring other consumers.

EXAMPLE

A consumer has been a member of a gym for a few months. The gym is running a promotion that if an existing gym member successfully refers a friend to become a gym member, the existing gym member will receive a 1 month free gym membership for every successful referral.

Penalties

The maximum civil and criminal penalties for referral selling are:

- The maximum civil and criminal penalties for referral selling are:

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
- 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

In 2018 the Federal Court ordered a debt collection firm to pay \$750,000 in penalties for misleading, harassing, coercive and unconscionable conduct in pursuit of unpaid debts from two vulnerable consumers. One of the consumers was in a care facility, and the other was a single parent with limited income. Both were pursued for unpaid mobile services debt.

The debt collector's behavior included intimidation of the care facility resident who had difficulty speaking after suffering multiple strokes. This was achieved by sending one or two letters per month over a period of about four years which falsely threatened legal proceedings if the debt was not paid. The debt collector also made multiple phone calls to the consumer, and to the nursing home in which they resided.

The debt collector, across multiple phone calls, also used scare tactics and gave false information to the single parent, stating that failure to pay would mean she would not be able to obtain credit for five to seven years, and falsely threatening that the firm would take legal action.

The Court found that the multiple telephone calls, coupled with the number and content of the debt collection firm's correspondence was calculated to intimidate or demoralise the consumers.

Legal reference: Australian Competition and Consumer Commission v ACM Group Limited (No 2) [2018] FCA 1115

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.

The salesman's statements could be considered coercion.

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

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

Penalties

- the greater of \$50 million, three times the valued gained from the conduct, or 30% of adjusted turnover during the breach turnover period for a body corporate
- \$2.5 million for an individual.

'Proof of transaction' and itemised bills

Summary

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

Consumers may request an itemised bill if the total 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 costing \$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 7 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 7 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.

Glossary and abbreviations

TERM	DEFINITION
body corporate	includes a company registered under the Corporations Act 2001 (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"> any type of goods or services costing up to \$100,000 (or any other amount stated in the ACL Regulations) goods or services costing more than \$100,000, which would normally be for personal, domestic or household use goods which consist of a vehicle or trailer used mainly to transport goods on public roads. <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"> an air seeder – <i>Jillawarra Grazing Co v John Shearer Ltd</i> [1984] FCA 30 a large tractor – <i>Atkinson v Hastings Deering (Queensland) Pty Ltd</i> [1985] 6 FCR 331 an industrial photocopier – <i>Four Square Stores (QLD) Ltd v ABE Copiers</i> [1981] ATPR 40–232 at 43,115.
goods	<p>include, among other things:</p> <ul style="list-style-type: none"> animals, including fish gas and electricity computer software second-hand goods ships, aircraft and other vehicles minerals, trees and crops, whether on or attached to land any component part of, or accessory to, goods.
liability	an obligation to put right a problem – for example, fixing a defective product, providing compensation or taking other action.

