

Sales practices

A guide for businesses and legal practitioners

This guide was developed by:

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Introduction

About the Australian Consumer Law

- i. The Australian Consumer Law (ACL) aims to protect consumers and ensure fair trading in Australia.
- ii. It is a national, state and territory law from 1 January 2011 and includes unfair contract terms legislation introduced on 1 July 2010.
- iii. Under the ACL, consumers have the same protections, and businesses the same obligations and responsibilities, across Australia.
- iv. Australian courts and tribunals can enforce the ACL, including those of the states and territories. The regulators of this law include:
 - the Australian Competition and Consumer Commission (ACCC)
 - the Australian Securities and Investments Commission (ASIC)
 - each state and territory consumer protection agency.
- v. The ACL replaces previous Commonwealth, state and territory consumer protection legislation in fair trading acts. It is contained in a schedule to the *Trade Practices Act 1974*, which has been renamed the *Competition and Consumer Act 2010* (CCA).
- vi. Aspects of the ACL are reflected in the *Australian Securities and Investments Commission (ASIC) Act 2001* to protect consumers of financial products and services.

About this guide

- vii. Consumer protection agencies across Australia have developed this guide to help businesses and legal practitioners understand the sales practices requirements of the ACL.
- viii. This guide covers:
 - unsolicited supplies
 - unsolicited consumer agreements
 - pyramid schemes
 - multiple pricing
 - lay-by agreements
 - referral selling
 - harassment and coercion.

- ix. It explains the law in simple language but is no substitute for the legislation. The guide provides general information and examples - not legal advice or a definitive list of situations where the law applies.
- x. Other guides to the ACL cover:
- consumer guarantees
 - unfair contract terms
 - business conduct
 - compliance and enforcement
 - product safety.
 - mandatory reporting.
- xi. The Australian Treasury also publishes information to help businesses comply – see *The Australian Consumer Law – a guide to provisions*, available from the Australian Treasury website at treasury.gov.au.

1. Unsolicited supplies

1.1

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: *This is not a bill. You are not required to pay any money.* This warning must be the most prominent text in the document.

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?

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

1.3 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.

1.4 For example, it is:

- unlawful to demand payment for books, magazines or DVDs posted to someone who did not request the items
- lawful to send a free product sample to someone, when there is no expectation they will pay for the goods
- unlawful to bill a business for an advertisement about its services, if that business did not authorise its publication.

Requesting payment for unsolicited goods or services

1.5 It is not reasonable to assume that a business has a right to be paid just because they have sent goods or provided services to a recipient.

1.6 A business 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.

Failing to include the warning can lead to maximum civil and criminal penalties of \$1.1 million for a body corporate and \$220,000 for an individual.

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

Must someone who receives unsolicited goods or services pay?

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

1.9 However, they may have to pay compensation if they wilfully damage unsolicited goods within three months of receiving them. This three-month period is called the *recovery period*. The supplier can seek return of the goods within this time.

1.10 The recovery period reduces to one month when the recipient gives written notice to the supplier that:

- they do not want the goods, and
- the supplier should recover the items.

1.11 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.

1.12 However, the recipient cannot:

- keep goods 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.

1.13

For example:

- A consumer arranges for a mechanic to replace the muffler on her car. When she returns, the mechanic says he also replaced the tyres and brake pads, which cost an extra \$1200. This work was unsolicited; she does not have to pay for any work other than replacing the muffler. This would not be the case if the mechanic asked her permission before replacing the tyres and brake pads, and she agreed.
- 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. The consumer is angry as he planned to demolish the shed. Replacing the shed door was outside the scope of their agreement and unsolicited. The consumer does not have to pay the extra \$250.
- A consumer takes his laptop to a repairer to have the hard drive replaced. When he returns, the repairer says he also repaired the CD drive and added extra memory capacity. He added \$150 to the repair bill for this extra work, which was unsolicited. The consumer does not have to pay the \$150.

Requesting payment for unauthorised entries or advertisements

1.14 It is unlawful to demand payment for an entry or advertisement that was not first authorised by the person or business concerned.

1.15 An advertisement 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.

1.16 It is possible to send an invoice for an unauthorised entry or advertisement, if it contains the warning statement required by the ACL Regulations: *'This is not a bill. You are not required to pay any money'*.

1.17 This warning must be the most prominent text in the document. Failing to include it could lead to maximum civil and criminal penalties of \$1.1 million for a body corporate and \$220,000 for an individual.

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

1.19 For example:

Three Queensland men phoned businesses and pressured them to pay for advertising they had not ordered. These scammers 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, banned them for life from the advertising industry, and ordered that they pay costs of \$180,000. The Federal Court order prevents the scammers from operating similar operations anywhere in Australia.

Unsolicited credit or debit cards

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

1.21 An item is a *credit card* if intended to obtain cash, goods or services on credit. For example, store-branded credit cards and store cards are credit cards.

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

1.23 Issuers must not send a credit card or a debit card, or an article that may be used as a credit or debit card, to someone unless:

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

1.24 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.

1.25 The maximum civil penalty for failing to comply is \$1.1 million for a body corporate or \$220,000 for an individual. Criminal penalties for the same amounts also apply.

1.26 More information about unsolicited credit and debit cards is available in Regulatory Guide 201 by the Australian Securities & Investments Commission at asic.gov.au.

2. Unsolicited consumer agreements

2.1

Summary

Salespeople who initiate unsolicited contact with consumers must comply with:

- limited hours for contact with consumers
- disclosure requirements when making an agreement
- criteria for the sales agreement, which must be in writing.

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

The *Corporations Act 2001* prohibits unsolicited hawking of securities, certain financial products and managed investment products. More information is available from the Australian Securities and Investments Commission at asic.gov.au

ACL reference: Sections 69-70, 73-75, 78-80 and 95

What is an unsolicited consumer agreement?

2.2 An agreement is unsolicited when:

- a supplier, their salesperson or dealer approaches or telephones a consumer without invitation from that consumer
- it results from negotiations by telephone or at a location other than the supplier's premises, and
- the total value is more than \$100, or the value was not established when the agreement was made.

2.3 For example, unsolicited consumer agreements may result from:

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

2.4 Unsolicited sales can also happen when a consumer:

- gave his or her contact details to a supplier for one purpose, and the supplier contacts them for another purpose, or
- returns a missed call from a supplier or responds to any unsuccessful attempt by the supplier to contact the consumer.

2.5 A consumer who has invited a supplier to quote - for example, measuring for blinds - has not asked to negotiate a sale.

2.6 For 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 to provide product information. If the supplier contacts the consumer about anything other than the competition, the contact is considered 'unsolicited'
- A supplier leaves a quote for the consumer to consider. 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.
- The above agreement would be unsolicited if the supplier had negotiated it with the consumer when they provided the quote.

2.7 In a dispute, it is up to the supplier to prove that an agreement was not unsolicited.

Permitted hours for contacting consumers

2.8 Permitted hours for telemarketing are regulated under the *Do Not Call Register Act 2006* and associated telemarketing standards. The standards do not allow telemarketing calls to consumers:

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

2.9 Other forms of contact, such as door-knocking, are regulated by the ACL, which requires that 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.

2.10 The maximum civil and criminal penalties for failing to comply are \$50,000 for a body corporate and \$10,000 for an individual.

Suppliers' obligations when calling on consumers

2.11 Suppliers who call on a consumer, other than by telephone, must:

- explain upfront the purpose of the visit and produce identification

- inform the consumer that they can ask the supplier to leave
- leave the premises if the consumer asks them to do so
- explain to consumers their right to terminate the agreement within 10 business days ('cooling off' rights), and
- provide their contact details in the agreement.

2.12 Similar obligations apply when contacting consumers by telephone - see 'Requirements for face-to-face and telemarketing approaches' on p14.

Disclose purpose and show identification

2.13 Before giving a sales pitch, a salesperson or dealer must clearly inform the consumer of the purpose of the visit and provide identification.

2.14 The identification must include information as prescribed in the ACL Regulations, including the name of the salesperson and the organisation they represent.

2.14 The maximum civil and criminal penalties for failing to comply are \$50,000 for a body corporate and \$10,000 for an individual.

Cease to negotiate

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

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

2.17 The maximum civil and criminal penalties for failing to comply are \$50,000 for a body corporate and \$10,000 for an individual.

Contact details

2.18 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).

2.19 The maximum civil and criminal penalties for failing to comply are \$50,000 for a body corporate and \$10,000 for an individual.

Requirements for face-to-face and telemarketing approaches

2.20 In summary:

- Consumers must be given a written copy of the agreement.
- The salesperson must inform consumers of their termination rights.
- The written agreement must meet specific criteria.
- Both parties must sign any amendments to the agreement.
- A supplier must not supply any goods or services, or accept any payment, during the cooling-off period.

The sales contract

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

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

2.23 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).

2.24 The document must be:

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

2.25 The document must clearly state:

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

2.26 The document must be accompanied by a notice that may be used to terminate the contract.

2.27 The maximum civil and criminal penalties for failing to comply are \$50,000 for a body corporate and \$10,000 for an individual (ACL sections 174-175).

Provisions of an agreement that are void

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

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

2.29 Any attempts to do so in an agreement have no effect (ACL section 89).

2.30 The maximum civil and criminal penalties for failing to comply are \$50,000 for a body corporate and \$10,000 for an individual.

Waivers not permitted

2.31 A consumer cannot waive their rights under the ACL (ACL section 90).

2.32 It is unlawful for any supplier to persuade, or attempt to persuade, a consumer to do so. The maximum civil and criminal penalties are \$50,000 for a body corporate and \$10,000 for an individual.

Cooling off and termination requirements

2.33 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 sections 76 and 82).

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

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

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

- 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.

2.37 The termination period is extended to six months if a salesperson:

- did not provide information about cooling-off rights, or
- breached requirements for unsolicited consumer agreements (such as failing to provide a written copy or not including required information)
- supplies goods during the cooling-off period.

2.38 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

2.39 An agreement terminated by a consumer is void – effectively cancelled, or treated as if it never existed (ACL sections 83, 84, 85, 87 and 88).

2.40 If the consumer cools off, 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.

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

2.42 For goods bought on credit, it is the supplier's responsibility to contact the credit provider and arrange for cancellation. For more information, contact the Australian Securities and Investments Commission – asic.gov.au.

2.43 For 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 service agreement (an 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.

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

2.45 The maximum civil and criminal penalties for failing to comply are \$50,000 for a body corporate and \$10,000 for an individual.

2.46 The supplier cannot:

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

2.47 This also has maximum civil and criminal penalties of \$50,000 for a body corporate or \$10,000 for an individual.

2.48 A consumer who cools off must, within a reasonable time, return any goods that have not been consumed or tell the supplier where to collect them.

2.49 If a consumer has not taken reasonable care of the goods, the supplier can seek compensation for depreciated value. The consumer does not have to pay compensation for normal use of the goods or circumstances beyond the consumer's control.

2.50 For example:

A consumer buys an electric mixer from a door-to-door trader but the trader 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 do not look pristine. The supplier is not entitled to compensation for the blades, as this was normal use of the mixer.

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

2.52 When an agreement is terminated after the cooling-off period and a service has already been provided, the consumer may have to pay for the service.

2.53 For 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 tell the consumer about his cooling-off rights. After the first clean, 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.

- A consumer agrees to buy cleaning supplies from a telemarketer, who fails to inform him of the cooling-off period. Five months later, the consumer realises he was entitled to cool off on the contract, and decides to do so. The supplier collects the remaining cleaning products, including unopened and some partly-used bottles. The supplier must refund the consumer for the amount paid under the agreement.

Supplying goods or services during the cooling-off period

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

- supply any goods or services relating to the agreement
- accept or require any form of payment.

(ACL section 86.)

2.55 The maximum civil and criminal penalties for doing so are \$50,000 for a body corporate and \$10,000 for an individual.

2.56 Goods or services supplied during the cooling-off period are considered unsolicited supplies. See Unsolicited supplies, page 6.

Supplier responsibility for failing to comply – unsolicited agreements

2.57 A supplier cannot enforce an agreement if the supplier's dealer – for instance, a telemarketer or door-to-door salesperson - has breached the law on unsolicited consumer agreements. (ACL sections 93 and 77).

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

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

3. Pyramid schemes

3.1

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 and 46

What is a pyramid scheme?

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

3.3 New participants make a payment, known as a 'participation payment', to join. They are promised payments for recruiting other investors. Pyramid schemes inevitably collapse and new members never make money; they usually lose the money they have paid to participate.

3.4 It is unlawful to participate in, or to persuade someone to participate in, a pyramid scheme. Criminal and civil penalties apply (see below).

3.5 There are two payments associated with a pyramid scheme:

- a participation payment to join
- a recruitment payment, promised when a member recruits others. This may be a financial or non-financial benefit, paid either to the new participant or to someone else.

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

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

- participation payments may (or must) be made when joining the scheme
- a participation payment is not the only requirement for taking part
- a new investor does not have a legally enforceable right to promised recruitment payments

- arrangements are not usually in writing
- the scheme involves promoting and selling goods or services (or both).

Marketing scheme or pyramid scheme?

3.8 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.

3.9 For example:

A consumer must pay \$1000 up front 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

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

3.11 The maximum civil and criminal penalties are \$1.1 million for a body corporate and \$220,000 for an individual (ACL sections 44, 164).

4. Multiple pricing

4.1

Summary

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', unless a retraction is published to a similar circulation or audience.

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

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

Understanding 'displayed price'

4.2 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.

4.3 The 'displayed price' is one:

- 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 (not out-of-date)
 - that price applies only to the goods at a specific location or in a specific region, or
- that reasonably appears to apply to the goods, including a partly-obscured price
- displayed on a register or scanner.

4.4 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.

4.5 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.

Specify the total price

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

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

4.8 For 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 total price.

The television should have been advertised for either a total price of \$2240 or with the each extra cost listed in addition to the total. The total price should be as prominent as the component prices.

4.9 The total price must be:

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

4.10 The total price must include:

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

4.11 The total price does not have to include a charge for sending goods from the supplier to the consumer, unless the supplier is aware of a minimum charge that must be paid.

4.12 For example:

A supplier advertises lounge suites for sale. At the point of sale consumers can pay extra for fabric protection.

The fabric protection charge does not form part of the total price because the consumer can choose whether to pay the extra charge.

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5. Lay-by agreements

5.1

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?

5.2 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 instalments (when the agreement is called 'lay-by'), and
- does not receive the goods until the full price has been paid.

5.3 Any deposit paid by the consumer is an instalment.

5.4 For example:

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

5.5 Lay-by agreements that are standard form contracts may be covered by unfair contract terms provisions in Part 2-3 of the ACL.

Agreements must be in writing

5.6 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.

5.7 An 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.

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

5.9 It is an offence for a supplier to:

- enter a lay-by agreement without putting it in writing
- not give the consumer a copy of the written agreement.

5.10 The maximum civil and criminal penalties for either offence are \$30,000 for a body corporate or \$6000 for an individual.

When a consumer cancels a lay-by agreement

5.11 The supplier must refund all amounts paid by the consumer under the agreement. They can charge a termination fee, unless the supplier breached the lay-by agreement.

5.12 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. What is 'reasonable' will depend on the circumstances, and suppliers should be prepared to justify claims for reasonable costs.

5.13 For example:

A consumer enters into a lay-by agreement to buy a winter coat in June but decides to cancel the agreement in August. It will be more difficult for the supplier to sell the coat at the end of winter. The termination charge could take into account any need to discount the coat.

5.14 If the consumer's lay-by payments do not cover the termination charge, the supplier can recover the outstanding amount as a debt.

5.15 Apart from the termination charge, a supplier is not entitled to damages or other remedy.

5.16 It is an offence to:

- fail to refund all amounts paid by the consumer, except for the termination charge
- charge a termination fee that is higher than the reasonable costs associated with the agreement
- charge a termination fee when the supplier has breached the lay-by agreement.

5.17 Each offence has maximum civil and criminal penalties of \$30,000 for a body corporate and \$6,000 for an individual.

Termination of lay-by agreements by suppliers

5.18 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).

5.19 The maximum civil and criminal penalties for failing to comply are \$30,000 for a body corporate and \$6,000 for an individual.

6. Referral selling

6.1

Summary

Promising future commissions for subsequent sales is illegal in certain circumstances.

It is unlawful to persuade a consumer to buy goods or services by promoting they will benefit for assisting the supply of goods or services to other customers.

Promising future commissions for subsequent sales is illegal in certain circumstances.

ACL reference: Section 49

What is referral selling?

6.2 'Referral selling' is when:

- a consumer is persuaded 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 - for example, other consumers also have to buy the goods or services from the same supplier.

6.3 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.

6.4 What matters is the condition that a future event has to happen for the consumer to receive that benefit.

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

7. Harassment and coercion

7.1

Harassment and coercion

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

ACL reference: Section 50

What is harassment and coercion?

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

- 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.

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

7.4 Financial institutions are entitled to attempt to collect debts owed, but laws relating to privacy, harassment and misleading and deceptive conduct apply to all businesses (including debt collection agencies).

7.5 For example:

- 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 would 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.

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8. 'Proof of transaction' and itemised bills

8.1

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.

ACL reference: Section 100

What is proof of transaction?

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

- supplier of the goods or services
- supplier's ABN, if they have one
- supplier's ACN, if they have one but do not have an ABN
- date of the supply
- goods or services supplied to the consumer, and
- price of the goods or services.

8.3 Examples of proof of transaction:

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

Supplier must provide proof of transaction

8.4 A supplier must give proof of transaction when a consumer:

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

8.5 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
- \$3000 for an individual.

Itemised bills for services

8.6 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, and
- a list of the materials used and the amount charged for them.

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

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

8.8 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.

9. Warranties, refunds, repairs - 'consumer guarantees'

9.1 The ACL sets out protections for consumers who buy goods and services from suppliers, manufacturers and importers – 'the consumer guarantees'.

9.2 The 'consumer guarantees' are a comprehensive set of rights and remedies that apply to defective goods and services. A consumer has these rights regardless of any other warranty provided by the supplier or manufacturer.

9.3 For more information, see *Consumer guarantees: a guide for businesses and legal practitioners*.

9.4 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

Glossary

Term	Definition
body corporate	includes a company registered under the <i>Corporations Act 2001</i> , an incorporated association, a cooperative or an owners' corporation.
business day	Monday to Friday, except public holidays
buy	to take possession of something by hiring, leasing or buying it, and by exchange or gift
call on	to visit
consumer	<p>a person who buys:</p> <ul style="list-style-type: none"> • any type of goods or services costing up to \$40,000 (or any other amount stated in the ACL Regulations) • goods or services which would normally be for personal, domestic or household use, or • 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 airseeder • a large tractor • a reduction photocopier
goods	<p>includes, among other things:</p> <ul style="list-style-type: none"> • animals • gas, electricity and water • 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
manufacturer	<p>includes a person who:</p> <ul style="list-style-type: none"> • grows, extracts, produces, processes or assembles goods

Term	Definition
	<ul style="list-style-type: none"> • holds him/herself out to the public as the manufacturer of goods • causes or permits his/her name, business name or brand mark to be applied to goods he/she supplies • permits him/herself to be held out as the manufacturer by another person, or • imports goods into Australia where the manufacturer of the goods does not have a place of business in Australia
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	duties, work, facilities, rights or benefits provided in the course of business, for example: <ul style="list-style-type: none"> • dry cleaning • installing or repairing consumer goods • providing swimming lessons • lawyers' services
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"> • in relation to goods – supply (including re-supply) by way of sale, exchange, lease, hire or hire-purchase, and • in relation to services – provide, grant or confer

Abbreviations

ACL – Australian Consumer Law

ACCC – Australian Competition and Consumer Commission

ASIC – Australian Securities and Investments Commission

Contacts

Australian Competition and Consumer Commission

GPO Box 3131
Canberra ACT 2601
Tel: 1300 302 502
accc.gov.au

South Australia

Office of Consumer & Business Affairs

GPO Box 1719
Adelaide SA 5001
Tel: (08) 8204 9777
ocba.sa.gov.au

Australian Capital Territory Office of Regulatory Services

GPO Box 158
Canberra ACT 2601
Tel: (02) 6207 0400
ors.act.gov.au

Tasmania

Office of Consumer Affairs & Fair Trading

GPO Box 1244
Hobart TAS 7001
Tel: 1300 654 499
consumer.tas.gov.au

New South Wales

NSW Fair Trading

PO Box 972
Parramatta NSW 2124
Tel: 13 32 20
fairtrading.nsw.gov.au

Victoria

Consumer Affairs Victoria

GPO Box 123
Melbourne VIC 3001
Tel: 1300 55 81 81
consumer.vic.gov.au

Northern Territory Office of Consumer Affairs

GPO Box 1722
Darwin NT 0801
Tel: 1800 019 319
consumeraffairs.nt.gov.au

Western Australia

Department of Commerce

Locked Bag 14
Cloisters Square WA 6850
Tel: 1300 30 40 54
commerce.wa.gov.au

Queensland Office of Fair Trading

GPO Box 3111
Brisbane QLD 4001
Tel: 13 74 68
fairtrading.qld.gov.au

Australian Securities and Investments Commission

PO Box 9827
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Tel: 1300 300 630
asic.gov.au

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