

australian
consumer law

Avoiding unfair business practices

A GUIDE FOR BUSINESSES AND LEGAL PRACTITIONERS

This guide was developed by:

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- 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
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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 avoid unfair business practices by understanding relevant sections of the ACL.

It covers misleading or deceptive conduct, unconscionable conduct, country of origin, false and misleading representations.

These guides:

- explain the law in simple language, but are not 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

The 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.
- [Unconscionable Conduct](#)
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.
- [Unfair Terms](#)
Covers what an unfair term is and which contracts are affected by the law.
- [Enforcement](#)
Covers how regulators enforce the ACL.

- [Safety Standards](#)
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 [acclaw.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

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Misleading or deceptive conduct

Summary

It is unlawful for a business to make statements in trade or commerce that:

- are misleading or deceptive; or
- are likely to mislead or deceive.

Failing to disclose relevant information, promises, opinions and predictions can also be misleading or deceptive.

In most cases, businesses cannot rely on small print and disclaimers as an excuse for misleading or deceptive conduct.

A limited exemption applies to businesses (mostly media outlets) who make representations in certain circumstances in the course of carrying on a business of providing information.

ACL s 60-63, 65-66, 68-69, 71-72, 74-75, 77-78, 79-80, 81-82, 83-84, 85-86, 87-88, 89-90, 91-92, 93-94, 95-96, 97-98, 99-100, 101-102, 103-104, 105-106, 107-108, 109-110, 111-112, 113-114, 115-116, 117-118, 119-120, 121-122, 123-124, 125-126, 127-128, 129-130, 131-132, 133-134, 135-136, 137-138, 139-140, 141-142, 143-144, 145-146, 147-148, 149-150, 151-152, 153-154, 155-156, 157-158, 159-160, 161-162, 163-164, 165-166, 167-168, 169-170, 171-172, 173-174, 175-176, 177-178, 179-180, 181-182, 183-184, 185-186, 187-188, 189-190, 191-192, 193-194, 195-196, 197-198, 199-200, 201-202, 203-204, 205-206, 207-208, 209-210, 211-212, 213-214, 215-216, 217-218, 219-220, 221-222, 223-224, 225-226, 227-228, 229-230, 231-232, 233-234, 235-236, 237-238, 239-240, 241-242, 243-244, 245-246, 247-248, 249-250, 251-252, 253-254, 255-256, 257-258, 259-260, 261-262, 263-264, 265-266, 267-268, 269-270, 271-272, 273-274, 275-276, 277-278, 279-280, 281-282, 283-284, 285-286, 287-288, 289-290, 291-292, 293-294, 295-296, 297-298, 299-300, 301-302, 303-304, 305-306, 307-308, 309-310, 311-312, 313-314, 315-316, 317-318, 319-320, 321-322, 323-324, 325-326, 327-328, 329-330, 331-332, 333-334, 335-336, 337-338, 339-340, 341-342, 343-344, 345-346, 347-348, 349-350, 351-352, 353-354, 355-356, 357-358, 359-360, 361-362, 363-364, 365-366, 367-368, 369-370, 371-372, 373-374, 375-376, 377-378, 379-380, 381-382, 383-384, 385-386, 387-388, 389-390, 391-392, 393-394, 395-396, 397-398, 399-400, 401-402, 403-404, 405-406, 407-408, 409-410, 411-412, 413-414, 415-416, 417-418, 419-420, 421-422, 423-424, 425-426, 427-428, 429-430, 431-432, 433-434, 435-436, 437-438, 439-440, 441-442, 443-444, 445-446, 447-448, 449-450, 451-452, 453-454, 455-456, 457-458, 459-460, 461-462, 463-464, 465-466, 467-468, 469-470, 471-472, 473-474, 475-476, 477-478, 479-480, 481-482, 483-484, 485-486, 487-488, 489-490, 491-492, 493-494, 495-496, 497-498, 499-500, 501-502, 503-504, 505-506, 507-508, 509-510, 511-512, 513-514, 515-516, 517-518, 519-520, 521-522, 523-524, 525-526, 527-528, 529-530, 531-532, 533-534, 535-536, 537-538, 539-540, 541-542, 543-544, 545-546, 547-548, 549-550, 551-552, 553-554, 555-556, 557-558, 559-560, 561-562, 563-564, 565-566, 567-568, 569-570, 571-572, 573-574, 575-576, 577-578, 579-580, 581-582, 583-584, 585-586, 587-588, 589-590, 591-592, 593-594, 595-596, 597-598, 599-600, 601-602, 603-604, 605-606, 607-608, 609-610, 611-612, 613-614, 615-616, 617-618, 619-620, 621-622, 623-624, 625-626, 627-628, 629-630, 631-632, 633-634, 635-636, 637-638, 639-640, 641-642, 643-644, 645-646, 647-648, 649-650, 651-652, 653-654, 655-656, 657-658, 659-660, 661-662, 663-664, 665-666, 667-668, 669-670, 671-672, 673-674, 675-676, 677-678, 679-680, 681-682, 683-684, 685-686, 687-688, 689-690, 691-692, 693-694, 695-696, 697-698, 699-700, 701-702, 703-704, 705-706, 707-708, 709-710, 711-712, 713-714, 715-716, 717-718, 719-720, 721-722, 723-724, 725-726, 727-728, 729-730, 731-732, 733-734, 735-736, 737-738, 739-740, 741-742, 743-744, 745-746, 747-748, 749-750, 751-752, 753-754, 755-756, 757-758, 759-760, 761-762, 763-764, 765-766, 767-768, 769-770, 771-772, 773-774, 775-776, 777-778, 779-780, 781-782, 783-784, 785-786, 787-788, 789-790, 791-792, 793-794, 795-796, 797-798, 799-800, 801-802, 803-804, 805-806, 807-808, 809-810, 811-812, 813-814, 815-816, 817-818, 819-820, 821-822, 823-824, 825-826, 827-828, 829-830, 831-832, 833-834, 835-836, 837-838, 839-840, 841-842, 843-844, 845-846, 847-848, 849-850, 851-852, 853-854, 855-856, 857-858, 859-860, 861-862, 863-864, 865-866, 867-868, 869-870, 871-872, 873-874, 875-876, 877-878, 879-880, 881-882, 883-884, 885-886, 887-888, 889-890, 891-892, 893-894, 895-896, 897-898, 899-900, 901-902, 903-904, 905-906, 907-908, 909-910, 911-912, 913-914, 915-916, 917-918, 919-920, 921-922, 923-924, 925-926, 927-928, 929-930, 931-932, 933-934, 935-936, 937-938, 939-940, 941-942, 943-944, 945-946, 947-948, 949-950, 951-952, 953-954, 955-956, 957-958, 959-960, 961-962, 963-964, 965-966, 967-968, 969-970, 971-972, 973-974, 975-976, 977-978, 979-980, 981-982, 983-984, 985-986, 987-988, 989-990, 991-992, 993-994, 995-996, 997-998, 999-1000

What is misleading or deceptive conduct?

'Conduct' includes but is not limited to actions and statements, such as:

- advertisements
- promotions

Whether conduct is misleading or deceptive will depend on the particular circumstances of the case. This means that all relevant circumstances will be taken into consideration, such as the entire advertisement, the medium in which the advertisement appeared (for example TV, radio, internet), product packaging, and any statements (or silence) made by a sales representative relating to the product. Fine print, contradictory statements and images that obscure or alter written statements are also taken into account.

Further, whether or not conduct is misleading or deceptive must be considered within the context of the class of consumers who are likely to be affected by the conduct. The effect of the conduct will be assessed against an 'ordinary' or 'reasonable' member of the relevant class. It is a business's actions and statements that matter—not its intentions. A business can mislead and deceive, without intending to.

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- A trader uses a business name that is similar to that of a long-established
-

Disclaimers and small print

In most cases, businesses cannot rely on disclaimers, disclosures or clarifications buried in small print as an excuse for engaging in misleading or deceptive conduct.

CASE STUDY

In *TPG Telecom Limited v Australian Competition and Consumer Commission*, following action by the ACCC, the Federal Court found that TPG misled consumers about the price of its ADSL + broadband. TPG prominently advertised unlimited ADSL + for \$. a month and then disclosed in the small print that this service was only available when bundled with home line rental of \$ per month. The High Court upheld the trial judge's finding that the advertisements were misleading because they conveyed the impression that TPG's Unlimited ADSL + broadband internet service could be acquired at a cost of \$. per month, when in fact this service could only be acquired with a 'bundled' home telephone line for an additional \$ per month plus startup costs.

TPG Telecom Limited v Australian Competition and Consumer Commission
[2013] 153 CLR 181 (HCA)

However, a prominent disclaimer may sometimes be sufficient to overcome what would otherwise amount to misleading or deceptive conduct.

EXAMPLE

- A bank advertises low credit card interest rates for the first months. The advertisement clearly and prominently indicates the low rates are only available to new customers who apply within a certain period. This disclaimer is sufficient because it clearly informs consumers about the terms and conditions.

It is recommended that businesses prominently display all disclaimers, and any terms and conditions that apply to an offer, in close proximity to the headline statement to reduce the risk of the conduct being misleading.

Predictions and opinions

A statement about the future that does not turn out to be true is not necessarily misleading or deceptive.

But promises, opinions and predictions can be misleading or deceptive if the person making the statement:

- knew it was untrue or incorrect
- did not care whether it was true or not
- had no reasonable grounds for making it.

CASE STUDY

In *Dr. Jeffrey M. Leach v Australian Competition and Consumer Commission*, following action by the ACCC, the Federal Court found that an individual had made claims about a cancer treatment with no reasonable basis. The individual offered a treatment program that he represented was effective in treating and curing cancer and was proven to bring cancer under control. He charged patients \$, for the first three months and \$, for each succeeding three month period. His claims were made on his website and in an e-book. The Federal Court found that these claims were untrue, that the individual had no reasonable basis for making the representations and possessed no reliable current scientific evidence or expert medical opinion to support them.

Dr. Jeffrey M. Leach v Australian Competition and Consumer Commission
[2013] 153 CLR 181 (FCA)

A court will consider the circumstances and the effect or impact on the consumer when deciding if a prediction or opinion was misleading or deceptive.

Exceptions for information providers and advertisers

Information providers are exempt from certain ACL provisions if they publish a matter in the course of carrying on a business of providing information. Information providers include media organisations such as:

- radio stations
- television stations
- publishers of newspapers or magazines (including online).

Advertisers are also exempt from certain provisions if:

- they are in the business of publishing or arranging for the publication of advertisements
- they received the advertisement in the ordinary course of this business; and
- they did not know, and had no reason to suspect, that the advertisement was misleading or deceptive.

However, advertisers must take particular care in relation to the products and services they advertise for their clients. They should know their clients' business and be aware of the requirements under the ACL, otherwise they risk breaching the law.

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

CAUTION.

False or misleading representations

Summary

It is unlawful for a business to make false or misleading representations about goods or services when supplying, offering to supply, or promoting them.

Whether a representation is false or misleading will depend on the circumstances of the particular case.

Making false or misleading representations is an offence. The maximum fine is \$10,000 for an individual and \$1 million for a body corporate.

ACL s 87(1) : 13.9t (r m) 11

What are false or misleading representations? 13.9t (r m) 11

Case Study

Pepe's Ducks was found to be misleading consumer by using certain words and images on its product packaging, website, delivery trucks, signage and merchandise, representing that its ducks were raised in an open range environment, when in fact the ducks were raised solely in indoor sheds.



Audi represented that the vehicle had seven seats as a standard feature, when in fact five seats was the standard configuration. The manufacturer also represented that the 'drive away' price for the vehicle was \$, , when in fact a purchaser would have to pay additional fees or charges for dealer delivery, statutory charges and two additional seats.



Whether a representation is considered false or misleading will depend on the circumstances of each case. A representation can be misleading even if it is true or partly true.

Case Study

On the front of their product packaging, Energizer claimed their batteries lasted as long as those of two other competitors. The claim was supported by tests, but only against some (not all) of the competitors' batteries, which was explained on the back of the packaging. A court found the message on the front of the packaging had misled consumers, even though there was a clearer message on the back of the packaging.



Testimonials

Testimonials are statements from previous customers about their experience with a product or service.

These can give consumers confidence in a product or service on the basis that another person—particularly a celebrity or well-known person—is satisfied with the goods or services.

It is unlawful to make a false or misleading representation that:

- purports to be a testimonial by any person; or
- concerns a testimonial by any person in relation to goods or services.

False or misleading representations concerning testimonials can persuade customers to buy something to their detriment, based on belief in the testimonial. They may also result in competitive detriment to other suppliers of similar goods and services.

Sale or grant of an interest in land

A business must not make false or misleading representations about the sale or grant of an interest in land.

It must not:

- represent that it has a sponsorship, approval or affiliation when it does not
- make false or misleading representations about the:
 - nature of the interest in the land
 - price, location, characteristics or use that can be made of the land
 - availability of facilities associated with the land.

EXAMPLE

- A real estate agent would be misrepresenting the characteristics of a property if advertising 'beachfront lots' that did not front the beach.

Employment and business activities

It is unlawful to make false or misleading representations about the:

- availability, nature or terms and conditions of employment
- profitability, risk or other material aspect of any business activity that requires work or investment by a person.

CASE STUDY

A Melbourne training company, Keat Enterprises, posted online advertisements for accounting internships or employment. However, the advertisements were a means of attracting people to enrol in its training courses that were generally priced from \$, to \$, , with no employment offered to applicants. The company was found to have contravened the law and was fined \$, for misleading conduct.

Legal reference: *Director of Consumer Affairs v Keat Enterprises Pty Ltd (C 100/2014)*
MC (A 100/2014) (10/11/2014)

Offering rebates, gifts, prizes and other free items

When supplying or promoting goods or services, it is unlawful to offer rebates, gifts, prizes or other free items without intending to provide them. It is also unlawful to fail to provide them as promised.

The rebate, gift, prize or other free item must be provided within the specified time or, if no time was specified, within a reasonable time.

CASE STUDY

A stereo equipment retailer held a promotion. Customers went into a draw to win prizes when they bought stereo equipment. The retailer felt the promotion had not been a financial success so, among other things, fake names were added to the draw. Those fake names were declared the winners. This meant no prizes were awarded by the retailer. The retailer pleaded guilty and was fined.

Legal reference: *Director of Consumer Affairs v Stereo Equipment Pty Ltd (C 100/2014)*
MC (A 100/2014) (10/11/2014)

Misleading conduct—nature of goods and services

Businesses must not engage in conduct that is likely to mislead the public about the nature, manufacturing process, characteristics, suitability for purpose or the quantity of any goods or services.

CAE v DIE

Apple promoted an 'iPad with WiFi + G' package in Australia, at a time when this product could not connect to any networks which were promoted as G networks. The Federal Court declared that this conduct was liable to mislead the public as to the characteristics of the device.

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Allergy Pathway, an allergy treatment provider, claimed that it could identify and cure or eliminate a person's allergies or allergic reactions. However, the company could not do this. The Federal Court found that the company had engaged in false, misleading or deceptive conduct in relation to the services it was offering.

L v f : A C
C C A P P
L FCA

Bait advertising

'Bait advertising' occurs when a person advertises goods or services in trade or commerce at a specified price, and there are reasonable grounds for believing that they will not be able to supply the advertised goods at the advertised price for a reasonable period or in reasonable quantities. What is a 'reasonable supply' will depend on several factors, including the type of goods and what is said in the advertisement.

CAE v D.

Six Harvey Norman franchisees in Perth each paid an infringement notice for advertising the Kodak 'Playsport' pocket video camera in a catalogue distributed across Perth when they did not stock the camera.

EAMPLE

- An electronics retailer runs a major national campaign advertising -inch televisions at a price of \$ for a week-long sale. The retailer usually sells about televisions of this type every week. The retailer only stocks two televisions at the advertised price and refuses to take customer orders. When customers attempt (e-5.7 (r o)-3.2 (r)-11.5 (a8.7 (e c)-1-13

Wrongly accepting payments for goods or services

Businesses must not accept payment for goods or services:

- if they do not intend to supply them
- if they intend to supply materially different goods or services
- if they knew, or should have known, they would not be able to supply the goods or services in a timely manner.

CA E 11.1-DIE

The Federal Court declared that on four separate occasions, an individual who operated an online electronics store accepted payment for goods, but failed to supply those goods to consumers within a reasonable timeframe. The Court ordered a penalty of \$, for each of the four contraventions, being a total of \$, .

L 11.1.1 f 11.1.1 : A 11.1.1 C 11.1.1
C 11.1.1 C 11.1.1 C 11.1.1
11.1.1 FCA

A telecommunications company signed up and charged customers for its mobile phone services, even though those customers lived in remote areas without mobile phone coverage.

L 11.1.1 f 11.1.1 : A 11.1.1 C 11.1.1
C 11.1.1 C 11.1.1 ED 11.1.1 P. L. (11.1.1)
11.1.1 FCA

CA E **DIE**

Sales representatives for the vacuum cleaner company Lux called upon three elderly

Representations about country or place of origin continued



This means the product undergoes a fundamental change in the country represented. The changes can be to the product's form, appearance or nature such that the goods existing after the change are new and different goods from those existing before the change.

Processes that lead to substantial transformation may include:

- on

Product of Australia

Businesses who claim that their product is all, or almost all, the 'Product of' or 'Produce of' a country can establish a 'safe harbour' defence by demonstrating that:

- each significant component or ingredient of the goods originated in that country; and
- all, or virtually all, of the production processes take place in the country.

Because the term 'product of' implies a stronger meaning than 'made in' or other general country of origin claims, the 'safe harbour' defence for 'product of' claims is more onerous.

What constitutes a 'significant ingredient' or a 'significant component' is not necessarily related to the percentage of that ingredient or component in the product.

EXAMPLE

- An apple and cranberry juice bottle can carry a 'produce of Australia' label only if both juices are sourced from Australia.

Even though the cranberry juice is about five per cent of the total volume, it is 'significant' to the product and the label would be misleading if the cranberry juice was imported.

The final product may contain an imported preservative and still be classed as 'produce of Australia' if the cranberry juice and apple juice are both sourced from Australia. This is because the juices are 'significant' to the product and the preservative is not.

However, 'Product of Australia' claims will be difficult to sustain for any product with a significant imported component or ingredient. This is particularly relevant for complex products such as processed foods and beverages.

Country of Origin Labelling

If a business labels a product with a prescribed logo, the goods must:

- meet the requirements for substantial transformation in the country represented by the logo; and
- meet the prescribed percentage of the costs of producing or manufacturing the goods in the country represented by the logo.

No logos were prescribed in the Competition and Consumer Regulations (Cth) at the time of publication of this guide.

Grown in

A business can lawfully claim goods are 'grown in' a particular country when:

- the country referred to as the country in which the goods were grown could also be represented as the country of origin of the goods, or the country of which the goods are the produce. This must be in accordance with the 'safe harbour' defence criteria for such claims; and
- each significant ingredient or significant component of the goods was grown in that country; and
- all, or virtually all, processes involved in the production or manufacture of the goods happened in that country.

Certification

A number of schemes exist to give customers confidence in claims made about goods. Many products carry a logo or other trademark to show they are certified by a particular scheme or have a recognised standard of quality or performance.

Credible schemes will provide detailed information about the basis on which they make claims, such as recognised standards.

A business can't continue to use a cancelled or expired certification.

More information

See the ACCC's guide, *Country of origin claims and the Australian Consumer Law*, April 2015, available from www.accc.gov.au/publications

TERM	DEFINITION
manufacturer	<p>includes a person who:</p> <ul style="list-style-type: none"> grows, extracts, produces, processes or assembles goods 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.
product-related services	<p>means a service for or relating to:</p> <ul style="list-style-type: none"> the installation the maintenance, repair or cleaning the assembly the delivery <p>of consumer goods of a particular kind.</p> <p>Without limiting any of the above, the definition also includes any other service that relates to the supply of consumer goods of that kind.</p>
regulator	the Australian Competition and Consumer Commission or state/territory consumer protection agencies.
services	<p>include duties, work, facilities, rights or benefits provided in the course of business, for example:</p> <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	<p>includes:</p> <ul style="list-style-type: none"> in relation to goods—supply (including re-supply) by way of sale, exchange, lease, hire or hire-purchase in relation to services—provide, grant or confer.

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ACCC	Australian Competition and Consumer Commission
ACL	Australian Consumer Law
A IC	Australian Securities and Investments Commission
A ICA	<i>Australian Securities and Investments Commission Act 2001</i> (Cth)
A PR	Australian Trade Practices Reporter
CCA	<i>Competition and Consumer Act 2010</i> (Cth)
FCAFC	Federal Court of Australia—Full Court
HCA	High Court of Australia
N CA	Supreme Court of New South Wales—Court of Appeal
MC	Magistrates Court of Victoria

