



fact sheet

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Australian Consumer Law

What is the Australian Consumer Law?

Australia now has consumer protection legislation that operates consistently nationally and in each State and Territory.

Limited parts of the Australian Consumer Law (ACL) commenced on 14 April 2010 and 1 July 2010, with the remaining provisions coming into effect on 1 January 2011.

The ACL has replaced consumer protection provisions in 17 pieces of State and Territory legislation and in the *Trade Practices Act 1974* (TPA). Related to these reforms, as of 1 January 2011, the TPA has been renamed the *Competition and Consumer Act 2010* (CCA). Several provisions that were previously in the TPA have been repealed and replaced with new provisions in the ACL. These include:

- Part IVA, relating to unconscionable conduct
- Part V, relating to consumer protection
- Part VA, relating to liability of manufacturers and importers for defective goods
- Part VC, relating to offences involving unfair practices, product safety and product information
- Several provisions in Part VI relating to enforcement and remedies.

Where can I find the Australian Consumer Law?

The ACL is Schedule 2 to the CCA.

Each State and Territory has enacted legislation to apply the ACL as a law of its jurisdiction.

The application provisions can be found in:

- the *Fair Trading (Australian Consumer Law) Act 1992* (ACT) (FTA ACT)
- the *Fair Trading Act 1987* (NSW) (FTA NSW)
- the *Consumer Affairs and Fair Trading Act* (NT) (CAFTA NT)
- the *Fair Trading Act 1989* (Qld) (FTA Qld)
- the *Fair Trading Act 1987* (SA) (FTA SA)
- the *Australian Consumer Law (Tasmania) Act 2010* (Tas) (ACLTA Tas)
- the *Fair Trading Act 1999* (Vic) (FTA Vic)
- the *Fair Trading Act 2010* (WA) (FTA WA).

Where the ACL is applied as a law of a State or Territory, its citation refers to that jurisdiction. For example, under s 28(1)(b) of the *Fair Trading Act 1987* (NSW), when the ACL is applied as a law of New South Wales, it is referred to as the Australian Consumer Law (NSW).

Who does the Australian Consumer Law apply to?

Australian Consumer Law as a law of the Commonwealth

Generally speaking, the ACL applies, as a law of the Commonwealth, to conduct by corporations: CCA, s 131(1). However, it can apply to conduct by individuals in certain contexts, being:

- unconscionable conduct by individuals in the supply or possible supply of goods or services to a corporation or in the acquisition or possible acquisition of goods or services by a corporation: CCA, s 131(2)
- some conduct outside Australia by Australian citizens or persons ordinarily resident within Australia: CCA, s 5(1)¹
- some conduct by individuals in trade or commerce between Australia and places outside Australia, between States and/or Territories, within a Territory or by way of the supply of goods or services to the Commonwealth or an authority or instrumentality of the Commonwealth: CCA, s 6(2)
- conduct by individuals arising from the use of postal, telegraphic or telephonic services or radio or television broadcasts: CCA, s 6(3)
- conduct relating to unfair terms in contracts for or in relation to the use of postal, telegraphic or telephonic services or radio or television broadcasts: CCA, s 6(3A).

Commonwealth government bodies are bound by the ACL as a law of the Commonwealth in the same way that they were previously bound by the consumer protection provisions of the TPA. That is, the ACL binds the Crown in right of the Commonwealth to the extent that it is carrying on a business, either directly or by an authority of the Commonwealth, as if the Crown were a corporation: CCA, s 2A.

Australian Consumer Law as a law of each State and Territory

The ACL applies as a law of each State or Territory to:

- persons carrying on business within the State or Territory
- bodies corporate incorporated or registered under the law of the State or Territory
- persons ordinarily resident in or otherwise connected to the State or Territory

regardless of whether the conduct occurs inside or outside the State or Territory (including outside Australia).²

In addition, the ACL binds the Crown in right of each State or Territory to the extent that it is carrying on business, either directly or by an authority of the State or Territory.³

Consumer protection in relation to financial services or financial products

Apart from certain provisions relating to linked credit providers (ACL, ss 278 to 287), the ACL does not apply to the supply or possible supply of financial services or financial products: CCA, s 131A. Consumer protection provisions relating to financial services or financial products can be found in Div 2, Pt 2 of the *Australian Securities and Investments Commission Act 2001* (the ASIC Act).

A note on definitions

The long list of definitions in ss 4 to 4K of the CCA does not apply to the ACL 'unless the contrary intention appears': CCA, s 4KA.

Instead, the definitions in s 2 of the ACL, or otherwise provided for in the ACL, apply.

¹ However, there are limitations upon the availability of some remedies in respect of such conduct: CCA, s 5(3), (4) and (5).

² FTA ACT, s 11; FTA NSW, s 32; CAFTA NT, s 31; FTA Qld, s 20; FTA SA, s 18; ACLTA Tas, s 10; FTA Vic, s 13; FTA WA, s 24.

³ FTA ACT ss 15 and 16; FTA NSW, ss 36 and 37; CAFTA NT, ss 35 and 36; FTA Qld, ss 24 and 25; FTA SA, ss 22 and 23; ACLTA Tas, ss 14 and 15; FTA Vic, ss 17 and 18; FTA WA, ss 28 and 29.

In some instances, the definitions in the ACL and the CCA are the same or appear to be substantially the same. For example, the same definitions of 'authority, in relation to a State or Territory' or 'authority of the Commonwealth' can be found in s 2 of the ACL and s 4 of the CCA.

The definition of 'services', although in a different form in s 2 of the ACL, appears to be substantially the same as in the definition in s 4 of the CCA. 'Goods' continues to be defined broadly in both the ACL and the CCA, although the definition in s 2 of the ACL specifically includes a number of additional items (computer software, second-hand goods and any component part of, or accessory to, goods).

Some ACL definitions are broader than in the CCA. For example, the CCA definition of 'trade or commerce' is confined to 'trade or commerce within Australia or between Australia and places outside Australia'. The definition in s 2 of the ACL encompasses this definition but explicitly provides that 'trade or commerce' includes 'any business or professional activity (whether or not carried on for profit)'.

The definitions of 'acquire' and 'supply' in s 2 of the ACL appear, at first glance, to be in the same form as s 4 of the CCA. However, s 5 of the ACL excludes the donation (or receipt of a donation) of goods or services from the definition of 'supply' (and likewise from the definition of 'acquisition'), except:

- where the donation is for promotional purposes, or
- for the purposes of Pts 3-3, 3-4, 4-3 or 4-4 of the ACL (which essentially relate to product safety and information standards).

References to 'acquire' and 'supply' appear throughout the ACL. For example, s 22(1)(b) prohibits engaging in unconscionable conduct, in trade or commerce, in connection with the acquisition or possible acquisition of goods or services; similarly, s 29(1) prohibits various kinds of false or misleading representations in connection with the supply or possible supply or promotion by any means of the supply of goods or services.

It may well be that the reference to 'for promotional purposes' will have the result that 'donations' of goods and services which are really undertaken as part of a business are in fact caught by the consumer protection provisions. However, since 'donation' and 'for promotional purposes' are not defined in the ACL, the position will not be settled until the scope of the s 5 exclusion has been tested.

Finally, it should be noted that a large number of the definitions previously found in s 4 of the TPA (relating to consumer protection provisions) have been repealed and are now found in s 2 of the ACL. In addition, many terms not previously defined in the TPA but which have particular relevance to the ACL provisions are now defined in s 2 of the ACL. One example is the new definition of 'publish', which applies particularly to advertisements and is defined as 'include in a publication intended for sale or public distribution (whether to the public generally or to a restricted class or number of persons) or for public display (including in an electronic form)'.

Who is a 'consumer'?

General definition of 'consumer'

Section 3 of the ACL contains an objective definition of 'consumer', which applies in many, but not all, parts of the ACL. This provision substantially carries forward the definition in s 4B of the CCA (although the two provisions are not in the same form). In summary, for most purposes in the ACL, there is a presumption that a person is a 'consumer' if they:

- acquire goods or services the price of which is \$40,000 or less, or
- acquire goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption, or
- acquire a vehicle or trailer (at any price) for use principally in the transport of goods on public roads, and

- in relation to the acquisition of goods, do not acquire, or hold themselves out as acquiring, the goods for the purpose of resupply, using them up or transforming them, in trade or commerce, in the course of a process of production or manufacture, or repairing or treating other goods or fixtures on land.

As was the case under the old consumer protection provisions in Pt V of the TPA, this definition is sufficiently broad to include businesses.

Different definition of 'consumer' in relation to a 'consumer contract'

Part 2-3 of the ACL (relating to unfair contract terms) only applies to consumer contracts. Section 23(3) of the ACL defines a 'consumer contract' as a contract:

- for the supply of goods or services or the sale or grant of an interest in land
- to an individual
- whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption.

The requirement that the supply be to an individual means that small businesses that are incorporated cannot avail themselves of the unfair contract term provisions. Although the provisions could theoretically apply to a sole trader who had acquired goods or services for purposes that were partly business-related, such an individual could only seek the protection of the unfair contract term provisions if their acquisition was still predominantly for personal, domestic or household use or consumption.

Unlike the definition in s 3, there is no requirement for the price for the goods or services the subject of the contract to fall under a monetary threshold.

'Consumer goods'

The ACL also contains a definition of 'consumer goods', which is a concept referred to in Pts 3–3 and 4–3 of the ACL (relating to product safety standards and safety of services relating to certain goods).

Section 2 of the ACL defines 'consumer goods' as 'goods that are intended to be used, or are of a kind likely to be used, for personal, domestic or household use or consumption'. If a recall notice or voluntary recall has been issued in relation to those goods, the definition also encompasses any goods that have become fixtures since they were supplied.

In distinction to the definition of 'consumer' in s 3, this definition does not require the price for the goods to fall under a particular monetary threshold.

Definition of 'consumer' in relation to unconscionable conduct

Under the now repealed ss 51AB and 51AC of the former TPA, the prohibitions on unconscionable conduct in relation to the supply of goods or services, or the acquisition of goods or services, contained definitions of 'consumer' and 'business consumer', respectively, that were broader than the definition in s 4B. In those provisions, a 'consumer' or 'business consumer' simply referred to the person to whom the goods or services were to be supplied or, in the case of a business consumer, the person from whom the goods or services were to be acquired.

Sections 21 and 22 of the ACL have retained this use of the terms 'consumer' and 'business consumer', so that these provisions apply a broader definition of 'consumer' than s 3 of the ACL.

Conduct covered by the Australian Consumer Law

The ACL brings together 17 pieces of State and Territory legislation, as well as the provisions of the CCA, into one regime for consumer protection. It covers a very broad range of conduct and introduces a number of concepts from State and Territory legislation that were not previously in the TPA.

Something old

The ACL continues to cover much of the same conduct that was previously prohibited under the TPA. In very broad terms, this encompasses:

- misleading or deceptive conduct in trade or commerce (Pt 2-1)
- unconscionable conduct (Pt 2-2)
- specific unfair practices, including making particular kinds of false or misleading representations, conduct related to unspecified supplies, participating in pyramid schemes and the requirement to state a single price for goods or services in certain circumstances (Pt 3-1)
- statutory warranties, which are now called ‘consumer guarantees’ (Pt 3-2)
- product safety, bans, recalls and warning notices (Pt 3-3)
- information standards (Pt 3-4)
- liability for manufacturers for goods with safety defects (Pt 3-5).

In addition, the ACL retains parallel provisions creating offences in respect of many of the civil contraventions (Ch 4).

Something new

The ACL covers a much broader range of conduct than was previously covered under the TPA, incorporating provisions that were previously found in State and Territory legislation and some entirely new provisions. Some examples are:

- new provisions dealing with unfair contract terms, pursuant to which a term of a consumer contract will be void if it meets the statutory test for unfairness (Pt 2-3)
- a new provision extending the protection against liability for unsolicited goods to unsolicited services (s 42)
- a new prohibition on supplying goods, where multiple prices are displayed for those goods, at a price other than the lower or lowest of the prices displayed (s 47)
- new provisions to regulate unsolicited consumer agreements (Pt 3-2, Div 2)
- new provisions to regulate lay-by agreements (Pt 3-2, Div 3)
- requirements that suppliers provide receipts for transactions over \$75 (excluding GST) and itemised bills for services if requested to do so within 30 days of the services being provided (ss 100 and 101).

Something in between

Although there is substantial overlap between the conduct regulated by the previous consumer protection provisions that were in the TPA and the new provisions in the ACL, there will be some uncertainty as to how the ACL operates until there is some case law on the new provisions. A number of provisions that are intended to operate in the same way as earlier provisions have been redrafted for a variety of reasons, including clarity; to accommodate the structure of the ACL; to incorporate previous interpretations of the provisions by the courts; or because of changes in drafting style since the provisions were originally enacted. One example is the partial exemption from prohibitions on misleading or deceptive conduct and various kinds of misrepresentations that existed in s 65A of the TPA. This is now found in two separate provisions of the ACL: s 19 and s 38.

Enforcement*One law, multiple regulators*

State and Territory fair trading bodies will enforce the ACL as a law of their own jurisdictions. The Australian Competition and Consumer Commission (ACCC) will enforce the ACL as a Commonwealth law but also has powers referred to it to enable it to enforce the State acts. The Australian Securities and Investments Commission (ASIC) has retained responsibility for enforcing the consumer protection provisions of the ASIC Act. These agencies have signed a Memorandum of Understanding

containing broad commitments relating to communication, cooperation and coordination in the administration and enforcement of the ACL.⁴ They have also jointly published a guide on *Compliance and enforcement: How regulators enforce the Australian Consumer Law*.⁵

Enforcement powers

Chapter 5 of the ACL contains a broad suite of enforcement powers, many of which have been available in other enforcement proceedings under the CCA for some time. These include general provisions for courts to order injunctive relief, pecuniary penalties and compensation orders, as well as remedies specific to particular kinds of conduct (such as country of origin representations, remedies relating to consumer guarantees, and joint and several liability of suppliers and linked credit providers in certain circumstances).

Part 5-1 of the ACL also contains enforcement powers that are available without approaching a court. These include the power to accept undertakings, the power to require traders to substantiate claims that they have made about their goods and services and the power to issue public warning notices.

In addition to the remedies found in the ACL, s 134A of the CCA gives the ACCC the power to issue infringement notices as an alternative to civil penalty proceedings for alleged contraventions of the ACL.

Transitional provisions

Most parts of the ACL, with some significant exceptions, came into effect on 1 January 2011. Accordingly, the now repealed provisions of the former TPA apply to conduct that took place up to and including 31 December 2010.

Some of the notable exceptions to this relate to certain enforcement powers. The ACCC has been able to seek pecuniary penalties and issue infringement notices or substantiation notices in respect of contraventions of certain consumer protection provisions of the then TPA since 15 April 2010.⁶ Its power to do so was first enacted through amendments to the TPA, but these have been repealed and replaced in the CCA (including the ACL) as of 1 January 2011.

Accordingly, conduct taking place on and from 15 April 2010 up to 31 December 2010 may be liable to pecuniary penalties, through s 76E of the TPA; to infringement notices, through s 87ZE of the TPA; and to substantiation notices, through s 87ZL of the TPA.

However, for conduct taking place on and from 1 January 2011, the same powers are available to the ACCC through s 224 (pecuniary penalties) and s 219 (substantiation notices) of the ACL, while infringement notices can be issued under s 134A of the CCA.

The unfair contract term provisions commenced on 1 July 2010 as a law of the Commonwealth. Parallel provisions came into force in each of the States and Territories on different dates from 1 July 2010 up to 1 January 2011.

Accordingly, to the extent that the ACL as a law of the Commonwealth is being applied, contracts entered into, renewed or varied after 1 July 2010 are subject to the unfair contract term provisions. For contracts entered into prior to 1 July 2010 but varied or renewed after that date, the unfair contract term provisions apply only to the extent of the renewal or variation: *Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010*, Sch 7, s 8(2).

⁴ www.consumerlaw.gov.au/content/the_acl/downloads/acl_mou.pdf

⁵ www.consumerlaw.gov.au/content/the_acl/downloads/compliance_enforcement_guide.pdf

⁶ *Trade Practices Amendment (Australian Consumer Law) Act (No 1) 2010* (Cth), s 2, item 3.

⁷ www.consumerlaw.gov.au/content/the_acl/downloads/A_guide_to_provisions_Nov_2010.pdf

Appendix A below provides a snapshot of where to find some of the main provisions.

Appendix A: Comparison table for some frequently-used provisions

<i>CCA 2010 Provision</i>	<i>Subject matter</i>	<i>TPA 1974 Provision</i>	<i>Subject matter</i>
Sch 2 s 20	Unconscionable conduct within the meaning of the unwritten law	s 51AA	Unconscionable conduct within the meaning of the unwritten law of the States and Territories
Sch 2 s 21	Unconscionable conduct	s 51AB	Unconscionable conduct
Sch 2 s 22	Unconscionable conduct in business transactions	s 51AC	Unconscionable conduct in business transactions
Sch 2 s 4	Misleading representations with respect to future matters	s 51A	Interpretation
Sch 2 s 18	Misleading or deceptive conduct	s 52	Misleading or deceptive conduct
Sch 2 ss 23–28	Various provisions relating to unfair contracts	–	N/A – not previously in TPA
Sch 2 s 29	False or misleading representations about goods or services	s 53	False or misleading representations
Sch 2 s 48	Single price to be specified in certain circumstances	s 53C	Single price to be stated in certain circumstances
Sch 2 s 35	Bait advertising	s 56	Bait advertising
Sch 2 s 36	Wrongly accepting payment	s 58	Accepting payment without intending or being able to supply as ordered
Sch 2 s 50	Harassment and coercion	s 60	Harassment and coercion
Sch 2 s 40	Assertion of right to payment for unsolicited goods or services	s 64	Assertion of right to payment for unsolicited goods or services or for making entry in directory
Sch 2 s 43	Assertion of right to payment for unauthorised entries or advertisements	s 64 (directory entries)	Assertion of right to payment for unsolicited goods or services or for making entry in directory
Sch 2 s 44	Participation in pyramid schemes	s 65AAC	Pyramid selling schemes – participation
Sch 2 s 51–68	Various provisions relating to consumer guarantees	ss 66–72, 74	Conditions and warranties in consumer transactions
Sch 2 s 109	Interim bans on consumer goods or product related services that may cause injury	s 65C	Product safety standards and unsafe goods
Sch 2 s 114	Permanent bans on consumer goods or product related services	s 65C	Product safety standards and unsafe goods
Sch 2 s 118	Supplying consumer goods covered by a ban	s 65C	Product safety standards and unsafe goods
Sch 2 s 224	Pecuniary penalties	s 76	Pecuniary penalties
Sch 2 s 232	Injunctions	s 80	Injunctions
Sch 2 s 233	Consent injunctions	–	–
Sch 2 s 234	Interim injunctions	–	–
Sch 2 s 246	Non-punitive orders	s 86C	Non-punitive orders
Sch 2 s 247	Adverse publicity orders	s 86D	Adverse publicity orders
Sch 2 s 223	Regulator may issue a public warning notice	s 86DA	Public warning notices
Sch 2 s 248	Order disqualifying a person from managing corporations	s 86E	Disqualification orders
Sch 2 s 239	Orders to redress loss or damage suffered by non-party consumers	s 87AAA	Orders to redress loss or damage suffered by non-party consumers
Sch 2 s 218	Regulator may accept undertakings	s 87B	Enforcement of undertakings
CCA s 134A	Infringement notices	s 87ZE	Infringement notices
Sch 2 s 219	Regulator may require claims to be substantiated	s 87ZL	Substantiation notices
Sch 2 s 237	Compensation orders on application by an injured person or the regulator	s 87	Other orders
Sch 2 s 250	Declarations relating to consumer contracts	–	–

More information

The ACCC, ASIC and State and Territory fair trading bodies have published a series of guides on the new legislation. These are available on from the Australian Consumer Law website:

www.consumerlaw.gov.au.

One of those publications – *The Australian Consumer Law: A guide to provisions*⁷ – contains a detailed overview of the provisions and cross-references to previous provisions in the former TPA and State and Territory legislation.

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