

A guide to the Australian Consumer Law

For fundraising and other activities of charities,
not-for-profits and fundraisers



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- New South Wales Fair Trading
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Acceptable Quality and the meaning of 'Durability'

Covers what makes a good 'durable' in the context of the consumer guarantee as to acceptable quality.

Acceptable Quality and the meaning of 'Safe'

Covers what makes a good 'safe' in the context of the consumer guarantee as to acceptable quality.

Further information and copies of these and other publications are available from the Australian Consumer Law website www.consumerlaw.gov.au

About the Australian Consumer Law

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

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

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

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

The regulators of the ACL are:

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

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

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

Objectives of the Australian Consumer Law

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

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

This is supported by 6 operational objectives:

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

The ACL replaced previously separate legislation, which means that:

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

One law, multiple regulators

The ACL is a single national law enforced in all jurisdictions by the various jurisdictions' consumer regulators.

Under this arrangement ACL regulators work to:

- ensure that marketplace misconduct is addressed
- employ the most effective means of addressing consumer harm through cooperative and complementary enforcement action
- avoid unnecessary duplication of effort in the effective administration of the ACL
- ensure, wherever appropriate, a consistent approach to dispute resolution and enforcement action.

As a law of each jurisdiction – Commonwealth, states and territories – the ACL will be enforced by courts and tribunals in each jurisdiction subject to the specific rules that apply to enforcement processes, courts and tribunals in each state and territory jurisdiction.

The ACL regulators coordinate their activity through Consumer Affairs Senior Officials network and other staff level networks.

Supply of goods or services

If you are regularly supplying goods or services in return for payment or other consideration then that activity is likely to be in trade or commerce and the ACL is likely to apply to you when you engage in that activity.

EXAMPLE

A not-for-profit entity provides subsidised cleaning services to people who are disabled. The not-for-profit is able to subsidise the price of the services as it receives a range of government grants. The not-for-profit is likely to be engaging in conduct in trade or commerce because it is supplying a service to the consumer in exchange for payment, even though the price is subsidised. Therefore, the ACL is likely to apply.

EXAMPLE

An environmental charity sells toy animals and children's books. A proportion of the purchase price paid for these goods contributes to the environmental preservation activities of the charity. As this type of fundraising involves the sale of goods the charity is likely to be engaging in trade or commerce and the ACL is likely to apply.

Professional fundraisers

Some charities, not-for-profit entities and fundraisers pay professional third party fundraisers to conduct fundraising activities on their behalf. Professional fundraisers are in the business of seeking donations and this is likely to be in trade or commerce for the purposes of the ACL. If you are a professional fundraiser, or if you engage a professional fundraiser to carry out fundraising activities on your behalf, then you need to be confident that the conduct of the fundraising activities does not breach the ACL.

EXAMPLE

A professional fundraiser has been engaged by a cancer research charity to undertake a national fundraising campaign on its behalf. The campaign includes door-knocking homes and face to face fundraising at shopping centres across the country. The fundraiser asks members of the public if they wish to make an ongoing donation via direct debit to the charity. The fundraising is in trade or commerce because the professional fundraiser is in the business of fundraising.

Fundraising in an organised, continuous and repetitive way

Regardless of whether you collect donations or payments for goods or services by using volunteers, employees or professional fundraisers, if those fundraising activities are carried out in a business-like way then they are likely to be in trade or commerce and subject to the ACL.

Factors that indicate that fundraising activities are more likely to be undertaken in a business-like way and therefore in trade or commerce include some or all of the following:

- the fundraising activities are continuous and repetitive
- the fundraising activities are organised and managed (e.g. through the use of business plans or fundraising strategies, measurement of fundraising goals and outputs, processes, policies and procedures etc)
- the entity fundraising is established such that its activities (which include fundraising) are likely to continue e.g. the entity may be incorporated as a separate legal entity
- the entity fundraising uses resources (e.g. assets and employees)
- the fundraising activities are promoted or marketed
- financial or other records of the fundraising activities are maintained.

The above are not an exhaustive list of factors. Whether a fundraising activity is undertaken in a business-like way will always depend on the specific circumstances.

EXAMPLE

An incorporated association is established for the purpose of providing volunteer emergency services, being partly funded by donations from the public. The association develops a fundraising strategy and undertakes regular fundraising drives that are organised and coordinated with a view to meeting its fundraising goals. The association keeps records of its fundraising revenue.

The ACL is likely to apply to the fundraising activities of the incorporated association, because these activities are undertaken in a business-like way and therefore the fundraising activities are likely to be undertaken in trade or commerce.

Collecting a one off donation for a one off cause is unlikely to be in trade or commerce. It is not likely to be conducted with the level of organisation, continuity and repetition of a business-like activity.

EXAMPLE

A parent seeks donations from their social media network via an online peer to peer platform, stating that the money will be used to fund their child attending a state athletics carnival. As this fundraising is a one off event and donations are not being sought in a business-like way, the ACL is unlikely to apply.

EXAMPLE

A school develops a one-off fundraising activity to support a cause which involves a donation from participating students. As this fundraising is a one off event and the donations are not being sought in a business-like way, the ACL is unlikely to apply.



Your obligations under the ACL

KEY POINT

You should be open, transparent, truthful and fair when fundraising. If you are, then your activities are unlikely to raise concerns under the ACL.

The extent to which a particular provision of the ACL may apply to your activities depends on the wording of the provision of the ACL and the nature and characteristics of your activity.

Generally, if your fundraising activities are in trade or commerce then you have several obligations that you must meet. Broadly, you must not engage in misleading or deceptive conduct or unconscionable conduct.

In addition, the ACL contains other obligations in connection with the supply of goods or services, including prohibitions on making false or misleading representations and the use of harassment or coercion, as well as provisions which provide for consumer guarantees. These are dealt with below.

KEY POINTS

Generally, if your conduct is in trade or commerce:

- you must not engage in misleading or deceptive conduct or unconscionable conduct
- if your fundraising activities also involve supplying goods or services, you must not make false or misleading representations or engage in unconscionable conduct in relation to the supply of those goods or services.



The prohibition against misleading or deceptive conduct

If you are a charity, not-for-profit or fundraiser with activities in trade or commerce then you are required by law not to mislead or deceive in relation to those activities. This obligation applies broadly, including if you are selling a good or service but also if you are seeking donations of money only (i.e. without supplying a good or service). This law applies even if you do not intend to mislead or deceive anyone.

Some examples of conduct that will mislead a consumer include:

- making representations about where the money you collect will go, or what proportion will be used to achieve the stated purpose, that are not true, accurate and able to be substantiated
- representing you are a volunteer collecting money on behalf of a charity, not-for-profit or fundraiser when that is not the case, for example, where you are a paid worker or receive a fee or commission from donations secured
- claiming that a person is making a one-off donation when they are in fact making a periodic (i.e. ongoing) donation
- claiming that the good or service a person is purchasing has certain qualities or characteristics that it does not have.

You can find general information about the obligation to not engage in misleading or deceptive conduct in trade or commerce in *Avoiding unfair business practices: A guide for businesses and legal practitioners*.

EXAMPLE

A large, established charity provides ongoing financial support towards the cost of providing books to children in an overseas country with a low literacy rate. In the conduct of its annual fundraising drive, the charity represents to consumers that their donations will help improve literacy of children.

The fundraising activities of the charity are likely to occur in trade or commerce due to the organised, continuous and repetitive nature of its activities. The statement, on its own, appears to accurately reflect the true situation and is therefore unlikely to mislead or deceive consumers.

EXAMPLE

A not-for-profit is conducting its annual fundraising campaign to raise money for homeless support services. While seeking donations, some of the organisation's volunteers and workers require consumers to complete a credit card authorisation form to make, what the consumer is told is, a single donation via credit card. The form is actually an agreement for an ongoing monthly donation.

The annual fundraising campaign of the organisation is likely to occur in trade or commerce due to the organised, continuous and repetitive nature of these activities. The ACL is likely to apply to the conduct of the not-for-profit, through its volunteers and workers, in seeking the donations. The statements made by the volunteers and workers suggesting that consumers are providing a single donation only is likely to amount to misleading or deceptive conduct under the ACL.

EXAMPLE

A professional fundraising company is paid to conduct a campaign, collecting donations on behalf of a charity that supports animal shelters.

When seeking donations, the company's workers represent, through a combination of the words they use and a range of visual factors (such as signs and uniforms), that 100% of the donations received will go towards the animal shelter charity. In reality, a large part of the donated funds is used to pay the fee charged by the company, which is based on the monthly amount the consumer commits to donate. The conduct of the fundraising company, engaged in on behalf of the charity, is likely to be in trade or commerce and likely to amount to misleading or deceptive conduct under the ACL.

This is because even where a representation may be technically true, for example representations made by a fundraising company that all funds received go to the bank account of the charity, it can be misleading if you have omitted other important information, for example that significant fees are then transferred from the charity to the fundraising company.

EXAMPLE

A charity supporting disease research engages a professional fundraising company to conduct a fundraising campaign on the charity's behalf. When asking for donations some of the fundraising company's workers represent, through a combination of the words they use and a range of visual factors (such as signs and uniforms), that they are unpaid volunteers when in fact they are paid for their services by the fundraising company (which receives a fee for the services it provides to the charity).

The conduct of the professional fundraising company, engaged in on behalf of the charity, is likely to be in trade or commerce as it is in the business of fundraising. The representations made by some of its workers, that they are unpaid volunteers, are likely to amount to misleading or deceptive conduct under the ACL.

It can also be misleading to be silent on facts when you have created an alternative impression. Where you have given an overall impression that all or most funds go to the charity but you don't adequately disclose that significant fees or commissions are paid to the fundraising company, this is likely to be misleading under the ACL.

EXAMPLE

A charity has a website with a donation facility to raise money to feed hungry children. The website has a banner that says '100% of your donation goes to children in need of a feed'. However, as a charity with costs related to ensuring governance and professional administration, approximately 20% of every donation goes towards the cost of running the operation. The statement is therefore likely to be misleading or deceptive.

A more general statement, such as "Help us feed hungry children" may be more appropriate.

EXAMPLE

A not-for-profit engages a professional fundraiser to conduct fundraising on its behalf. Part of the fundraiser's role includes managing the charity's periodic (i.e. ongoing) donations.

The fundraiser writes to consumers who have current periodic donations in place seeking an increase in the amount that each consumer regularly gives. The letter states that if the consumer takes no action in relation to the letter their periodic donation will be increased by the amount suggested in the letter. It has given the impression that it has the authority to increase the consumer's periodic donation without their agreement when this is not the case.

The statement is therefore likely to be misleading or deceptive.



Obligations that only apply in connection with the supply of a good or service

The obligations not to mislead or deceive or engage in unconscionable conduct apply to all activities that are in trade or commerce. In addition, if your fundraising or other activities involve supplying a good or a service then you also have further obligations under the ACL.

False or misleading representations

It is unlawful to make false or misleading representations in connection with the supply or possible supply of goods or services, or in the promotion of such supply. For example, you must not make false or misleading representations about:

- the quality or characteristics of the goods or services
- whether the goods are new
- where the goods were made
- testimonials relating to the goods or services
- the price or any guarantees or warranties.

EXAMPLE

A not-for-profit which helps provide access to clean drinking water for developing communities overseas regularly sells handicraft which it represents is created by the overseas communities it assists. In reality, the products are not created by those communities and are instead made in Australia. The representations made by the not-for-profit are likely to be considered false or misleading under the ACL.

You can find further information regarding your obligations in *Avoiding unfair business practices: A guide for businesses and legal practitioners*.

Harassment or coercion

It is also unlawful to harass or coerce someone in connection with the supply of, or payment for, goods or services.

For example, you cannot engage in unnecessary or excessive solicitation, or use actual or threatened force, in attempting to sell goods or services for the purposes of fundraising.

EXAMPLE

A not-for-profit organisation uses volunteers to travel door-to-door selling books which fund the organisation's activities. One of the volunteers pressures a person with a brain injury into purchasing the books, telling the person that if they do not buy the books, the volunteer will report them to the local council for having an overgrown garden.

The conduct of the volunteer may raise unconscionable conduct and harassment and coercion concerns under the ACL because the book was supplied to the person using coercive tactics that appear to target them as a vulnerable consumer.

You can find further information regarding your obligations in *Sales practices: A guide for businesses and legal practitioners*.

Unsolicited Consumer Agreements

If your entity sells goods or services to consumers through door-to-door sales, telemarketing, or approaching consumers in public places such as shopping centres you should be aware of the ACL obligations that apply to ‘unsolicited consumer agreements’.

An unsolicited consumer agreement involves a supply of a good or service. Donations to a charity, including donations received by a professional fundraiser on behalf of a charity, are not unsolicited consumer agreements. As always, best practice is to ensure that your dealings with consumers are fair and respectful. Charities, not-for-profits and fundraisers who seek donations door-to-door, via the telephone, or by approaching consumers in public places should be mindful of consumers’ wishes regardless of whether the unsolicited consumer agreement provisions apply.

EXAMPLE

A worker associated with a professional fundraiser collecting on behalf of a charity approaches a potential donor on the street and signs them up to a monthly periodic donation via direct debit. After the first deduction, which is made 3 days after the donor signs up, the donor changes their mind and requests that the funds be refunded and the monthly direct debit be cancelled. This scenario would not be treated as an unsolicited consumer agreement as it did not involve the sale of a good or service and therefore the consumer would not be entitled to the cooling off rights under these provisions. If the fundraiser was selling a good or service, unsolicited consumer agreements rights, including cooling off periods, could apply.

Regardless, other ACL provisions such as prohibitions on misleading or unconscionable conduct may still apply and refunds should be given where conduct in contravention of these provisions led to the periodic donation. In any case, the charity should cancel the future monthly direct debits as requested by the donor.

You can find further information about the unsolicited consumer agreement obligations in *Sales practices: A guide for businesses and legal practitioners*.

Consumer Guarantees

The consumer guarantees are a set of rules that apply to goods and services supplied to a consumer.

Guarantees relating to the supply of goods

If you sell a good to a consumer there are certain guarantees. For example, if you sell a good to a consumer that fails to meet a consumer guarantee because it is faulty in some way, you must provide the consumer with a repair, replacement or refund depending on whether the fault is minor or major.

EXAMPLE

A not-for-profit entity sells handbags manufactured overseas to raise funds for delivering community employment programs. Some of the handbags are faulty.

Depending on the nature of the fault, consumers would be entitled to either a repair or replacement of their handbag or a refund.

Guarantees relating to the supply of services

If you supply a service to a consumer there are certain guarantees, for example, that the service is provided with due care and skill. If you fail to meet a guarantee, and it is a minor failure, the consumer can ask you to remedy the work free of charge and within a reasonable time. If the failure with the service is major, then the consumer can recover compensation for any reduction in the value of the services or cancel the contract and get a refund for that part of the service not consumed.

EXAMPLE

A not-for-profit entity provides domestic repair and cleaning services at commercial rates to elderly people. In the course of cleaning gutters at one woman's house, the handyman damages parts of the gutters causing them to leak when it rains. This may be a failure to perform work with due care and skill and the consumer may be entitled to have the work remedied free of charge and/or the cost of another handyman to remedy the failure.

You can find further information regarding consumer guarantees in *Consumer guarantees: A guide for businesses and legal practitioners*.

National Disability Insurance Scheme (NDIS)

Some not-for-profit entities may supply goods or services to participants in the National Disability Insurance Scheme (NDIS), which allows participants who receive funding to purchase their own disability related goods and services. The ACL provisions outlined above may apply to these supplies.

You can find further information in *A guide to competition and consumer law: for businesses selling to and supplying consumers with disability*.



Enforcing the law

ACL regulators investigate complaints about potential breaches of the ACL and take enforcement action where necessary and where this falls within current priorities.

There are a variety of enforcement options available to ACL regulators, including issuing an infringement notice where the relevant regulator has reasonable grounds to believe that an entity has breached the ACL.

ACL regulators can also take court action against an entity, in some cases seeking monetary penalties. The maximum penalty for some ACL provisions is:

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

Lesser civil penalties apply to other contraventions.

Other remedies including Court enforceable undertakings and corrective advertising are also available. ACL regulators also utilise a range of compliance tools to prevent breaches of the ACL including business and consumer education, and working closely with stakeholders and other agencies.

ACL regulators may have regard to the adequacy of the compliance programs in place when considering the most appropriate remedy to an alleged breach of the law. An ACL regulator may take into account whether an entity has attempted to comply with this guide.



Other obligations

Other State, Territory and Commonwealth laws may apply to your charity, not-for-profit or fundraising entity. For example:

- laws governing your incorporation (i.e. if you are incorporated as an association, cooperative or company)
- fundraising-specific legislation
- gaming and racing legislation
- industry-specific legislation
- taxation, employment, criminal, occupational health and safety legislation.

Obligations may differ between states and territories. You may also have other obligations for various reasons. For example, if you are a member of a peak body or are in receipt of government grants or tax concessions or if you fundraise via an online platform.

EXAMPLE

A person sets up a one-time peer to peer fundraising appeal stating that the monies received will be used for seeking medical treatment for their ill child. They do not have a child and the money obtained was used for a holiday. The ACL is unlikely to apply to the misleading statements as the statement did not occur during a business-like activity done in a continuous and repetitive way. However, the person soliciting donations may be liable under other laws, including criminal laws, for obtaining a financial advantage by deception. The conduct may also breach the rules of the online platform used to seek donations.

Charities

If you are a charity registered with the Australian Charities and Not-for-profits Commission (ACNC), the national regulator of charities, you must conduct your operations in compliance with the Australian Charities and Not-for-profits Commission Act 2012 and ACNC governance standards.

The ACNC website also contains further information about other laws that may apply to your charity and has a dedicated page to fundraising and charity obligations, see www.acnc.gov.au/fundraising.

If you are unsure about your legal obligations, or which laws apply to your specific circumstances, you should consider seeking legal advice.



ACL regulators

State and Territory ACL regulators

Australian Capital Territory

Access Canberra

Ph: 13 2281

www.accesscanberra.act.gov.au

New South Wales

NSW Fair Trading

Ph: 13 3220

www.fairtrading.nsw.gov.au

Northern Territory

Consumer Affairs

Ph: 1800 019 319

www.consumeraffairs.nt.gov.au

Queensland

Office of Fair Trading

Ph: 13 7468

www.qld.gov.au/law/fair-trading

South Australia

Consumer and Business Services

Ph: 13 1882

www.cbs.sa.gov.au

Tasmania

Consumer Affairs and Fair Trading

Ph: 1300 654 499

www.consumer.tas.gov.au

Victoria

Consumer Affairs Victoria

Ph: 1300 558 181

www.consumer.vic.gov.au

Western Australia

WA Consumer Protection – Department of Mines, Industry Regulation and Safety

Ph: 1300 304 054

www.consumerprotection.wa.gov.au

Australian Competition and Consumer Commission

Ph: 1300 302 502

www.accc.gov.au

Australian Securities and Investments Commission

Ph: 1300 300 630

www.asic.gov.au