

Rental cars

An industry guide to the Australian Consumer Law



This guide was developed by:

- Australian Capital Territory Office of Regulatory Services
- Australian Competition and Consumer Commission
- Australian Securities and Investments Commission
- Consumer Affairs and Fair Trading Tasmania
- Consumer Affairs Victoria
- New South Wales Fair Trading
- Northern Territory Consumer Affairs
- Office of Consumer and Business Affairs South Australia
- Queensland Office of Fair Trading
- Western Australia Department of Commerce, Consumer Protection

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Introduction

The Australian Consumer Law (ACL) is Australia's national consumer law, replacing previous consumer protection laws in the Commonwealth, states and territories. The ACL applies at the Commonwealth level and in each state and territory.

This guide provides information on the ACL for car rental businesses.

It covers key aspects of the law such as contract terms, deposits and refunds, focusing on issues where:

- > industry bodies have requested more detailed guidance for business
- > consumers frequently report problems to national, state and territory consumer protection agencies.

In addition, guides to unfair contract terms for specific industries can be found at consumerlaw.gov.au.

What is not in this guide

This guide gives general information and examples – not legal advice or a definitive list of situations where the ACL applies. You should not rely on this guide for complete information on all your obligations under the ACL.

Other ACL guides and information

This guide supplements the ACL guides for business and legal practitioners, available from consumerlaw.gov.au:

- > Consumer guarantees
- > Sales practices
- > Avoiding unfair business practices
- > A guide to unfair contract terms law
- > Compliance and enforcement: how regulators enforce the Australian Consumer Law
- > Product safety.

For more information, view:

Australian Consumer Law website
consumerlaw.gov.au

Australian Competition & Consumer Commission (ACCC)
acc.gov.au

State and territory consumer protection agencies

Australian Capital Territory: Office of Regulatory Services
ors.act.gov.au

New South Wales: Fair Trading
fairtrading.nsw.gov.au

Northern Territory: Consumer Affairs
consumeraffairs.nt.gov.au

Queensland: Office of Fair Trading
fairtrading.qld.gov.au

South Australia: Consumer and Business Services
cbs.sa.gov.au

Tasmania: Consumer Affairs and Fair Trading
consumer.tas.gov.au

Victoria: Consumer Affairs Victoria
consumer.vic.gov.au

Western Australia: Department of Commerce
commerce.wa.gov.au

Terminology

For the purposes of this guide:

A **supplier** is anyone – including a trader, a retailer or a service provider – who, in trade or commerce, supplies products or services to a consumer (including supply by way of a rental agreement).

Trade or commerce means in the course of a supplier's or manufacturer's business or professional activity, including a not-for-profit business or activity.

A **consumer** is a person who acquires (including by way of a rental agreement):

- > any type of products or services costing up to \$40,000 (or any other amount set by the ACL in future) – for example, car rental services
- > a vehicle or trailer used mainly to transport goods on public roads. The cost of the vehicle or trailer is irrelevant
- > products or services costing more than \$40,000, which are normally used for personal, domestic or household purposes – for example, a car.

A person is **not** a consumer if they buy products to:

- > on-sell or resupply
- > use, as part of a business, to:
 - » manufacture or produce something else (for example, as an ingredient)
 - » repair or otherwise use on other goods or fixtures.

Major failure and **minor failure** refer to failures to comply with consumer guarantees. The ACL does not use the term 'minor'; it only makes reference to a failure that is 'major' and 'not major'. However, throughout this guide the term 'minor failure' is used for simplicity and will apply to circumstances where a failure will not be major.

A **representation** is a statement or claim.

Consumer guarantees on products

Under the ACL, the following consumer guarantees are relevant to motor vehicles rented by a consumer:

1. Suppliers and manufacturers guarantee that motor vehicles are of acceptable quality – see 'Acceptable quality' below
2. A supplier guarantees that motor vehicles will be reasonably fit for any purpose the consumer or supplier has specified
3. Suppliers and manufacturers guarantee that their description of motor vehicles (for example, in a brochure or television commercial) is accurate
4. A supplier guarantees that motor vehicles will match any sample or demonstration model
5. Suppliers and manufacturers guarantee that motor vehicles will satisfy any extra promises – or "express warranties" – made about them
6. A supplier guarantees "undisturbed possession" or that no one will try to repossess or take back motor vehicles, or prevent the consumer using them, for the term of the lease or hire agreement (except in certain circumstances).

Consumer guarantees cannot be excluded even by agreement.

For more information on consumer guarantees applying to products, refer to *Consumer guarantees: a guide for business and legal practitioners*, available from consumerlaw.gov.au.

Acceptable quality

The test for acceptable quality is whether a reasonable consumer, fully aware of a motor vehicle's condition (including any defects) would find it:

- > fit for all the purposes for which vehicles of that kind are commonly supplied
- > acceptable in appearance and finish
- > free from defects
- > safe
- > durable.

This test takes into account:

- > the nature of the motor vehicle
- > the cost of renting the motor vehicle
- > representations made about the vehicle; for example, in your advertising or in the vehicle manual
- > anything you told the consumer about the vehicle before they rented it, and
- > any other relevant facts, such as the way the consumer has driven or used the vehicle.

Rental cars are still of acceptable quality, even where they have defects, if:

- > you alert the consumer to the defect before the consumer agrees to the rental
- > the consumer examines the vehicle before renting it and the examination should have revealed it was not of acceptable quality. The examination does not require the consumer to find hidden defects or ones that are difficult to detect or would require expert knowledge; for example, engine faults or a damaged undercarriage
- > the consumer uses the motor car in an abnormal way. 'Abnormal' use has not been defined under the ACL; however, certain uses for certain vehicles will be inherently abnormal for example, a small hatchback is not designed for off-road use. Information provided in the manufacturer's handbook and any other operating instructions may also be relevant.

Major vs minor failures

When a rented motor vehicle fails to meet a consumer guarantee, your rights and obligations depend on whether the failure is major or minor.

Major failures

A major failure to comply with the consumer guarantees is when:

- > a reasonable consumer would not have rented the motor vehicle if they had known about the full extent of the problem
- > the motor vehicle is significantly different from the description, sample or demonstration model shown to the consumer
- > the motor vehicle is substantially unfit for its normal purpose and cannot easily be made fit within a reasonable time
- > the motor vehicle is substantially unfit for a purpose that the consumer told the supplier about, and cannot easily be made fit within a reasonable time
- > the motor vehicle is unsafe.

When there is a major failure to comply with a consumer guarantee, the consumer can choose to:

- > reject the rented vehicle and choose a refund of the contract price or an identical replacement (or one of similar value if reasonably available), or
- > continue with the car rental contract and ask for compensation for any drop in its value caused by the problem.

Example:

A consumer rents a car for a one-week holiday. After two days, the car fails to start. The consumer calls the rental company, which arranges a mechanic to look at the vehicle. The mechanic advises there is an electrical fault with the car's ignition that will take several days to fix.

As there has been a major failure to meet the consumer guarantee of acceptable quality (the time it will take to fix it is not reasonable), the consumer can choose whether to receive a replacement vehicle, or a refund of the price of the rental agreement.

Minor failures

A minor failure to comply with a consumer guarantee is where a problem with a rental vehicle can be fixed and does not have the characteristics of a major failure (see 'Major failures' above).

A minor failure does not initially allow the consumer to reject the vehicle and demand a refund, replacement or compensation for the difference in value.

When the failure to comply with a consumer guarantee is minor, you can choose between providing a repair in a reasonable time or offering the consumer a refund or an identical replacement (or one of similar value if reasonably available).

Example:

When a consumer collects their rental car, they notice it is dirty both inside and out, so they complain to the rental company. It could be considered that the company has failed to meet the consumer guarantee of acceptable quality; however, the problem does not have the characteristics of a major failure and can be fixed easily and within a reasonable time. The rental company can choose whether to repair the problem (for example, by cleaning the car) in a reasonable time or to provide the consumer with a replacement vehicle or a refund.

Consequential loss

A consumer can claim compensation for any consequential loss arising from a failure to meet one or more of the consumer guarantees. You will have to pay for losses that could have been expected to result from that failure and were reasonably foreseeable.

You would not have to pay for problems unrelated to your conduct or the products you supplied; or losses caused by something completely independent of your business after the rented vehicle left your control.

For more information on consumer guarantees, refer to *Consumer guarantees: a guide for business and legal practitioners*, available from consumerlaw.gov.au.

Unfair contract terms

If you use standard form car rental contracts, you must ensure these comply with national unfair contract terms laws. These laws are part of the ACL.

Unfair contract terms laws protect consumers against contract terms that:

- > would cause a significant imbalance in their rights and obligations under a contract
- > are not reasonably necessary to protect the business
- > would cause detriment (financial or otherwise) to a consumer.

Examples of terms that may be considered unfair include those allowing the business to:

- > cancel or vary the terms of the contract, without allowing the consumer to do the same
- > make the consumer liable for things that would normally be outside the consumer's control
- > prevent the consumer from relying on representations made by the business or its agents
- > charge the consumer's credit card without giving the consumer notice or an opportunity to dispute the charges
- > forfeit a security bond for **any** breach of the contract, that is, even if there is no causal link between the breach and the forfeiture
- > avoid liability for negligence
- > increase the fees and charges payable without the right for the consumer to terminate (free of any penalty).

To comply with unfair contract terms laws, you must ensure your contracts do not contain any unfair terms. It is not enough that you consider that applying your policies, procedures and discretion will ensure consumers are dealt with fairly in your view.

If a court finds a term is unfair, that term is treated as if it never existed. If the contract can operate without the unfair term, it will otherwise still be binding.

Examples:

A consumer returns a rental car at the agreed time and location, but during the time before it is inspected, it is damaged by vandals. The rental car company's standard form contract seeks to make the consumer liable for any damage that occurs between when the consumer returns the car and when the business inspects it – which may be up to one business day.

Another consumer returns a rental car with some damage, and the business automatically charges them the maximum damage payment allowable under the contract without taking reasonable and timely steps to work out what the repairs will cost. The rental car company's standard form contract seeks to permit the business to charge the consumer the full amount while damage is being assessed; then later to refund the difference between that full charge and the actual repair costs, once these are known.

Both the above scenarios are examples of contract terms that are likely to be unfair, in which case a business will not be able to enforce them in the event of a dispute.

The unfair contract terms laws do not apply to a contract to supply products or services from one business to another.

Transparency and fine print

A lack of transparency regarding a term in a standard form consumer contract may cause a significant imbalance in the parties' rights and obligations.

A term is considered to be transparent if it is:

- > expressed in reasonably plain language
- > legible
- > presented clearly
- > readily available to any party affected by the term.

Examples of terms that may not be considered transparent include terms that are:

- > hidden in fine print or schedules
- > phrased in complex or technical language.

For more information, see *A guide to the unfair contract terms law*, available from consumerlaw.gov.au.

Common issues

Representations about liability and 'cover'

When renting, customers often want to pick up a car and get away quickly and the business wants to help them do so. Within this environment, it is crucial that information available at the point of sale – verbal explanations, forms, pamphlets, signs – does not mislead customers about key issues such as liability when things go wrong.

Under the ACL, it is illegal for a business to make statements that are incorrect or likely to create a false or misleading impression.

You also need to consider the overall impression your information makes. You cannot rely on small print and disclaimers as an excuse for a misleading overall message.

This applies to damage cover that is supplied as part of the ordinary cost of hiring or at an additional cost to the hirer. Even such factors as the name of the cover product and the impression that it creates are important.

You should be particularly careful when explaining cover options at the counter when the consumer is collecting a vehicle. Your business must not create the impression that the consumer will get a greater or more extensive level of protection from liability for damage than is actually the case. This could be misleading conduct or a false representation.

For example, when you are explaining standard liability levels or advertising and selling liability reduction (extra cover) products, consumers should be able to understand the exceptions to this cover. If there are circumstances where the headline excess is not a true ceiling or maximum, this should be clear.

Disputes may arise where, for example, customers have paid extra money for a product with a name suggesting total cover and then sustain reasonably common damage – such as to the vehicle roof – and the company tells them that the contract makes them liable.

Good practice to lessen the risk of such problems could include:

- > counter staff delivering clear verbal explanations ending with a testing of the customer's understanding
- > using visual aids, such as tables, at the point of sale to highlight cover and exclusions.

For more information on misleading and deceptive conduct and false representations, refer to *Avoiding unfair business practices: A guide for business and legal practitioners*, available from consumerlaw.gov.au

Charges for repairs and debits to credit cards

Disputes commonly arise when car hire businesses make a credit card deduction for such things as tolls, fines or damage without informing the consumer first. Unless you have explained all liabilities or the consumer has closely read the terms of their rental car contract, they may be unaware of their liabilities.

Before you make credit card deductions for damage (whether it is the consumer's fault or not), you should provide an itemised bill and a reasonable opportunity for the consumer to dispute any charge.

If you ask a consumer to pay a security deposit or bond, specify in writing the circumstances in which they will forfeit it.

Example:

A prestige car hire company retained a consumer's 'security bond', claiming the consumer had caused damage to the car, resulting in the need for repairs.

However, the company did not provide an itemised bill showing the actual cost of repairing the damage.

This made it difficult for the company to claim that the consumer's 'security bond', or some part of it, should not be returned to them.

Itemised bills

Under the ACL, a consumer can ask you for an itemised bill that shows how the price was calculated.

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 you for the supply of the services.

You must give the consumer the itemised bill, without charge, within seven days of the request. The itemised bill must be expressed in plain language, legible and clear.

Change of vehicle

If you provide a consumer with a different type of vehicle from the one they booked, this is likely to be a breach of contract and may also raise a number of possible breaches of the ACL, depending on the circumstances.

Failure to comply with the consumer guarantees

Under the ACL, suppliers guarantee that motor vehicles will be reasonably fit for any purpose the consumer or supplier has specified; they also guarantee that their description of motor vehicles (for example, in a brochure or on a website) is accurate. Providing a different vehicle from the one the consumer booked may result in a failure to comply with one of these guarantees.

Example:

A couple books a vehicle for a long-distance drive. As they are travelling with a large amount of luggage, they check the rental company's website and choose a type of vehicle that the website states can accommodate four suitcases.

When they collect their car they are told the type of vehicle they booked is unavailable and they have been upgraded to a more expensive one at no extra cost. However, they find this vehicle only has room for two suitcases.

The rental company has failed to meet the consumer guarantee that a product will match the description; therefore, the consumers are entitled to a remedy.

Bait advertising

The ACL prohibits advertising a service at a specified price if there are reasonable grounds for believing the business will not be able to offer the service at that price in quantities and for a period that is reasonable. This could be considered 'bait advertising'.

Example:

A consumer responds to an advertisement offering specific models of vehicle for rent at a substantially reduced rate.

When the consumer attempts to collect the vehicle the rental car company advises that the vehicle is currently being hired and encourages the consumer to rent another model at a higher rate.

By only having one vehicle of that model available at the advertised rate the rental car company is not offering the advertised service in reasonable quantities.

For more information on bait advertising, see *Avoiding unfair business practices: A guide for business and legal practitioners*, available from consumerlaw.gov.au.

Terms in standard form contracts

Some standard form car rental agreements enable businesses to substitute alternative vehicles without prior notice and without any compensation to the consumer should the substitute vehicle not meet the consumer's needs.

However, according to the unfair contract term legislation, this type of term is likely to be regarded as unfair if it permits the operator to unilaterally vary the characteristics of the goods or services to be supplied under the contract.

Example:

A car rental company uses a standard form contract that includes the following term: "Should the vehicle booked be unavailable through unforeseen circumstances, we reserve the right to substitute an alternative vehicle without prior notification and at no extra cost, save for any additional running costs pertaining to the substitute vehicle. This shall not constitute a breach of contract and does not entitle the customer to a refund."

This term could be considered unfair as it seeks to remove the consumer's right to a remedy under contract law and under consumer guarantees for damages arising out of the company's breach of the contract or to compensation for losses caused by the change of vehicle (for example, additional running costs). It could also be unenforceable because it attempts to exclude remedies the consumer would be entitled to if the variations to the agreement amounted to a major failure of the consumer guarantees.

For more information, see *A guide to the unfair contract terms law*, available from consumerlaw.gov.au.

Alleged pre-existing damage

You cannot hold a consumer responsible for any pre-existing damage to a vehicle.

You can help prevent disputes over alleged pre-existing damage by providing consumers with a pre-existing condition report (also called a 'vehicle damage report') when they hire a car. You cannot ask a consumer to acknowledge the vehicle is in an undamaged state unless you have provided them with this report and they have had an opportunity to inspect the vehicle.

Consumers are entitled to:

- > inspect the car thoroughly to compare it with the report
- > note any additional damage on the report, and discuss this with you.

A pre-existing condition report should only cover panel and other visible, external damage. You cannot require a consumer to attest to the mechanical condition, safety or roadworthiness of a vehicle, as they cannot ascertain these things. You are responsible for a vehicle's maintenance and general upkeep before it is hired, including ensuring it is roadworthy.

When they return a car to you, consumers have the right to:

- > take photographs that show the vehicle's condition
- > be present when you inspect it.

Component pricing

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

A prominent single price is one that:

- > stands out so that it is easily seen by a consumer
- > is clear, eye-catching and noticeable.

While what is 'prominent' may vary on a case-by-case basis, you should consider factors such as the size, placement, colour and font of the price, as well as the background of the advertisement. For example, if a single price is smaller or in a colour that is harder to read than any component price, then this is likely to mean it is not as prominent.

What is the single price?

The single price means the minimum total cost that is able to be quantified (or calculated) at the time of making the representation in order for a consumer to rent a car.

The single price is calculated by adding up each of the price components that you are able to quantify when you make the price representation; for example, any tax, duty, fee, levy or charge imposed on you.

Components you do not need to include are:

- > optional extras – additional charges that a consumer may choose to pay. However, if an optional extra is depicted in the advertisement, you must include the price for that optional extra
- > any components that are not quantifiable at the time the representation is made
- > amounts your business pays to a third party that are not passed on to the consumer
- > amounts a consumer is required to pay directly to a relevant authority (such as parking fees or toll road charges).

How do I determine whether a component is 'quantifiable'?

An amount is quantifiable if **at the time you are making the representation**, you are able to readily convert it into a dollar amount.

If a total price is comprised of a number of components, you must quantify and add up each component to the extent to which you are able.

Where a total price involves:

- > a combination of quantifiable and non-quantifiable components
- > a component amount that fluctuates or varies (for example, changes in foreign currency),

you calculate the components and total price based on the information available at that time.

You also need to clearly advise consumers of the basis on which the amounts were calculated and that they may change. This will allow you to provide consumers with the minimum total cost they need to pay.

Advertisements that do not contain any price representations do not need to comply with the component pricing rules, but still must comply with your broader obligations under the ACL.

Businesses as consumers

Under the ACL, a business has certain consumer rights when it acquires products or services (including by way of a rental agreement). You cannot refuse a remedy to a customer simply because their car rental agreement was made for or on behalf of a business.

A business is protected by consumer guarantees if it acquires:

- > products or services that cost up to \$40,000
- > products or services that cost more than \$40,000 and are of a kind ordinarily acquired for domestic, household or personal use or consumption
- > a vehicle or trailer primarily used to transport goods on public roads.

However, the consumer guarantees will not apply if a business acquires products to resupply or transform into a product to sell.

Example:

A tourism business owner rents a minivan to transport customers while his own van is being repaired. When booking the rental, the business owner specifies he needs a van with a folding ramp, as some of his customers require disabled access. The rental company agrees to supply this. However, the minivan they supply does not have this feature.

As the rental business has not provided a product fit for the purpose specified by the tourism business owner, they must provide a refund or replacement under the consumer guarantees.

The business owner can also claim compensation for consequential loss if he loses customer bookings due to the rental business's failure to meet the consumer guarantees, and the lost bookings were reasonably foreseeable.

Where a product is not normally acquired for personal, domestic or household purposes, liability for failure to comply with a consumer guarantee can be limited by contract to one or more of the following:

- > replacement of the product or the supply of an equivalent product
- > repair of the product
- > payment of the cost of replacing the product or acquiring an equivalent product
- > payment of the cost of having the product repaired.

For more information, contact your local consumer protection agency.

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