CHAPTER 8

Legal requirements of small businesses offering goods and services

WHY IT IS IMPORTANT

In 2014, Tiny Tots Images Photography promised that it would refund consumers up to $50,000 after it breached the Australian Consumer Law in providing its services. The Australian Competition and Consumer Commission said that the business misled customers when it informed them that they had no cooling off rights. It was not explained to customers how they could end agreements with the business, and contact details for the company were also not provided. Tiny Tots agreed to offer refunds to customers and introduce a Trade Practices Compliance Program to ensure no future breaches of the law. Regardless of their size or what they sell, all businesses need to be aware of their legal obligations towards customers.

WHAT YOU WILL LEARN

KEY KNOWLEDGE

Use each of the points below from the Business Management study design as a heading in your summary notes.

- Ethical and socially responsible management of the legal requirements of small businesses
- An overview of the various levels of government creating relevant legislation
- The legislation created by common law, such as contract and negligence
- The types of legislation created by the federal government, such as the Trade Practices Act, which impact upon small business
- The types of legislation created by state governments, such as the Fair Trading Act, which impact upon small business
- The types of legislation created by local government, such as local laws affecting food handling, which impact upon small business

LEGAL REQUIREMENTS OF SMALL BUSINESSES OFFERING GOODS AND SERVICES

KEY SKILLS

These are the skills you need to demonstrate. Can you demonstrate these skills?

- accurately use relevant management terms
- research the selected day-to-day operation/s of a small business using print and online sources
- acquire and exchange business information and ideas
- apply the selected day-to-day operation/s to a practical and/or simulated business situation
- discuss the ethical and socially responsible management of the selected day-to-day operation/s.
Small businesses need to ensure that they meet their legal responsibilities. Legal requirements must be met even when selling products as seemingly innocent as candles and plastic toys.

Roc’s Oriental Gift Import, a gifts supplier based in Moorabbin, was ordered to recall unsafe candles and children’s toys in 2013. After searching the premises, Consumer Affairs Victoria seized candles in plastic holders and plastic toy helicopters that did not comply with Australian Consumer Law. Consumer Affairs Victoria took civil action in the Melbourne Magistrates’ Court against the company in relation to selling the dangerous goods.

As well as recalling the harmful products, the business was permanently banned from selling them unless a compliance program was put in place. The company was also ordered to pay $3000 to the Victorian Consumer Law Fund and court costs, and to publish a public warning on its website.

‘It is vital that importers, wholesalers, manufacturers, distributors and retailers ensure they are aware of their responsibilities to their customers and comply with safety standards, which are in place to protect consumers,’ Director of Consumer Affairs Victoria, Dr Claire Noone, said. ‘These products are banned for a very good reason — they are unsafe and have the potential to cause serious injury.’

‘Australia has strict safety standards in place to protect consumers from dangerous products, and it is Consumer Affairs Victoria’s priority to ensure these products are removed from the market permanently,’ she said.
Legal responsibilities of small business — an introduction

**KEY CONCEPT** All businesses have a legal responsibility to ensure they conduct themselves fairly in relation to the consumer, the community and other businesses.

Too much government interference! Too much red tape! Too many regulations! These are familiar cries from small business owners, who face an increasing number of legal obligations in every aspect of their businesses. Today, small businesses face levels of regulation, similar to those facing large businesses. While most small business owners are willing to comply with regulations, compliance is often time consuming and costly, and regulations can be confusing and contradictory.

Regulations are rules, laws or orders that businesses must follow.

Legal responsibilities

Society expects small business owners to abide by the laws of a country. Consequently, it is essential that they have a sound working knowledge of the laws that will affect their operations (so that they avoid penalties), and that they understand and accept the legal responsibilities they owe to all stakeholders. All levels of government impose legal responsibilities on small businesses, and these laws govern every aspect of the life of a business:

- When a business is first established, a business name must be registered with the Australian Securities and Investments Commission (ASIC), unless the owner is trading under their own personal name, in which case registration is optional. Patents (exclusive rights given to an inventor in exchange for public disclosure of an invention) and trademarks (distinctive signs such as logos that help the customer identify a product or service) need to be registered with the appropriate federal government body. New business name registrations require an Australian business number (ABN), and a partnership or company requires its own tax file number. If the business is established as a company, it is required to register with ASIC to receive a Certificate of Registration and an Australian company number (ACN).
- The acquisition and development of business premises will be influenced by local government zoning and building regulations, as well as regulations relating to the position and size of signage. Fire regulations and parking regulations will also affect the layout and location of business premises.
• The purchase or leasing of equipment imposes legal and financial responsibilities, often involving contractual arrangements with banks and other financial institutions, as well as the suppliers of the equipment.

• Taxation laws apply to all businesses, and all businesses are required to complete a quarterly business activity statement (BAS) which details the collection of the goods and services tax (GST), and payment of pay as you go (PAYG) income tax instalments on behalf of employees. The business may also have to pay state government payroll tax, as well as tax payable on its own earnings.

• The employment of staff is governed by yet another set of laws, including legislation relating to workplace relations, superannuation, occupational health and safety, and equal employment opportunity.

• A small business may commence operation being run by a sole proprietor, but if it expands by becoming a partnership or a company, new legal obligations are imposed at each stage.

• Even when a business fails, there are legal procedures which must be followed. Employees’ legal entitlements to holiday and long service leave pay may need to be honoured, and if a business is declared bankrupt, there is a legal process for selling all the assets and distributing the proceeds to creditors.

Obligations
In addition to these regulations, most of which have been covered in detail in previous chapters of this book, all businesses have quite specific legal responsibilities to their customers and competitors in the way in which they provide goods and services. It is these obligations that are the focus of this chapter.

The case study ‘Dangerous candles and toys seized’ (page 229) is an example of the legal responsibility of all businesses not to supply dangerous products to the public. However, businesses have a much broader responsibility to their customers in relation to the goods and services they sell. For example, in the US in 2007 a judge took his dry cleaners to court, demanding $64 million in compensation for losing his red-and-white-striped trousers. The judge did not win the case, but while this claim for damages may seem disproportionate, there is no doubt that the dry cleaners had a legal obligation not to lose any item of clothing left with them for cleaning. The excessive nature of the claim should not alter the fact that consumers are entitled to fair compensation in cases such as this. This is one of many responsibilities faced by businesses that apply to the way in which they interact with customers.

TEST your understanding
1 Why do many small business owners complain about the level of regulation they are required to manage?
2 Why is it important for small business owners to have a good working knowledge of their legal rights and responsibilities?
3 Identify and describe three aspects of running a business that involve legal responsibilities on the part of a business owner.

APPLY your understanding
4 Explain what you believe would be fair compensation for a person who had an item of clothing lost by a dry cleaning business.
5 Examine each of the following situations, and explain whether the owner has met their legal obligations, and why.

A Dennis is an electrician who runs his own one-person business. He does not apply for an ABN because he believes it is not necessary for a sole proprietor.
B Katie and Marie are in partnership in a dressmaking shop. They decide to use Marie’s tax file number as the official TFN for the business.
C Gino runs a family fish and chip shop. He has no employees but gives his teenage children extra pocket money for helping out in the shop at busy times. He does not include any PAYG information on his BAS.
D Dianne runs a babywear shop. She inadvertently sells a type of dummy that has been banned because it is dangerous. She claims she did not know about the ban.

DID YOU KNOW?
According to the Director of Consumer Affairs Victoria, Dr Claire Noone, Consumer Affairs Victoria inspected 5000 product lines and seized 28 000 unsafe goods in the 2012–13 financial year.
KEY CONCEPT  Australia has three levels of government — federal, state and local. Each level of government imposes different responsibilities on businesses in their dealings with customers and competitors.

On 1 January 1901, the federal system came into being when the Commonwealth of Australia was formed. Previously, Australia consisted of six colonies under the control of the British monarch. Each colony had its own form of government and set of laws. When the colonies became a federation, they became states and agreed to hand over some powers to a central government. Under these new arrangements, three levels of government were established: federal, state and local.

- Taxation
- Foreign affairs
- Defence
- Social security
- Health
- Education
- Aboriginal welfare
- Trade
- Communication
- Immigration

Federal
- Law and order
- Housing
- Health
- Education
- Transport
- Local government
- Industry and business development

State
- Parks
- Rubbish
- Minor roads
- Street lighting
- Zoning
- Signage
- Development applications
- Health regulations
- Fire regulations

Local

The three levels of government in Australia and their main responsibilities

Federal and state powers are determined by the Australian Constitution, while state governments determine local government powers through state legislation. In Victoria, the Local Government Act 1989 delegates the powers listed in the figure above to local municipal councils. The state government retains the power to add, change or remove local government responsibilities. Municipal councils have the power to make local laws, often called by-laws.

Sources of law

There are two main sources of law:

1. Parliament-made laws. The Federal Parliament is responsible for enacting laws that are relevant to its constitutional responsibilities for all of Australia, while each state parliament makes laws that apply only to that state. These laws are called statutes or Acts of Parliament. 'Legislation' is a term also used to describe this set of laws. Our parliaments are our main law-making bodies.

2. Laws made by the courts. A set of laws has developed based on the decisions made by judges in higher courts. The higher court makes decisions about the interpretation of the law as it believes the law should be recognised and understood. Once the decision is made, it becomes binding. In this way, law is made by precedent. This is called common law (because it applies to everyone) or judge-made law. With reference to businesses, the law of contract is one that has developed through the common law, as a way of holding people to deals that they have made.

Statutes or Acts of Parliament are laws made by either the federal government or the state governments.

A precedent is a legal judgement or decision used as an authority to decide a similar case.

Common law is the set of laws that apply to everyone, based on the decisions made by judges in courts.
Legislation affecting small business

All three levels of government have enacted laws and regulations that affect the way small businesses offer goods and services. These laws will not only influence the dealings between businesses and their customers, but will also affect their relationship with competitors. These laws and regulations have two broad purposes:

1. to protect consumers from being sold dangerous or unsuitable products, and to ensure that they receive the products and services they expect to receive, at the price they expect to pay. This includes protecting consumers from undesirable or misleading practices that may be attempted by unscrupulous business owners.

2. to ensure maximum levels of fair and open competition between businesses. This is achieved by regulating business practices that may restrict competition, and by ensuring that there are a number of competing businesses operating in the same market at any one time. Greater competition gives the consumer more choice, and reduces the risk of dishonest practices.

The following table lists some of the laws which can affect the ways in which small businesses offer goods and services to the public.

### Laws enacted by all three levels of government and their effect on small businesses

<table>
<thead>
<tr>
<th>Federal laws</th>
<th>State laws</th>
<th>Local laws and regulations</th>
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| • Competition and Consumer Act 2010  
  – Introduced the Australian Consumer Law that replaced many national, state and territory laws, including the Trade Practices Act 1974  
  – Provides for competition between businesses and protects customers from undesirable or misleading practices | • Australian Consumer Law and Fair Trading Act 2012 (Vic.) repealed the Fair Trading Act 1999 and incorporates the Australian Consumer Law for Victoria.  
• Food Act 1984 (Vic.) regulates the sale of food in Victoria to ensure safety and suitability for human consumption (largely administered by local councils) | • Licensing and inspection of all food premises, delegated through the Food Act 1984 (Vic.)  
• Local zoning laws regulate the location of different types of businesses, such as ‘commercial’, ‘retail’, ‘light industrial’  
• Local parking regulations and hours of operation will affect customer access to the business |
| • National Measurement Act 1960 prescribes the national units of measurement for weight, size and volume of products, as well as standards for the accuracy of measuring equipment | | |

### TEST your understanding

1. Identify the level of government that has responsibility for each of the following:  
   - Defence  
   - Health regulations  
   - Street lighting  
   - Housing  
   - Zoning  
   - Transport  
   - Foreign affairs  
   - Trade

2. Explain the difference between statute law and common law.

3. What are the two main purposes of laws and regulations that apply to businesses offering goods and services to the public?

4. What are the two aims of the Competition and Consumer Act?

5. In what ways is food safety a responsibility of both state and local government?

### APPLY your understanding

6. All of us come into contact with federal, state and local government laws every day, often without realising it.

(a) Working in pairs, list all the things you have done today since waking up. Next to each item in the list, identify the federal, state or local government laws which might have applied to that particular activity (e.g. driving to school you will be affected by the road laws).

(b) In whole class discussion, compile a full list of ways in which all members of the class have been affected by the three types of laws.
The Competition and Consumer Act introduced the Australian Consumer Law and protects the rights of consumers to be treated honestly and ethically. It does this by prohibiting a number of undesirable business practices.

From 1 January 2011, the *Competition and Consumer Act* 2010 replaced the *Trade Practices Act* 1974. The new Act introduced the Australian Consumer Law (ACL). This law replaced a wide range of existing national, state and territory consumer protection and fair trading laws, and clarified understanding of the law for Australian businesses. It is administered by the Australian Competition and Consumer Commission (ACCC) and each state and territory’s consumer law agency. In Victoria, this is Consumer Affairs Victoria.

**Practices prohibited by the Competition and Consumer Act**

The following are some of the undesirable and misleading practices that are illegal under the Act:

1. **Misleading or deceptive conduct.** Advertisements must not use words that are deceptive or claim that a product has some specific quality when it does not. Such actions convey a false impression of the exact nature of the product. Additionally, price reductions or specials must be genuine.

2. **Unconscionable conduct.** This is conduct in business transactions that is unfair or unreasonable and goes against good conscience, as illustrated in the case study on page 235.
3 False or misleading representations regarding goods or services. A false or misleading representation is a statement of fact that is untrue, such as claiming that a motor vehicle has a certain fuel consumption performance when it does not.

4 Offering gifts and prizes in connection with the supply of goods and services and then not providing them.

5 Conduct that may mislead the public. For example, using a brand name similar to a well-known brand, or using an Australian-made logo when the product was made overseas.

6 Bait advertising. A business attempts to attract customers by advertising some products at lower prices. When the advertised products quickly run out, customers are directed (or switched) to higher priced items.

7 Referral selling. This occurs when a business offers a customer a special deal or special price if the customer refers other potential customers to the seller. This is illegal because it may encourage consumers to spend more money than they planned with the expectation that they may recoup some if they encourage others to buy.

ACCC pursues unconscionable conduct

In August 2013, the Full Federal Court handed down its decision in ACCC v Lux Distributors Pty Ltd. The conduct of Lux, a company that sells vacuum cleaners direct to householders, was under question. The ACCC alleged that Lux employees gained entry to the homes of three elderly women and offered to conduct free maintenance checks of their vacuum cleaners. This was a deceptive ruse to gain entry to each customer’s home with the real purpose of selling each woman a new one. The ACCC alleged that the women were then unfairly pressured into purchasing the latest Lux model for a price of up to $2280.

The court held that Lux had indeed engaged in unconscionable conduct, in breach of section 21 of the Australian Consumer Law. Section 21 provides that a person must not, in trade or commerce, in connection with the supply of goods or services to another person, engage in conduct that is, in all the circumstances, unconscionable.

In its reasons for the decision the court noted that, ‘The norms and standards of today require businesses who wish to gain access to the homes of people for extended selling opportunities to exhibit honesty and openness in what they are doing, not to apply deceptive ruses to gain entry’.

Statutory rights — consumer guarantees

One of the main reforms introduced by the Australian Consumer Law was consumer guarantees. Consumer guarantees are a comprehensive set of rights and obligations in relation to the supply of goods and services to consumers. All suppliers and manufacturers automatically provide guarantees on their products they sell to consumers. These exist regardless of any express warranty provided by the
A business cannot eliminate consumer rights under the consumer guarantees, but they can extend and improve these basic rights. Australian Consumer Law provides the following guaranteed rights:

- The consumer will gain clear legal title to goods; that is, that the seller actually owns the goods being sold, and can legally transfer ownership to the buyer.
- Goods must correspond to any sample, demonstration model or description provided to the buyer.
- Goods must be of acceptable quality; that is, they must be safe, durable, free from defects, acceptable in appearance and finish, and do all the things that the goods are ordinarily used for. If a consumer purchased a sandwich, for example, that turned out to be stale, or contained impurities, the sandwich would not be considered of acceptable quality.
- Products must be fit for a particular purpose. Fitness of purpose means the product will perform as the instructions or advertisement imply. A pair of running shorts being sold as football shorts, for example, would be a breach of a condition to supply goods for the purpose for which the seller knew they were intended.
- Repairs and spare parts are reasonably available.
- Services are carried out with reasonable care and skill.
- Services are completed within a reasonable time.

**Acceptable quality** means the product is safe, durable, free from defects, acceptable in appearance and finish, and able to do the things you would expect it to. **Fitness of purpose** means the product is suitable for the purpose for which it is being sold.

**Breaches of the Act**

A breach of any of the consumer protection provisions of the Competition and Consumer Act can result in an Australian Consumer Law regulator (such as the ACCC or Consumer Affairs Victoria) taking criminal proceedings against the business concerned. The Act allows the courts to impose penalties of up to $1.1 million for companies, and $220,000 for individuals who breach the Act. In addition, the consumer can sue the business for compensation. When legal fees and the damage to the business’s reputation are included, the cost of breaching the Competition and Consumer Act can be enough to ruin a small business, so ensuring compliance with the Act is vitally important for every small business owner.

**Test your understanding**

1. What law protects the rights of consumers?
2. Provide a brief description of:
   (a) bait advertising
   (b) misleading advertising
   (c) referral selling
   (d) clear legal title
   (e) acceptable quality.
3. Read about the case brought against Lux Distributors Pty Ltd on page 235. Explain why the conduct of the company was considered to be ‘unconscionable’.
4. Explain why it is important for a small business owner to comply with the consumer protection provisions of the Competition and Consumer Act.

**Apply your understanding**

5. In each of the following examples, state whether there has been a breach of the Competition and Consumer Act.
   A. A small business advertises a particular brand of television and states that it is at a cheaper price than that offered by a competitor. This statement is false.
   B. A small business advertises jumpers and claims that they are made in Australia when in fact they are made in Hong Kong.
   C. A small business advertises that a special deal is only for one week when in fact it plans to extend it for two months.
   D. A small business offers its customers a 10 per cent discount if they provide the names and addresses of five potential customers for the business.
KEY CONCEPT The Competition and Consumer Act aims to maximise competition between businesses. It does this by prohibiting businesses from engaging in any practice that would either restrict trade or reduce the number of businesses operating in a particular market.

Anti-competitive practices
The Act either prohibits or places strict controls on the following activities by business:

1. **Exclusionary provisions** (s.45). The Act prohibits two or more businesses that would normally be in competition with each other from reaching an agreement to exclude or limit their dealings with a particular supplier or customer. For example, a manufacturer can refuse to deal with a particular retailer if it believes that retailer is a poor credit risk, but it cannot seek agreement from other manufacturers to refuse to supply that retailer.

2. **Price fixing** (s.44ZZRF). The Act prohibits businesses from agreeing to fix, control or maintain the price for goods or services. It is illegal for two businesses in competition with each other to agree to set identical prices for their products.

3. **Misuse of market power** (s.46). The Act prohibits businesses with a substantial degree of market power from taking advantage of that power to:
   - (a) damage or get rid of a competitor
   - (b) prevent anyone from competing in the market
   - (c) prevent another competitor from entering the market.

4. **Predatory pricing** (s.46). This occurs when a business sets its prices at a sufficiently low level with the purpose of damaging or forcing a competitor to withdraw from the market. This leaves the business with less competition so that it can disregard market forces, raise prices and exploit consumers.

5. **Exclusive dealing** (s.47). This is when one business trades with another while imposing restrictions on the other’s freedom to deal with other businesses. An example is when a hair products supplier will only sell to a hairdresser on condition that the hairdresser does not purchase hair products from a competitor of that supplier. This can be legal in some circumstances, if it is not seen to lessen competition in the market for the products in question. For example, McDonald’s sells Coke products but not Pepsi. Businesses that wish to enter such an arrangement, and believe it may be legal, must notify the ACCC of the agreement. The ACCC will then examine the details before either approving or disallowing the arrangement.

6. **Resale price maintenance** (s.48). Suppliers cannot set the prices at which retailers will sell their products. Suppliers can recommend a retail price for the sale of their goods, but it is illegal to attempt to force a retailer to sell at that price. It is also illegal to set a minimum price that sellers must not sell below, and to force a retailer not to discount goods. On the other hand, it is quite legal for a supplier to insist on a maximum price, as this can discourage a retailer who has a monopoly in a particular location from overcharging customers.

7. **Mergers and acquisitions** (s.50). The Act prohibits **mergers** and **acquisitions** between one or more businesses if they result in the competition being substantially lessened. A merger or acquisition may be permitted if it does not substantially limit competition. Planned mergers and acquisitions must be notified to the ACCC, which will determine if they can proceed.

Cabcharge Australia Limited was ordered to pay $14 million in penalties and $1 million towards the ACCC’s costs by the Federal Court in 2010, for misuse of market power. Customers who use taxis have the option of paying their fare through an electronic payment processing service. Cabcharge refused to allow competing suppliers of electronic payment processing services for taxis to process Cabcharge branded non-cash payment products. Cabcharge also supplied taxi meters and associated fare schedule updates below-cost for an anti-competitive purpose.

A **merger** is the joining together of two or more organisations to form one organisation.

An **acquisition** is when one business takes over another business.
Price fixing. In December 2012, the Federal Court ordered Cathay Pacific Airways and Singapore Airlines Cargo to pay a total of $23 million in penalties for engaging in cartel conduct in breach of the Trade Practices Act 1974 (now the Competition and Consumer Act 2010). A cartel occurs when businesses make an agreement to act together instead of competing against one another. A common form of illegal cartel activity is price fixing.

‘The conduct, which we consider to constitute a serious breach of the law, included an attempt by Singapore Airlines Cargo to fix air freight rates for meat exports including the potential meat exports going to US and Australian troops stationed in the Middle East,’ ACCC Chairman Rod Sims said. ‘The ACCC is fiercely committed to stopping cartel conduct, which is illegal, harms competition and often increases prices for consumers.’

The ACCC commenced proceedings against Singapore Airlines Cargo and Cathay Pacific in 2008 and 2009 respectively, alleging that they engaged in cartel conduct, including in relation to fuel and other surcharges applied to the carriage of airfreight.

The Court also ordered injunctions restraining each airline from engaging in such conduct for five years.


Resale price maintenance. In December 2012, the ACCC accepted court enforceable undertakings from hearing aid wholesaler and retailer Oticon Australia Pty Ltd, acknowledging that it had engaged in resale price maintenance in the supply of hearing aids to retailers in Australia.

In response to an ACCC investigation, Oticon Australia accepted that it engaged in resale price maintenance in September 2011 by agreeing to supply hearing aids to a retailer on condition that the retailer sell Oticon Australia hearing aids at prices much closer to the recommended retail prices. It also offered to supply hearing aids to another retailer on the condition that it would sell at a price within 15 per cent of Oticon Australia’s recommended retail prices.

Oticon Australia provided the ACCC with a court enforceable undertaking that it will refrain from engaging in resale price maintenance, and maintain and continue to implement a compliance program.


Mergers and acquisitions. The ACCC announced that it would oppose the acquisition of the assets of Macquarie Generation by AGL Energy Limited (AGL) in March 2014. It believed that the proposed acquisition was likely to result in a substantial lessening of competition in the market for the retail supply of electricity in New South Wales.

‘The proposed acquisition would result in the largest source of generation capacity in NSW being owned by one of the three largest retailers in NSW. Indeed, with this acquisition, the three largest retailers in NSW would own a combined share of 70 to 80 per cent of electricity generation capacity or output. This is likely to raise barriers to entry and expansion for other electricity retailers in NSW and therefore reduce competition compared to the situation if the proposed acquisition does not proceed,’ ACCC Chairman Rod Sims said.

The ACCC consulted with a large number of stakeholders and a significant proportion expressed concerns about the effect of the proposed acquisition.

Role of the ACCC

The ACCC has wide powers to investigate alleged breaches of the Competition and Consumer Act, and can institute legal action against any person or organisation suspected of breaching the Act. It will sometimes be granted a court order to seize confidential documents from businesses suspected of anti-competitive behaviour.

Only a court can determine whether a breach of the Act has occurred and make orders against offenders. The ACCC’s role is to bring matters before the courts for consideration, both for the imposition of criminal penalties, and to gain redress for those who may have been harmed by breaches of the Act. The ACCC will take proceedings under the Act to the Federal Court of Australia. The court can impose penalties of up to $10 million for companies and $500,000 for individuals found guilty of anti-competitive behaviour. Other actions may include an injunction — that is, a restraint on a person from continuing to engage in conduct that is in contravention of the Act — or the awarding of damages to cover a loss caused by a breach of the Act.

The ACCC has the power to authorise behaviour which might have appeared to be anti-competitive if it considers that conduct to be in the public interest. It can also actively monitor prices and approve price rises in markets where competition is limited. Businesses wishing to engage in mergers or takeovers can seek advice from the ACCC as to whether the proposed action is likely to breach the Act, and then proceed according to that advice. The ACCC aims to encourage compliance with the Act rather than simply punish wrongdoers.

**TEST your understanding**

1. Using the case studies on page 238, explain each of the following
   (a) price fixing
   (b) resale price maintenance
   (c) mergers and acquisitions.

2. Explain the legal penalties or remedies that might apply after a successful prosecution for breaches of anti-competitive practices provisions of the Act.

3. Describe the role and major activities of the ACCC.

4. Why is the ACCC so important to business in Australia?

**APPLY your understanding**

5. In each of the following situations, state whether there has been a breach of the Competition and Consumer Act. If so, describe the type of breach found.

   A. Franchisees of a franchised garden maintenance business were required to sign a clause in their agreement with the franchisor that they would only operate in a specific group of postcode areas.

   B. The owners of five petrol retailers along a major stretch of road met each week to determine how much they would all charge on each day of the week.

   C. The manufacturer of a range of electrical goods provided all retail outlets selling its products with a list of recommended retail prices for each of its products.

   D. A branch of a major supermarket chain, located in the same shopping centre as an independent supermarket, consistently prices all its products 5 per cent below those of the independent supermarket, even when the independent business lowers its prices to try and match its competitor.
Victorian consumers are protected by the **Australian Consumer Law and Fair Trading Act 2012**, which incorporates the Australian Consumer Law for Victoria. In Victoria, Consumer Affairs Victoria administers this law.

### Australian Consumer Law became state law

The Australian Consumer Law is enacted in Victoria through the **Australian Consumer Law and Fair Trading Act 2012** which came into operation on 1 July 2012. That Act repealed the **Fair Trading Act 1999**. As well as national competition and consumer laws, the Australian Consumer Law replaced a wide range of existing state and territory consumer laws. Many of the terms in the Fair Trading Act were refined or redefined, and laws were clarified to improve understanding for consumers and businesses.

Some of the legislation that was previously in the **Fair Trading Act 1999** and is now found in the Australian Consumer Law includes:

1. **Unfair terms** in a consumer contract are terms that cause a significant imbalance in the parties’ rights and responsibilities, to the detriment of the consumer.
2. **A retailer must provide:**
   - an itemised bill on request
   - a receipt for all transactions over $75 and, on request, for transactions under $75.
3. Unsolicited consumer agreements (made through door-to-door sales or telephoning consumers) are limited to 9 am to 6 pm on weekdays and 9 am to 5 pm on Saturdays, and are not permitted on Sundays or public holidays. This rule does not apply when consumers have agreed in advance to an appointment time for the seller to visit their home. A salesperson must leave immediately if requested and must not contact the consumer again for at least 30 days (with that same product).
4. **Participation in pyramid schemes** is illegal.
5. Lay-by agreements must be in writing and be transparent (expressed in plain language, legible and presented clearly). The agreement must specify all terms and conditions, including any termination charge.
6. **A business must offer a refund if the product:**
   - is faulty
   - is unfit for its usual purpose or any purpose specified at the time of sale
   - does not match its description or the quality of the sample provided at the time of sale.

### Consumer Affairs Victoria

Consumer Affairs Victoria (CAV) is a state government department which has been set up to protect and promote the interests of consumers. Its role includes advising government on any necessary changes to consumer legislation, publicising consumer protection issues and educating the community on all aspects of consumer laws. It provides advice and assistance on matters relating to residential tenancies,
estate agents, building, shopping and credit. CAV also has responsibility for licensing and regulating a whole range of businesses such as credit providers, estate agents, motor car traders, travel agents and second-hand dealers.

CAV initiates court action against businesses found to be in breach of the Australian Consumer Law, often in response to complaints from consumers. It also has a major role in banning dangerous products. It has offices throughout metropolitan and regional Victoria and can also provide assistance in conciliating disputes between the consumer and a business.

Like the ACCC, CAV seeks to encourage compliance with consumer laws rather than jump straight into court action. CAV does have the power to inspect premises and seize documents, with a court order. Conciliation of disputes, however, is a priority. CAV can issue a public warning notice about businesses if it has reasonable grounds to suspect that the business may have breached the Australian Consumer Law. CAV can also seek monetary penalties, or other remedies such as an injunction (preventing something from being done or ordering that something be done), damages (monetary compensation) or compensatory orders in court. CAV may also apply to a court for an order disqualifying a person from managing a business for a contravention of the Australian Consumer Law.

**TEST your understanding**

1. How was the Australian Consumer Law applied to Victorian law?
2. What are the responsibilities of a business in providing receipts for customers?
3. What are the limits on unsolicited consumer agreements?
4. Describe the responsibilities of a business in relation to goods put aside on lay-by.
5. When must a retailer offer a refund?
7. Use the Consumer Affairs Victoria eBookplus weblink in your eBookPLUS to calculate the penalties for breaches of the Australian Consumer Law and Fair Trading Act 2012. Choose five obligations and use the current value of penalty units to make the calculations for businesses and individuals.

**APPLY your understanding**

8. In each of the following examples, state if there has been a breach of the Australian Consumer Law and why.
   A. A small business advertises a motor vehicle as having low mileage when in fact it has travelled 200,000 kilometres.
   B. A small business owner displays a sign that reads ‘Choose carefully. No refunds given’.
   C. A small business owner does not issue a receipt for a $300 transaction.
   D. A small business owner removes any unfair terms from the business’s contracts.

9. In groups of three or four, discuss these questions:
   a. Are the fines for business owners who breach the Australian Consumer Law in Victoria adequate?
   b. What are some alternative punishments?

**SAMPLE PAGE PROOFS**

**DID YOU KNOW?**

In May 2013, Consumer Affairs Victoria achieved a landmark outcome in the case of Hair Science International Pty Ltd, which was ordered to pay $100,000 for making false claims that its treatment could regrow hair. Clients were actually given a hairpiece.
8.6 Small business and local government

**KEY CONCEPTS**

Local councils have control over a wide range of small business activities, including land zoning, development applications, fire regulations and signage.

One of the most important roles of local government is the enforcement of laws affecting food handling.

**Local laws impacting on small business**

The local laws that businesses need to be aware of differ according to where the business chooses to locate and the nature of the business. Local councils usually have particular requirements. Most expect that a business owner will speak to them before any decisions are made.

When setting up a new business, undertaking land or building development, or changing the purpose of a property, the first step is to apply to the local council for a planning permit. This permit provides evidence that council permission has been given to develop a property. Certain regulations apply to some types of businesses, including food and health services. The business owner can expect to be advised on the zoning of the land and any other local planning conditions that apply to the development. Areas are divided into zones, including residential, industrial and commercial; and each has specific requirements.

If the new development involves construction, demolition, alteration or extension of a building, the business will probably need a building permit. The local council building surveyor can issue this or the business owner can find a private registered building surveyor. Not all upgrade or refurbishment works to an existing building require a building permit, but the building surveyor can confirm whether or not it is needed. Where a building permit is required, it provides the surveyor’s permission for work on the building to go ahead and ensures that building regulations are followed.

Under the *Food Act 1984*, a business that sells or handles food needs a Registration of Food Premises from their local council. If the business is going to sell and serve alcohol, or have tables and chairs on the footpath, permits will again need to be issued by the local council.

Local councils are responsible for administering the *Food Act 1984* in Victoria. Councils must ensure that:

- all businesses that prepare, serve, manufacture or sell food meet the requirement to register with the relevant local council Health Unit, and pay an annual registration fee
- new premises that are to be used for food preparation are constructed to conform to the Food Standards Code, a set of standards covering storage, preparation areas, etc.
- businesses are classified according to their food safety risk
  - Class 1 and 2 food premises (higher risk) must have a written food safety program and a designated food safety supervisor who will ensure that all food handling staff have sufficient skills and knowledge to provide safe food.
  - Class 3 food premises must maintain basic records of their food safety practices on site (class 3 and 4 premises that are considered lower risk do not need a food safety program or food safety supervisor).
Classification of food premises is based on the type of food handled by the business and the microbial hazards this food poses to consumers. Basically, the greater the potential risk for things to go wrong during the food handling processes, and the greater the potential impact on people’s health when food becomes hazardous during the food handling process, the higher a business’s classification. In this case there are more regulatory requirements. All premises are inspected by the council when first registered.

Community groups can be either class 2, 3 or 4, depending on their food activities and the associated food safety risk. Community groups whose food handling activities pose low risk to public health are subject to special arrangements, making it easier for them to conduct charitable food events.

The Food Act requires that a food safety audit be conducted to determine whether a food safety program has been complied with during the period covered by the audit, and that it is still adequate at the date of the audit. This applies to class 1 and 2 premises (although council can decide to inspect any premises at their discretion). The audit of a food safety program must be conducted by a food safety auditor or a council auditor approved by the Department of Health.

Councils are able to issue on-the-spot fines for certain food safety or hygiene offences. This includes a range of less serious infringements for less serious hygiene or food safety problems.

If there is repeated non-compliance by a business, councils can choose to charge the business additional fees for follow-up inspections, in order to recover the costs of repeatedly attending the same premises. Serious non-compliance or a repeated failure to comply with food laws will lead to prosecutions for food safety breaches. Details of offences under the Food Act involving the conviction of a business by a court are now publicly available on the Department of Health website.

The Department of Health is responsible for promoting a consistent approach to food safety and for providing guidance to local councils in order to achieve consistent state-wide application of the Food Act. This means that businesses in every part of Victoria can expect a similar approach to food regulation by councils.

TEST your understanding
1. What are some of the ways that local government can affect small businesses?
2. Explain three major problems with the enforcement of the Food Act that were identified in the case study article.
3. List and describe the main responsibilities faced by food businesses in conforming to the Food Act.
4. Outline what is involved in a food safety audit.
5. What can councils do about non-compliance with the Food Act?
6. What role does the Department of Health play in food safety?

APPLY your understanding
7. Arrange for an environmental health officer from your local council to address your class about their role in enforcing the relevant Food Act. Prepare a list of interview questions and send them to the officer before the visit. After the visit, compile a report and arrange for a copy to be sent to the officer.
8. Arrange to interview a representative from your school’s canteen. Prepare a report on:
   • safe food handling procedures
   • food regulations with which they must comply.
9. Research the website of your local council to determine what other local laws have been implemented that apply to small businesses.
**APPLY YOUR SKILLS:** Responsibilities created by the three levels of government

**PRACTISE YOUR SKILLS**
- accurately use relevant management terms
- research the selected day-to-day operation/s of a small business using print and online sources
- acquire and exchange business information and ideas
- apply the selected day-to-day operation/s to a practical and/or simulated business situation
- discuss the ethical and socially responsible management of the selected day-to-day operation/s.

**Responsibilities created by the federal government**

Harvey Norman franchisees mislead consumers

In December 2013, the Federal Court ordered four Harvey Norman franchisees to pay a total of $116,000 in civil pecuniary penalties (monetary penalties) for making false or misleading representations to customers regarding consumer guarantee rights. The Harvey Norman franchisees included stores in Launceston and Moonah in Tasmania and Hoppers Crossing and Sale in Victoria.

The Court found that each franchisee had made a number of false or misleading representations to consumers about their consumer guarantee rights. While the allegations made by the ACCC against each of the franchisees differed, examples of the misrepresentations included representations that:
- the franchisee had no obligation to provide remedies for damaged goods unless notified within a short specified period, such as 14 days
- the franchisee had no obligation to provide an exchange or refund for faulty goods supplied
- the franchisee had no obligation to provide a remedy independently of the relevant product manufacturer.

Staff located inside the franchise stores made the representations orally.

‘These penalties send a strong message to all businesses . . . that they must not mislead consumers about their rights.’


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**TEST your understanding**

1. Explain the role of the ACCC in responding to breaches of the Competition and Consumer Act.
2. Identify the type of behaviour prohibited by the Act, for which the Harvey Norman franchisees were prosecuted in this case.
3. Explain the legal consequences that were applied to the Harvey Norman franchisees as a result of this finding by the Federal Court.

**APPLY your understanding**

4. The ACCC does not always prosecute businesses that breach the Competition and Consumer Act.

In many cases, once the offending conduct has been identified, the business will willingly change its behaviour to ensure it no longer breaches the Act. Use the ACCC weblink in your eBookPLUS to find an example of where this has occurred.

Then answer the following questions:
(a) What was the name of the business involved?
(b) What was the business conduct that was at risk of breaching the Competition and Consumer Act?
(c) What was the solution agreed to by the business to resolve the issue?
Responsibilities created by the state government

Australian Tourism Centre Pty Ltd — court action

The Supreme Court of Victoria has handed down final orders against the travel company Australian Tourism Centre Pty Ltd, trading as Victorian Tourism Centre, and has ruled that it misled and deceived customers in its telephone sales of travel and accommodation vouchers. The business sold vouchers that customers could not actually redeem in full or at all when they tried to use them.

The court found the company had breached the Fair Trading Act 1999, engaging in misleading and deceptive conduct and making false representations in relation to goods and services. The court also declared that the company's sole director, Stephen Ian Glenister, had been involved in those breaches.

The court found that, between 2004 and 2008, the company withdrew more money from customers' credit cards than agreed to or authorised by the customer for travel packages, and refused, delayed and failed to pay refunds to customers.

Victorian Tourism Centre also falsely claimed it was linked to the Victorian government and misled customers about refunds.

The court also found the company had breached the requirements of the Act in relation to telemarketing agreements.

The court imposed an injunction on Mr Glenister, restraining him for failing to comply with the telemarketing provisions of the Act, and ordered him to pay refunds to a number of consumers plus court costs.

Mr Glenister was also ordered to pay the Director of Consumer Affairs Victoria's costs for publishing public notices, detailing the court's findings and orders, in The Age and Herald Sun newspapers.


‘...falsely claimed it was linked to the Victorian government and misled customers about refunds.’

TEST your understanding
1 What is the role of Consumer Affairs Victoria in this case?
2 Explain the nature of the deceptive and misleading behaviour on the part of the company.
3 What penalties were applied to the company?

APPLY your understanding
4 Use the CAV court actions weblink in your eBookPLUS to select three recent cases. For each case, answer the following questions:
   (a) What actions or behaviour on the part of the relevant business led to the court action?
   (b) What penalties were imposed by the court?
Responsibilities created by local government

Food Act breaches result in fines and convictions for restaurant

A restaurant in Bendigo was fined and convicted in July 2013 for breaches of the Food Act 1984 and Food Standards Code. The City of Greater Bendigo prosecuted the company operating the restaurant, AS and RJ Proprietary Limited, and its directors in the Bendigo Magistrates’ Court. They faced 24 charges relating to general food handling, food storage, premises maintenance and pest control issues from April 2012 to April 2013.

Council officers visited the restaurant several times over the 12 months and saw rodent droppings on the floor, a dead rat under the cooking equipment, food chewed through by pests and an insect infestation in a tub of sesame seeds. They issued the restaurant with improvement notices.

According to defence solicitor Peter Chadwick SC, cleaning schedules had been reinstated, and safe food handling retraining had occurred. Mr Chadwick told the court that the building had been pest-free for six months and all rodent faeces had been cleared.

The company directors pleaded guilty. The company was fined $35,000 with conviction. The two directors, Avta Chatha and Ribina Jalill, were ordered to pay $10,000 and $5,000 respectively and were also convicted.

Though the sanctions reflected the serious nature of the charges, the Magistrate indicated that the fines for such offences could have been millions of dollars for a company or hundreds of thousands of dollars for an individual.

The Food Act 1984 stipulates that a food business must keep its food premises in a clean and sanitary condition and must ensure that food prepared, sold or otherwise handled at the food premises is safe and suitable.

The fines for such offences could have been millions of dollars for a company or hundreds of thousands of dollars for an individual.

**TEST your understanding**

1. Why was the Bendigo restaurant fined?
2. Why do you think the local council checks local food-related businesses?
3. What penalties were applied to the restaurant?

**APPLY your understanding**

4. It is the local council’s responsibility to ensure that businesses that sell or prepare food comply with regulations. Without looking at the actual regulations, can you guess what sort of regulations a food-related business must comply with in relation to food handling?

5. Imagine you run a bakery. It is up to you to ensure food safety. In the following situations, what would you do to ensure that food regulations are met?
   A. Su knows that she must not touch the bread with her bare hands, but when she is in a hurry she takes a short cut.
   B. Geoff the baker makes a batch of scones. Some fall to the floor so he just picks them up and puts them back on the tray.
   C. One of the sales assistants has a heavy cold and arrives for work coughing and spluttering.
   D. Geoff the baker doesn’t check the use-by date on the flour before making today’s fresh batch of patty cakes.
KEY CONCEPT The law of contract deals with legally enforceable agreements involving two or more parties. Businesses enter into such agreements many times each day, so it is important for a small business owner to have a basic knowledge of contract law and the responsibilities it creates.

Written or verbal contracts?

Many people believe that a contract must always be a written document, signed by both parties. This is not necessarily the case. Some contracts, such as those involving the sale of a house or the sale of a car, have to be in a particular written form, as specified by legislation. Buying a cup of coffee or lunch at a local café is a verbal contract and does not require a written document. If you eat the food and walk out without paying, you breach the contract. If the café owner does not provide the food ordered and you have paid in advance, then the café owner has breached the contract.

Many business contracts are formalised in writing so that both parties are clear as to their obligations; this also makes disputes less likely. In the absence of any written documentation, it can be difficult to prove a contract exists, unless witnesses were present at the time of the agreement. In many other situations, source documents such as order forms, invoices and receipts provide written evidence of a contract. A business will send an order form to one of its suppliers, and in return the goods are supplied with an invoice, and the supplier keeps a copy of that invoice. If there is any dispute, both parties have documentary evidence that a legally binding agreement existed between them, with details of the goods to be supplied and the price.

Elements of a contract

There are three essential elements necessary to make a contract legally binding:
- offer
- acceptance of the offer
- consideration.

In addition, a contract cannot be legally enforceable unless the following requirements are satisfied:
- no mistake, misrepresentation, duress or undue influence
- capacity to enter a contract, in both age and understanding
- the object of the contract must be legal.

Offer

An offer is made when one party is willing to give something of value (for example, money) in exchange for something of value to be provided by the other party (for example, a cleaning service). The offer must be clearly communicated to the other party. An offer needs to be distinguished from an invitation to treat. The word ‘treat’ means to negotiate or bargain; it is an old English word. The display or advertisement of goods is an invitation to treat. The offer occurs when the customer approaches the seller and indicates they would like to buy the goods. The effect of this is that, for example, a person advertising a car for sale at a particular price is not bound to sell the car just because a possible buyer turns up with the quoted amount. The potential buyer is not responding to an offer, but making an offer, which the seller has every right to refuse.
Acceptance
An acceptance occurs when one party agrees to the proposal of the other. This requires an act that clearly communicates acceptance of the offer, in the form of an oral or written statement, a shake of the hand, or the physical act of handing over the goods in exchange for the money. A receipt or cash register printout provides evidence that agreement has been reached.

Consideration
In essence consideration is the price paid to initiate the contract. Both sides must give up something for the contract to be binding. In most cases, one party gives up money in exchange for goods or services provided by the other party. An offer to give someone a gift does not constitute a contract, even if the other party is prepared to accept the gift. Also, the gift does not place any obligation on the receiver. The consideration must be agreed to by both parties.

Mistake, misrepresentation, duress and undue influence
Both parties to a contract must have a clear knowledge and understanding of the nature of their agreement. For example, if a seller had two cars for sale and a buyer made an offer for one of them, but the seller thought he was making an offer for the other car, and accepted the offer, the mistake may mean there is no contract. The two parties must also enter the relationship willingly. If one party can prove that he or she was pressured into the agreement, they may be able to avoid the contract.

Capacity
If one party can prove that he or she was drunk, or of unsound mind at the time of entering into a contract, it may be possible for that person to avoid their contractual obligations. A contract is not binding on a person who is not yet an adult (that is, they under 18 years of age), unless the contract is for goods that would be considered a necessity, such as food, shelter or clothing. Some contracts for the education or training of a minor, such as apprenticeships, are also binding.

Legality
If an agreement is made to carry out an illegal activity, it will not be a legally enforceable contract. If a person hires a tradesman and agrees to pay cash for the work done to avoid paying GST, the agreement may be illegal and therefore not
an enforceable contract. An agreement for one party not to give evidence in court, or agreements to deprive either party of the right to sue the other would not be enforceable contracts.

Responsibilities to a contract

Once a contract has been entered into, both parties are obliged to carry out their part of the agreement and do the things they agreed to do. If one party fails to carry out what was promised, then there is a breach of contract. The injured party has the right to sue for damages, or to legally force the other party to perform their part of the agreement. The injured party may also choose to terminate the contract, in which case any consideration already provided must be returned to the injured party.

TEST your understanding

1 Describe two contracts that you made recently and then answer the following questions about each one.
   (a) Was the contract verbal or written?
   (b) Who were the parties in the contract?
   (c) What consideration was given by the parties?

2 What is meant by the expression ‘invitation to treat’?

3 What has to occur once a contract has been entered into?

4 In the case of a breach of contract, what actions can the injured party take?

APPLY your understanding

5 Examine the following hypothetical cases and state whether you think a contract exists. Include the legal reasoning behind your decision.

A Gemma offers to buy Zara’s laptop computer for $850. They agree to make the exchange when Zara delivers the laptop to Gemma’s house. Once Zara arrives, Gemma says she is no longer interested.

B An art dealer had incorrectly attached a price tag of $100 to a painting that was worth $1000. A customer offered to buy the painting for $100.

C Charlie owed Frank $4000, and was having trouble paying it back. Frank offered to take Charlie’s car to settle the debt. Charlie was reluctant because he knew the car was worth a lot more, but agreed so that Frank would stop bothering him.

D A group of young men decided to have a drag race in a suburban street. They each put in $100 prize money, and agreed the winner would keep it all.

6 ‘Verbal contracts are not worth the paper they are written on.’ What is meant by this expression?


**KEY CONCEPT** In addition to their statutory and contractual responsibilities, all businesses have a common law responsibility not to cause harm to their customers, or any other members of the public who might come into contact with the business.

The law of **torts** covers those areas of the law where one party interferes with the rights of another, but where there has been no criminal activity (such as theft or criminal assault). Some common torts include:

- **Defamation**, where one person deliberately damages the reputation of another. It is possible to defame someone unintentionally by the careless wording of a press release, neglecting to check detail or neglecting to authenticate a news story.
- **Nuisance**, where one person interferes with another’s use of his or her land. An example would be where a swimming pool leaked or overflowed, and flooded the next door neighbour’s property.
- **Trespass**, where there is deliberate interference with someone’s person or possessions.

The tort of **negligence** centres around the idea that everybody is required to be aware of the effect their normal day-to-day activities could have on other people, and to take care that they do not harm any other person who could be affected by those activities. This awareness is known as a ‘duty of care’. An obvious example of when you owe a duty of care is when you ride a bike or drive a car on the public roads. The law of negligence has particular relevance for small business, as it deals with the responsibility on a business owner to observe a duty of care when dealing with customers and other members of the public. For example, a business must ensure that it is safe for customers to enter and move around a shop.

The modern law of negligence was developed as a result of a decision of the House of Lords in England in the case of *Donoghue v Stevenson* (1932). In this case, a woman drank some ginger beer from an opaque bottle and discovered the remains of a decomposed snail in the bottle. She became very ill and sued the drink manufacturer, Stevenson. Prior to this case, the courts would only recognise liability for harm caused by a defective product when a contract existed between the parties. The bottle had been purchased by the *plaintiff*’s boyfriend, and he had purchased it from a shop, not from the manufacturer, so there was no direct contract between the woman and the manufacturer.

The court eventually found that the manufacturer owed a duty of care to the person who ultimately consumed the drink, and was therefore liable for the harm caused. It was decided that because the manufacturer sold the product in a form in which he intended it to reach the customer, and there was no chance of intermediate inspection, the manufacturer had to take care that his product was not likely to cause harm to anyone who might consume it.

This principle was adopted into Australian law in the case of *Grant v Australian Knitting Mills* (1936). Grant had suffered from dermatitis as a result of wearing a pair of underpants that had a chemical left in them during manufacture. The High Court of Australia applied the same principle of the duty of care of a manufacturer that had applied in the case of *Donoghue v Stevenson*.

In recent years the principles of negligence have been expanded to include cases where a person in business gives advice to a customer. If the customer acts on

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**A tort** is the infringement of the rights of one individual by another.

**Negligence** occurs when someone who should exercise a duty of care fails to do so and a second party suffers loss and damages.

**A plaintiff** is a party who initiates a civil case.
that advice, and is harmed in some way, the business can be sued for negligence. Accountants, lawyers and others who are in business to provide advice to clients can be affected by this rule.

The five elements that have to exist before a tort of negligence can occur are:

1. A duty to conform to a certain standard of conduct in relation to others so as to avoid unreasonable risks. A business is expected to be aware of possible risks to customers, and take all reasonable steps to avoid those risks.

2. Failure to conform to that required standard of care, or a breach of that duty. It has to be proved that the defendant failed to take the precautions that were required in the circumstances.

3. Material injury to the interests of the plaintiff, including either personal or financial harm. Merely exposing someone to danger or loss is not relevant, particularly if the harm is avoided in time.

4. A reasonable connection between the defendant’s action and the harm done to the plaintiff, so that the defendant might have reasonably foreseen that their actions would affect the plaintiff.

5. No conduct by the plaintiff that might prejudice their case. For example, if the customer does not use the product in a way the manufacturer intended, it is possible that a negligence case could fail.

TEST your understanding

1. Why should a small business owner be particularly concerned with the law relating to the tort of negligence?

2. What key legal principle was established in the case of Donoghue v Stevenson?

3. How did the common law principles of negligence come to be applied in Australia?

4. List the five elements that a plaintiff must prove to bring a successful action for negligence, and provide an example of each.

APPLY your understanding

5. In groups of three or four, decide whether the defendants were negligent in the following cases. Explain your decision.

A. On a busy hot summer day, a lifeguard leaves the beach for five minutes to get a drink. In the meantime, a swimmer is calling out for help. The swimmer drowns and his parents decide to sue.

B. After a party, Imogen accepts a lift from Patrick, despite being aware he had been drinking for several hours. Patrick subsequently crashes the car. Imogen is hurt and decides to sue.

C. While watching a cricket match, a spectator is hit in the face by a cricket ball and suffers a broken cheekbone. She decides to sue the batsman.

6. Paulo operated a café called Delights. Food and drinks were ordered from Julio’s, who delivered each morning. One Friday, Julio was sick and a casual employee delivered the food and drinks late. Juanita, one of the partners in Paulo’s business, was supposed to refrigerate each delivery but her car broke down this day. When she finally arrived, she realised the delivery had been outside for five hours. She refrigerated the whole delivery quickly. The business operated as usual on Friday, but some customers became quite ill over the weekend. The customers are considering taking action against Delights. Delights is considering legal action against Julio’s.

   Analyse the implications of this situation. In your response, refer to:
   (a) all the parties towards whom action may be directed
   (b) the factors that must be established for such actions to be successful
   (c) the possible consequences of such actions.
A business owner should do more than simply follow the letter of the law. An ethical and socially responsible business will ensure that it actively pursues the highest standards of compliance with the law, or goes beyond what is required by law to ensure that its customers are accurately informed of all their rights.

‘Make sure you read the fine print on the contract!’ This is a recommendation we will often hear from others when we are entering into an agreement with a business. Many business contracts are long, involved documents with complex legal language, and lots of clauses in very small, hard-to-read print. While it is possible for the business using such a contract to claim it is conforming to its legal responsibilities, is it really acting in an ethical manner towards its customers? To genuinely claim to be meeting its legal responsibilities in an ethical and socially responsible manner, the business owner needs to respect the legal rights of all stakeholders.

A business owner can incorporate a comprehensive ethical and socially responsible approach to all of its legal responsibilities by implementing an Australian Consumer Law compliance program. On a simpler level, having an effective complaints handling process, and dealing with returns and refunds in a positive manner, can be effective ways of operating in an ethical and socially responsible manner.

Benefits of ethical and socially responsible management

The ethical and socially responsible management of the business’s legal responsibilities can bring a number of benefits, including the following:

- Increased awareness by staff of legal obligations can enhance their business knowledge, improve their value as employees, alert them to any unlawful conduct on the part of competitors or suppliers, and improve customer service.
- Unlawful behaviour can destroy the reputation of a business, while an ethical approach will enhance the reputation and attract customers.
- Very few businesses aim to break the law, and this can sometimes happen inadvertently. If this does occur, and the regulatory authorities take legal action, the policies and procedures of the business can be important in any court hearing. The ability to demonstrate ethical behaviour through compliance programs and a sympathetic and supportive treatment towards complaints and refunds could reduce any penalties imposed by the courts.

Australian Consumer Law compliance programs

An Australian Consumer Law compliance program aims to set up positive ways of conforming to the Competition and Consumer Act and to avoid the risk of inadvertently breaching the Act. A successful compliance program recognises the importance of all employees becoming aware of the business’s legal responsibilities and the need for honest and fair dealing.

For most small businesses, this will mean providing training for staff, and setting up systems for ensuring high standards in adhering to all legal responsibilities to customers and competitors. It may also mean ensuring that one or more employees has a specific responsibility for compliance; publishing a set of guidelines for all
employees to follow; and carrying out regular risk assessments and reviews of the compliance program. Ultimately, the type of program will depend on the size and type of business concerned.

Establishing a compliance program usually involves the business proceeding through three stages:

1. **Commitment to comply.** The business owner develops a willingness to address the issue of compliance and allocates the resources to achieve it.

2. **Compliance know-how.** Training occurs to ensure all staff are aware of their compliance responsibilities. Policies and procedures are developed to ensure regular review and risk assessment.

3. **Compliance as business practice.** Compliance becomes the accepted way business is done and all work practices comply with the law. Compliant practices are the norm, while non-compliance is actively discouraged.

**Handling complaints**

An ethical business will always welcome complaints and use them as a basis for improvement. Handling complaints effectively can lead to a better understanding of customers’ expectations, improved customer satisfaction and loyalty, and a reputation which will attract more customers. A successful complaints handling system will include the following features:

- well-trained staff, capable of handling complaints in a positive manner, and rewarded for doing so
- the ability to deal with complaints immediately, and keep the customer informed if the resolution of the problem is likely to take more than 48 hours
- making sure the complaints process is simple for customers, and that customers know that complaints will be welcomed
- keeping detailed information on types of complaints, and feeding this information back into business procedures to make changes where necessary.

**Returns and refunds**

A business is required by law to offer a refund if the goods provided are faulty, do not match the description or a sample, or fail to do the job they were supposed to do. There is no obligation to offer a refund if the customer has simply changed their mind, has found the same product at a cheaper price in another store, or damage has occurred after the purchase was made. Despite the lack of obligation in these cases, ethical and socially responsible business management can lead to refunds or exchanges taking place when these circumstances occur. A business can develop its own policy for allowing some change-of-mind purchases if the customer is able to provide a good reason for that change of mind. If returns, refunds and exchanges are dealt with in the same positive manner as complaints, and the policy allows for some flexibility, the reputation of the business as a fair and ethical trader can be enhanced.
8.9 Ethical and socially responsible management of legal responsibilities

TEST your understanding
1. What are the advantages for a business in managing its legal responsibilities in an ethical and socially responsible manner?
2. What is an Australian Consumer Law compliance program?
3. Describe the key features that should be included in a compliance program.
4. How can a compliance culture be identified in a business?
5. Outline the three stages involved in setting up an Australian Consumer Law compliance program.
6. List and explain the major features of a successful complaints handling procedure.

APPLY your understanding
7. Design a simple complaints form that could be used by a business. It should provide space for customer details, details of the products or services involved, and a layout that will allow the business to feed complaints information back into business procedures and make changes where necessary.
8. Use the CAV refunds and returns policy poster above to develop a refunds policy which a business could use that would enhance their reputation as a fair and ethical trader.
Summary

Legal responsibilities of small business
• All businesses offering goods and services have legal responsibilities to their customers, the community and other businesses.

Federal, state and local government
• Australia has three levels of government — federal, state and local.
• Each level of government imposes different responsibilities on businesses in their dealings with consumers and competitors.
• Responsibilities created as a result of laws passed by parliaments are known as statute law.
• Law developed by the application of precedent in the courts is known as common law.

The Competition and Consumer Act and consumer protection
• The Competition and Consumer Act 2010 is a federal government statute that aims to promote fair trade and competition in the marketplace. It is administered by the ACCC.
• The Australian Consumer Law aims to protect consumers from undesirable business practices, such as misleading advertising, false representations, bait advertising, and referral selling.

The Competition and Consumer Act and business competition
• The Competition and Consumer Act aims to maximise competition by prohibiting businesses from engaging in restrictive trade practices, such as price fixing, abuse of market power, exclusive dealing, price discrimination and resale price maintenance.

State government legislation — the Fair Trading Act
• The Victorian Australian Consumer Law and Fair Trading Act 2012 repealed the Fair Trading Act 1999 incorporating the Australian Consumer Law in Victoria, and is administered in Victoria by Consumer Affairs Victoria.
• The Australian Consumer Law also sets standards for business in relation to unfair terms in a contract, itemised accounts and receipts, door-to-door selling, advertising, lay-by and refunds.
• Consumer Affairs Victoria can initiate prosecutions against businesses alleged to be in breach of the Act.

Small business and local government
• Local government has control over a wide range of small business activities, including land zoning, development applications, fire regulations and signage.
• Local councils are also empowered to enforce the Food Act 1984 (Vic.), to inspect and regulate food premises, and to prosecute businesses not complying with appropriate standards of food safety.

Common law responsibilities — law of contract
• The law of contract deals with legally enforceable agreements involving two or more parties.
• All contracts must include an offer, acceptance and consideration.
• For a contract to be enforceable there must be no mistake, misrepresentation or duress; the parties must have the capacity to enter contractual arrangements; and the object of the contract must be legal.

Common law responsibilities — the tort of negligence
• Under the law of torts, all businesses have a duty of care towards their customers and any other members of the public who might come into contact with the business.
• Five elements must exist before the tort of negligence can occur.

Ethical and socially responsible management of legal responsibilities
• An ethical and socially responsible business will ensure that it actively pursues the highest standards of conformity with the law, and ensure that its customers are accurately informed of all their rights.
• Trade practices compliance programs provide businesses with the means to observe the highest ethical standards in relation to their legal responsibilities.
• Policies and procedures for dealing with complaints and refunds provide opportunities for businesses to meet their legal responsibilities in an ethical and socially responsible manner.
Review questions

TEST your understanding

1. Identify the three levels of government, and describe three responsibilities of each level.
2. Explain the difference between statute law and common law.
3. What are the two aims of the Competition and Consumer Act?
4. Outline the role of the ACCC and its major activities.
5. List and describe three business activities that are prohibited under the Australian Consumer Law.
6. Identify and explain three examples of anti-competitive practices.
7. What is the role of Consumer Affairs Victoria, and how does it perform this role?
8. Identify three business activities previously regulated by the Fair Trading Act, which are now part of the Australian Consumer Law, and explain the responsibilities each imposes on business.
9. What activities are performed by local councils in administering food safety?
10. List and explain the three essential elements of a contract.
11. What additional requirements must be satisfied for a contract to be enforceable?
12. Explain the legal principle of the ‘duty of care’ and its importance to small business.
13. Outline the importance of ethical and socially responsible management of the legal responsibilities to a small business.
14. Identify and describe three ways in which a business can meet its legal responsibilities in an ethical and socially responsible manner.

APPLY your understanding

15. Identify a business of which you have some knowledge. It could be a business which employs a member of your family or a friend; or where you have part-time work. Prepare a report on how that business specifically manages its legal responsibilities, including the following:
   (a) How does the business ensure that it conforms to the consumer protection requirements of the Australian Consumer Law?
   (b) How does the business ensure healthy competition with its competitors? Is competition based mainly on different price structures, on quality of products or services, or on some other factors? How closely does the business try to match what its competitors are doing?
   (c) Is the business involved in the selling or handling of food? If so, how does it deal with local council inspections, and other aspects of food safety? If the business is not involved in food handling, in what ways is the business influenced by local council policies and activities?
   (d) Give two examples of contractual relationships the business has with other businesses. Identify the offer, acceptance and consideration that form the basis of that relationship.
   (e) What precautions does the business take to observe its duty of care to its customers and to the general public?
   (f) Describe examples of ethical and socially responsible management of the legal responsibilities of the business relating to:
      • compliance with the Australian Consumer Law
      • complaints
      • returns and refunds.
School-assessed coursework

OUTCOME 3
Discuss one or more of the day-to-day operations associated with an ethical and a socially responsible small business, and apply the operation/s to a business situation.

ASSESSMENT task — investigation and report (written, visual, oral)

The wedding planner

Jane has just set up a small business as a wedding planner. She hopes that couples planning a wedding will commission her to put together a ‘total wedding package’, for which she will charge a fee. In order to create the type of wedding packages her customers want, she has to deal with a number of different suppliers of wedding services. These include reception venues, wedding car hire businesses, photographers and video businesses, florists, printers, dressmakers and formalwear hire businesses.

Jane wants to make sure she fulfils all her legal responsibilities and she wants to have a reputation as an ethical business owner, as she knows that most of her business will come from personal recommendations and word of mouth.

Jane’s biggest concern is that she doesn’t know whether all the other businesses she has to deal with share her principles. Imagine you are her solicitor, and she comes to you seeking advice. She wants to know how she can tell whether or not all the suppliers of wedding services she will be dealing with are acting legally and ethically, because any unlawful or inappropriate activities will reflect back on her and her business.

Prepare a written advice for Jane that will help her identify whether or not her business and the other businesses she is dealing with are meeting their legal responsibilities to their customers, to other businesses and to the community. Your advice should include the following:

• how to tell whether a business is conforming to the federal Competition and Consumer Act
• how to tell whether a business is meeting the requirements of the Australian Consumer Law
• the responsibilities of food businesses, such as reception venues, in ensuring food safety
• how Jane can be sure that contracts she enters into with suppliers and her own customers are both legal and enforceable
• the duty of care she owes to her customers to make sure they are not defrauded by the various other businesses supplying wedding services
• what she can do to ensure she manages her legal responsibilities in an ethical and socially responsible manner.