

FACT SHEET

Consumer protection and
people with intellectual disability



IMPORTANT – This Document only provides general information.

It is not intended to be a substitute for you getting your own specific legal advice.

Consumer protection and people with intellectual disability

A consumer is a person who buys goods or services for personal, domestic, or household use or consumption. The goods or services may include food, clothes, furniture, electrical appliances, telephone services, buying a motor vehicle from a dealer, applying for credit cards, applying for personal loans, receiving health services etc.

People with intellectual disability (PWID) may need support at the time of making a contract

A person who has sufficient understanding of the nature and effect of a contract is said by the law to have 'capacity to contract'. Some, but not all, people with intellectual disability may lack capacity to enter a contract. A person's capacity may vary over time and it should not be assumed a person always lacks capacity. Where a person has support, they may no longer lack capacity in exercising their rights as consumers.

People with intellectual disability may need support in entering into contracts; i.e. they may need help to understand the nature and effect of the specific contract at the time it is made. The more complex the transaction and the higher the value of the property, the greater the understanding (and help) required.

Such help may include:

- having a support person present
- making them feel comfortable and not vulnerable
- having the contract read and explained in simple terms
- asking them to explain in their own words what the contract means
- asking questions that test their memory
- testing their ability to understand their needs and how to meet them
- asking questions that test if they understand when and how much to pay
- avoiding the use of questions that only need a “yes” or “no” answer
- overcoming any speech problems
- avoiding “nodding” or “smiling” etc. to influence answers
- checking for undue influence
- allowing time to think, or change their mind, or get independent advice
- supplying the goods and services to them and not to the person they are with, etc.

With this help a person with intellectual disability is able to freely and voluntarily enter into a contract which they can understand. In legal language they are said to have ‘legal capacity’ to enter into a contract, just like everyone else.

This fact sheet provides some information to PWID and support persons about the precautions to take, their rights, and remedies, as consumers.

1. Consumers beware!

Before buying, the consumer should inspect the goods carefully, and if there is a written contract, read it carefully before signing and keep a copy. Once you pay for

the goods or services, or sign the contract, it may be very difficult to make changes afterwards.

Cooling-off Periods

You may be allowed time to change your mind. For example a 5 business day cooling-off period for door to door sales and telemarketing. A 5 business day cooling-off period for buying a residential property. A 10 day cooling-off period for a negotiated contract for electricity or gas supply.

Unsolicited Goods

If you are sent goods that you did not ask for, you do not have to pay for them and you do not have to return them. You may be able to keep them if they are not repossessed within three months.

IDRS provides free legal advice to benefit people with intellectual disability. Please call (02) 9318 0144 to make an appointment to talk a lawyer about consumer protection or other issues.

2. Is the contract unenforceable or able to be set aside?

Under contract law there are principles that may allow a PWID to get out of the contract.

These are:

- **Capacity**

If a PWID does not understand the general nature and effect of the contract then they are said to 'lack legal capacity.' In such cases they may be able to get out of the contract if they can also prove that the seller knew or ought to have known of their disability or condition, and the goods or services are able to be returned.

There is an exception to this if the goods and services are necessities.

Necessary goods and services are things needed to maintain a basic lifestyle such as food, clothing, medical treatment, and shelter. If a reasonable price was paid and the goods and services were actually required then a lack of legal capacity cannot be used to get out of the contract.

- **Undue Influence**

Undue influence occurs when a person cannot make a free and independent decision because of the very strong way their thoughts and actions are influenced by another person.

- **Duress**

Duress occurs where there is actual or threatened harm forcing the person to enter the contract against their will.

- **Misrepresentation**

This includes false advertising, mistaken information, incorrect information or advice that is relied upon etc.

- **Unconscionable Dealings**

This occurs where one person knows or ought to have known about the other persons' disability and takes advantage of it to enforce the contract against them.

NOTE: These principles may also make a contract 'unfair' or 'unjust' under consumer laws (referred to later).

3. Is the contract 'unfair' or 'unjust'?

a) Goods and services

The general effect of the consumer laws is that if the consumer contract can be shown to be **unfair** or **unjust** then the consumer may be able to get out of it, vary it, get money refunded, or get compensation.

What may cause a contract to be unfair or unjust?

- unequal bargaining power
- undue pressure or coercion
- unreasonable harassment
- false advertising
- concealment of defects
- unreasonable conditions in the consumer contract
- overly complicated language and form of the contract
- limited educational background and literacy
- whether there was help or advice given
- whether a support person was present
- physical and mental disability

- poor economic circumstances
- undue influence, etc

If the complaint cannot be resolved with the trader you can lodge it with NSW Fair Trading which acts as an informal negotiator. If it is still unresolved you may be able to make an application to the consumer and commercial division of the NSW Civil and Administrative Tribunal (CTTT) from January 1, 2014. Only the tribunal or a court can decide if a term in a contract is **unfair**.

The consumer laws include:

- **The Australian Consumer Law**

This law started in 2011 and applies all over Australia. It deals with consumer protection and '**unfair**' contracts in relation to goods and services, sales practices, door to door sales, lay-by sales, product safety, penalties etc. Contact NSW Fair Trading, the NCAT, or the ACCC.

- **The Consumer Claims Act (1998), NSW**

This law previously applied to consumer matters for goods and services in NSW. Contact NSW Fair Trading, and the NCAT.

- **The Trade Practices Act (1974) and the Fair Trading Act (1987)**

The consumer protection parts of these laws (including a "catch-all" provision for conduct that is misleading or deceptive), apply to consumer contracts entered into before the Australian Consumer Law started.

- **The Contracts Review Act (1980)**

This law overlaps with the others. It deals with '**unjust**' contracts.

- **The Sale of Goods Act (1923)**

This law deals with defective goods.

b) Consumer credit

The laws that apply to consumer credit include:

- **The National Consumer Credit Protection Act 2009**

This law started recently and applies to all of Australia. It requires responsible

lending by retailers, and banks etc. The lender must make sure that the credit is '**suitable**' to the borrower so that the borrower is able to repay the loan from his income, and that the loan meets the borrowers' requirements. This law applies to domestic and household credit

- **The NSW Consumer Credit Code**

This law applied after 1/11/1996 and before the above law. It provides a remedy for consumer credit contracts that are '**unjust**'.

What matters may cause a credit contract to be unfair or unjust under these laws?

(The same matters referred to above as causing a contract to be unfair or unjust)

These laws apply to credit cards, personal loans, housing loans (i.e. a loan secured by a mortgage,) contracts for the sale of goods and services where payment is deferred by way of instalment payments, etc. The credit must be provided for personal, domestic, or household purposes, (not for business purposes).

Complaints under these laws should be made to the credit provider. If their response is not satisfactory then contact the Financial Ombudsman Service to try to resolve the matter. If it still is unresolved they may investigate and issue a written decision which is binding on the financial services provider, but not on you. If you are still not satisfied you can take the matter to court for judgment which may include varying the interest rate, extending time for payment, cancelling the loan or debt, discharging a mortgage, refusing to enforce the credit contract against the debtor etc.

4. Has the contract been breached

Generally faulty goods and poor quality services are a breach of the contract and the buyer may be entitled to a replacement of the goods or alternative services, or a refund, or to compensation. (The consumer laws referred to above also provide these and other remedies).

Manufacturers' and traders' warranties

Sometimes a new product comes with a warranty or guarantee that they will be replaced or fixed if they break within a certain time. These do not limit the consumers' rights if the goods are defective or of poor quality.

For example- if you buy a lounge with a six month guarantee. After 7 months the fabric cover has worn thin and split in places. You call the store and they tell you that the guarantee was only six months and there is nothing they can do. Nonetheless you can still argue that the quality was not good enough for the price that you paid and therefore the store was in breach of the contract by selling poor quality goods. It is not relevant that they offered a guarantee for only six months. You can still get a replacement or your money back.

The Motor Dealers Act (1974)

This provides extra protections in buying a car from a dealer, particularly in regard to the condition of the vehicle, and the legal title to it. (For private car sales it is very much a case of 'buyer beware').

5. Are the goods or services unsafe or dangerous?

If injury or damage occurs to any person or property because of unsafe or dangerous goods or services then both the supplier and the manufacturer may be held responsible under the law of contract, or the law of torts, or the consumer laws. In such cases you should seek legal advice.

6. What about insurance contracts?

Most insurance contracts are **not** covered by the Australian Consumer Law, however, as of July 2013, there were proposals to change that law to apply to insurance as well. You will need to find out if and when these proposed changes have been made.

The main law for insurance is the **Insurance Contracts Act (1984)**. This law applies to almost all consumer insurance policies such as home and contents, motor vehicle, travel, personal accident, income protection, public liability etc.

It is very important to read and understand the insurance contract. There is a 14 day cooling-off period for you to change your mind.

The consumer applying for insurance has a **duty to disclose** relevant information to the insurer before a contract is entered into. This is extremely important because if you fail to disclose relevant information you may find that the insurer will say you have breached the insurance contract and refuse your claim.

Disclosing relevant information to a support person or an insurance broker who then fails to tell the insurance company is treated as a failure to disclose. Every renewal of an insurance policy is a new policy, that is, a new contract requiring disclosure.

Sometimes breaches of the insurance contract may be excused and the insurance company is not allowed to refuse to pay a claim. This may occur if the consumers' act or omission was **not a material cause of the loss**, then the insurer must still pay the claim. For example where a car driver has an accident, and had not renewed his license which expired two weeks previously. This failure to renew the licence would be a valid omission because it was not related to the loss.

If a claim is refused you should request an **internal review** of the decision from the insurer. If then it cannot be resolved contact the **Financial Ombudsman Service**.

They are familiar with insurance law, they are free, they will investigate the complaint, and their decision is binding on the insurance company, but not on you. If you are not satisfied with their decision you can reject it and pursue court action.

There is a time limit on making a complaint to the Financial Ombudsman Service. It must be made no more than three months after the consumer receives notice of the insurer's final decision following the internal review.

7. Important contacts for consumer protection

- Department of Fair Trading- **133 220**
- NSW Civil and Administrative Tribunal (NCAT)- **1300 135 399**
- Australian Competition and Consumer Commission- **1300 302 502**
- Australian Securities and Investment Commission- **1300 300 630**
- Financial Ombudsman Service- **1300 780 808**
- Consumer Credit Legal Centre- **1800 808 488**