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Holiday accommodation
A guide for providers
and booking agents
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Consumer Affairs
Victoria



Disclaimer

Because this publication avoids the use of legal language, information about the law may have been summarised or expressed in general statements. This information should not be relied upon as a substitute for professional legal advice or reference to the actual legislation.

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“Your rights and responsibilities”

Why is this guide important?

This guide outlines some key responsibilities that can become part of better business practice for accommodation providers and booking agents in the tourism industry. As an accommodation provider, you are legally obliged to comply with a wide range of legislation including Corporations Law, the *Trade Practices Act 1974* (Commonwealth) and the *Fair Trading Act 1999* (Victoria). Consumers are increasingly demanding higher quality, better standards and are more aware of their rights. Complying with consumer protection legislation and improving business practices help you meet these expectations and avoid costly disputes, claims and prosecution.

This guide focuses on your relationship with consumers and outlines your rights and obligations under the *Fair Trading Act 1999* (FTA). There are general obligations that apply to the booking of accommodation under Part V of the *Trade Practices Act 1974* that are mirrored in the FTA.

Booking agents and accommodation providers (owners or operators both incorporated and individuals) are bound by the FTA which contains general and specific provisions against unfair practices and terms. Some provisions of the FTA such as unfair contract terms and telemarketing are not contained in the Trade Practices Act. The following sections are of particular relevance:

- a) Section 9 - misleading and deceptive conduct
- b) Section 11 – misleading conduct in relation to services
- c) Section 12 - false representation in relation to goods and services
- d) Part 2A – implied conditions and warranties in contracts
- e) Part 2B – unfair terms in consumer contracts
- f) Section 161A – requirements for bills and receipts, and
- g) Section 163 – consumer contracts to be legible and clearly expressed.

Consumer Affairs Victoria has issued detailed general guides on preventing misleading and deceptive conduct in trade or commerce and preventing unconscionable conduct in trade or commerce.¹

Penalties apply to many of the offences under the FTA and most of the legislative provisions referred to above.² The level of penalty would be determined by the courts if an offence is successfully prosecuted by Consumer Affairs Victoria.

¹ Guidelines on the false, misleading and deceptive conduct provisions of the *Fair Trading Act 1999*, Consumer Affairs Victoria, 2005.

[http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Fair_Trading/\\$file/guidelines_misleadingdeceptive.pdf#xml=http://search.justice.vic.gov.au/isysquery/irl422f/3/hilite](http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Fair_Trading/$file/guidelines_misleadingdeceptive.pdf#xml=http://search.justice.vic.gov.au/isysquery/irl422f/3/hilite)

Guidelines on the unconscionable conduct provisions of the *Fair Trading Act 1999*, Consumer Affairs Victoria, 2005
[http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Fair_Trading/\\$file/guidelines_unconscionableconduct.pdf#xml=http://search.justice.vic.gov.au/isysquery/irl422f/5/hilite](http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Fair_Trading/$file/guidelines_unconscionableconduct.pdf#xml=http://search.justice.vic.gov.au/isysquery/irl422f/5/hilite)

² Section 11 – misleading conduct (services) and section 12 – false representation – 600 penalty units for individual & 1200 penalty units for companies.
Section 19 – accepting payment without being able to supply services - 600 penalty units for individual & 1200 penalty units for companies.
Part 2A, sections 32L and 32M – contract cannot exclude implied terms - 60 penalty units for individual & 120 penalty units for companies.
Part 2B, section 32Z – unfair contract terms – 10 penalty units for an individual and 20 penalty units for companies.
Section 161A – bills and receipts – 60 penalty units for an individual and 120 penalty units for companies.
Section 163 – consumer contracts to be clear - 60 penalty units for individual & 120 penalty units for companies.
A penalty unit is currently \$107.43 and is reviewed annually.

Who does this guide apply to?

The guide applies the relevant sections of the FTA and other legislation to typical activities that accommodation providers are engaged in when dealing with consumers.

Owners who rent their homes or investment properties to consumers in holiday destinations or, for special sporting and entertainment events have become a significant and growing area of holiday accommodation business. Both short and longer term accommodation is offered by owners or managers of hotels, motels, flats, apartments, bed and breakfast, backpackers, cabins, caravan parks or other private dwellings.

Owners and accommodation providers may arrange the letting or occupancy of properties themselves or use an agent. Consumers may be offered this accommodation for a holiday, work arrangements or other purposes on a short term basis. Short term accommodation is defined as booking or letting of accommodation for a period (or consecutive periods) of up to 90 days. This is consistent with the definition in the *Estate Agents Act 1980* (see section detailing other legislation).

The type of business that takes accommodation bookings from consumers is typically an accommodation provider, a tourism operator, a visitor information centre, real estate agent or, a business that provides a travel and/or accommodation booking service. These businesses could operate as an online booking agent and/or have a local presence.

Some booking agents may perform functions captured under the *Travel Agents Act 1986* if travel is booked with accommodation. If the booking involves a travel component, these agents must be licensed as travel agents under the requirements of the legislation.

Making false or misleading statements

Is this relevant to me?

Yes, if you advertise your accommodation in brochures or in any other medium including the internet. It also applies if you are making statements about accommodation when talking to consumers.

Advertising means any promotion or special offer in all electronic and print media including newspapers, magazines, television, radio, direct mail, brochures or on the internet.

What does the legislation say?

The FTA states that it is illegal for you to make false or misleading statements to consumers about accommodation.

Misrepresenting accommodation in advertising, brochures or in representations to consumers may be deliberate or accidental; either way it is illegal.

Section 11 of the FTA states that any trader must not:

Engage in conduct that is liable to mislead the public as to the nature, the characteristics, the suitability for their purposes or the quantity of any services.

Section 12(b) of the *Fair Trading Act 1997* requires any person offering services not to:

- falsely represent that services are of a particular standard, quality, value or grade or have a particular previous use.

What constitutes a false and misleading statement?

You should ensure that any statement about accommodation contained in advertising or made in representation to consumers is accurate and current. It may also be illegal to omit disclosing pertinent information.

For example, advertising a three bedroom holiday house that in fact has two bedrooms with an additional sofa bed in the lounge room is omitting important information.

Similarly, any condition, limitation, qualification or restriction upon any offer should be clearly stated by you and communicated to consumers.

For example, if you advertise a special offer that only applies where more than two nights accommodation is booked, you should make this condition explicit.

Do not mislead consumers about the quality, suitability, or details of the accommodation. This applies to advertising and provision of information to consumers prior to booking accommodation.

False or misleading representation could include statements about the quality, location or amenities of any accommodation that is offered.

For example, if you advertise that accommodation is 'five minutes from shops and the beach' when in fact it is a 20 minute drive, then such a statement could be regarded as false and misleading.

Equally, if you advertise in a brochure that 'rooms are spacious with panoramic views' and this applies to only one room, this could constitute a false and misleading statement.

As a further example, if you advise consumers that the property has a pool and spa and neither of these facilities is in working order or the pool has been emptied awaiting repairs, it could be regarded as a false and misleading statement.

It is recommended that if you provide a quality rating for accommodation that does not have an approved AAA Tourism approved STAR Rating³, information should be provided to consumers regarding the method of rating so that the basis of the rating is not false or misleading.

If you become aware that information about accommodation is inaccurate for example, through consumer enquiries or complaints, any advertising should be suspended or removed from print or electronic media until it can be verified.

Price statements that are misleading

Is this relevant to me?

Yes, if you quote a price for accommodation in a brochure, advertising or in any representation to consumers.

What does the legislation say?

The FTA makes it illegal for accommodation providers and booking agents to give consumers misleading information about the prices charged for accommodation and any related facilities or services.

Section 12(g) of the FTA states that any person trading in goods or services must not:

- make a false or misleading representation with respect to the price of goods or services.

How does this apply to quoting prices for accommodation?

A booking agent should disclose the full tariff or cost of accommodation to the consumer at the time of booking accommodation. This includes disclosure about whether GST has been added to the prices or not.

For example, it is good business practice to disclose minimum or maximum prices if there is variation (eg. seasonal tariffs, weekend rates or school holiday rates).

If you advertise a price for accommodation and it only applies at off peak periods (outside holiday periods) you should make this clear.

You should disclose the cost of non optional extras such as service charges (eg. gas, electricity and water charges) in the price. A consumer should not get any surprises when the bill is paid.

³ The STAR Rating Scheme is administered by AAA Tourism under the National Accommodation Classification Scheme which assesses amenities, facilities, maintenance levels and cleanliness of an accommodation property. Each property that is assessed under this scheme is given a STAR rating of between one and five based on an overall score of facilities, amenities, level of maintenance and cleanliness.

What should I be aware of when entering an agreement with a customer?

If you book and let a property for holiday or other purposes, it is recommended that you have a written agreement with the customer which includes a statement that you are letting accommodation with the start and end dates clearly stated.

If the letting of accommodation is not for holidays⁴, you may be required to meet the obligations of the *Residential Tenancies Act 1997* in some circumstances even if it is a short term lease. The obligations under this Act are quite distinct and additional to those that apply under the FTA. The *Residential Tenancies Act 1997* requires that if a tenancy agreement is in writing it must be in a standard form. There are also requirements in the Act relating to bonds if you request one including the maximum amount of a bond. A landlord is required to complete a 'condition report' on the property before a bond is requested.

Once you have accepted a booking from a consumer, you have to honour it subject to any conditions you have outlined to consumers. This is because you have reached an agreement with the consumer on the terms of the booking (eg the dates, accommodation type and price) and entered a contract between you and the consumer. You may only change the terms of the booking at a later date if there is mutual agreement between you and the consumer.

The FTA implies certain promises into all consumer contracts. These statutory rights known as implied conditions are specified in part 2A of the FTA. Essentially, accommodation must be fit for purpose and as represented. Please see below section on refunds for more detail.

Breach of implied conditions gives the consumer the right to rescind the contract and request a refund. You cannot include a term in a contract that excludes or restricts these implied conditions.

What do I need to tell consumers about terms and conditions?

Accommodation providers and booking agents may have specific terms and conditions for example, relating to fees, deposits or cancellations. If you have any special arrangements like these, you should make consumers aware of them before making a booking and entering into an agreement.

A failure to disclose these conditions could be regarded as misleading or deceptive under sections 9 and 11 of the FTA.

For online bookings, you should make terms and conditions easily available and identifiable on your website to avoid possible disputes.

Where an accommodation provider or booking agent requests a bond, the conditions associated with that bond should also be disclosed.

What if I am booking accommodation over the internet or by telephone?

Before booking accommodation and entering into any agreement with a customer over the internet or by telephone, you are required by the FTA (section 69 or section 67E) to give the following information either verbally or in writing:

- the total cost of the accommodation including GST and any booking fee, and
- details of your business – the full name of your business and either your business address or business telephone number.

If you are telemarketing⁵, you must also give the customer a cooling off notice with the written agreement within five days of the telephone call. Under the FTA, a customer has at least 10 days cooling off from the day the agreement is received. Also, you are not allowed, by law, to make a telemarketing call for at least 30 days if the consumer has told you that he or she does not want to receive such calls.

⁴ Section 10 of the *Residential Tenancies Act 1997* states - This Act does not apply to a tenancy agreement if the rented premises are ordinarily used for holiday purposes.

⁵ Direct marketing by telephone.

Unfair contract terms

What does the legislation say about unfair contract terms?

The FTA prohibits the use of unfair terms in consumer contracts that cause a significant imbalance of rights and obligations between you and the consumer.

Terms which may be considered unfair include those that permit you and not the consumer to:

- avoid or limit performance of the contract
- vary the terms of the contract
- terminate the contract
- determine unilaterally whether the contract has been breached or to interpret its meaning, or
- vary unilaterally the characteristics of the services supplied under the contract.

And those that:

- penalise the consumer but not you for breach or termination of the contract, or
- limit the consumer's right to sue.

Further guidance on unfair terms can be found on the Consumer Affairs website at www.consumer.vic.gov.au.

How does this apply to accommodation bookings?

When you reach an agreement with a consumer you are entering a contract which includes terms and conditions. You should ensure that these terms and conditions are not unfair.

For example, if you state in your contract that you reserve the right to cancel an accommodation booking in any circumstances without notice, such a term could be regarded as unfair.

Equally, any term in your contract that states without qualifications that you have the right to vary deposit amounts or any fees and charges at any time could be regarded as unfair.

A term or condition that excludes liability for failure to provide accommodation may also be deemed to be an unfair contract term.

Finally, a term that limits a booking agent's liability for changes made to the description of accommodation may be considered an unfair contract term under the FTA.

Any terms of a contract that are unfair terms are void.

Receipts and customer payment advice

A booking agent or accommodation provider is required to provide itemised bills on request and to provide receipts for all transactions over \$50 and receipts on request for under \$50 transactions. Section 161A of the FTA outlines these requirements. This applies to all transactions including online transactions and credit card payments made over the telephone.

If an accommodation provider or booking agent receives a request for an itemised bill or a receipt, it must be provided within seven days of receiving the request.

Credit card transactions

Do I need to make consumers aware of credit card surcharges?

If you charge a lower cash price to consumers than you do to those paying by credit card, you should state clearly any costs or charges associated with using a credit card.

If these charges are not disclosed, you may be contravening misleading and deceptive conduct provisions (sections 9 and 11) of the FTA.

If a booking is made over the telephone or internet, you should make it clear to the customer that a higher charge will be incurred if payment is made by credit card.

Can I deduct a cancellation or booking fee by credit card?

If you accept a credit card booking and it is cancelled or the customer fails to turn up, you can charge the consumer's credit card account provided that you:

- advise the consumer prior to purchase of conditions associated with using a credit card; and
- have reached agreement with the consumer regarding these conditions.

Otherwise, it may be considered an unauthorised transaction under the Australian Securities and Investment Commission's Electronic Funds Transfer Code of Conduct.

Further, if you do not disclose that a deduction will be made from a consumer's credit card where there is a cancellation, it may also be considered misleading or deceptive conduct under the FTA.

Accepting payment without being able to supply accommodation

Section 19 of the FTA makes it is an offence to accept payment (whether full payment or just a deposit) if you do not have any intention of providing accommodation at the agreed time of booking.

Also, if you cancel a booking that you have already accepted from a customer, you are likely to be in breach of contract.

Cancellation fees

What amount can I claim as a cancellation fee?

If you charge a customer a cancellation fee, booking fee or administration charge (including any held deposit or advance payment), the fee should not be excessive and should be limited to the costs of booking accommodation and/or the costs of making the accommodation available to the customer.

A cancellation fee should be based on the principle of fair compensation for legitimate costs incurred by the booking agent or property owner. In setting cancellation fees, a booking agent should take into account the likelihood that losses can be limited by rebooking with another consumer when an accommodation booking is cancelled. The scope for limiting loss through re-booking diminishes closer to the accommodation booking date. However, the extent and level of the loss depend on each booking agent's circumstances.

If the contract term allows you to reclaim losses from a consumer that could have been avoided had you taken reasonable steps to do so, this may be deemed an unfair contract term under the FTA.

For example, if you claim 100 per cent of the accommodation booking from a consumer regardless of when the booking is cancelled, this could be regarded as an unfair contract term.

Refunds

When do I need to give a refund?

A customer has a right to ask for a refund for booked accommodation if any of the implied conditions outlined earlier have not been met. A 'no refunds' statement in advertising, brochures or on your website is illegal.

Every time you book accommodation and receive payment for the service, you are entering a contract which includes implied conditions. These are conditions that you must adhere to and cannot change. Implied conditions are set by law under the FTA and the *Trade Practices Act 1974* (Commonwealth) and are:

- accommodation must fit its intended purpose based on the reasonable expectations of the consumer at the time of sale (and made known to the accommodation provider or booking agent)
- accommodation will be booked and provided with due care and skill, and
- if you provide any goods as part of the accommodation package, these must be of merchantable quality and also fit for purpose.

For example, if a consumer books a 'three bedroom' holiday house (as advertised) that in fact has two bedrooms and a lounge room sofa bed, the accommodation may not be fit for purpose.

You have to refund a deposit paid if:

- a customer tells you they have a specific requirement that you agree to but then do not fulfil
- you make other claims about the accommodation which you cannot fulfil or are untrue, for example, "this resort is in a bushfire free area".

If you cannot provide accommodation for whatever reason for example, the accommodation has been destroyed by fire or the authorities have closed roads and/or issued explicit advice not to go to certain areas due to safety concerns, both you and the consumer are released from the contract. In this circumstance, the consumer is entitled to a refund of any deposit paid less any expenses reasonably incurred before the consumer cancelled.

You don't have to provide a refund if the customer changes his or her mind, does not like the accommodation or finds accommodation cheaper elsewhere and cancels the booking.

Also, you cannot be held responsible for external environmental conditions outside your control, for example, lack of snow, rainy weather at the beach. These are the normal risks associated with any holiday booking. If a customer chooses to cancel an accommodation booking at the beach because of cooler than expected weather, they would not be entitled to a refund.

Not discriminating on unlawful grounds

If you provide or offer to provide accommodation, including short term letting, you are bound by the *Equal Opportunity Act 1995* (Vic) (EOA). The EOA contains provisions against unlawful discrimination on the basis of 17 attributes including age, race, gender, disability, religious belief, parental status, marital status and physical features. Of particular significance to accommodation providers and booking agents are the following provisions:

- section 49 - discrimination in offering to provide accommodation
- section 50 - discrimination in providing accommodation
- section 100 - prohibition on requesting discriminatory information, and
- section 195 - offence of discriminatory advertising.

The EOA requires you to treat all consumers fairly and equally and does not allow you to change the terms and conditions upon which accommodation is offered or limit access on the basis of attributes like age, sex, gender, disability or race.

To avoid breaking anti-discrimination laws, any advertisement for accommodation must not imply that preference will be given to consumers on the basis of attributes like age, sex or race.

Section 50 of the EOA makes it unlawful to limit access to accommodation or vary the terms and conditions associated with booking accommodation in a discriminatory way.

You are free to choose who you will accept a booking from provided that in exercising this right you are not discriminating on the basis of age, sex, gender or race.

What other legislation do I need to know about?

Letting of accommodation on a short or long term basis has been traditionally captured under legislation and regulations covering real estate agents. In September 2005, the Victorian Government approved a regulation that exempted short term accommodation booking agents from the real estate licensing requirements of the *Estate Agents Act 1980*. The exemption applies to businesses that advertise, book and lease accommodation for holiday or other purposes for a period (or consecutive periods) of up to 90 days. Longer term letting of accommodation by a booking agent would continue to require an estate agents licence.

The *Residential Tenancies Act 1997* contains provisions relating to letting of dwellings and protects the rights of consumers who enter into a tenancy agreement other than for holiday purposes. It covers residents of caravan parks. These legislative obligations may apply to the booking of some accommodation that is not for holidays where a lease is negotiated with a consumer. Section 10 of the Act excludes tenancy agreements if the rented premises are used for holiday purposes.

More information on the rights and obligations of landlords is contained on the Consumer Affairs Victoria website:

<http://www.consumer.vic.gov.au/CA256EB5000644CE/page/Renting?OpenDocument&1=910-Renting-&2=-&3=->

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