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The law



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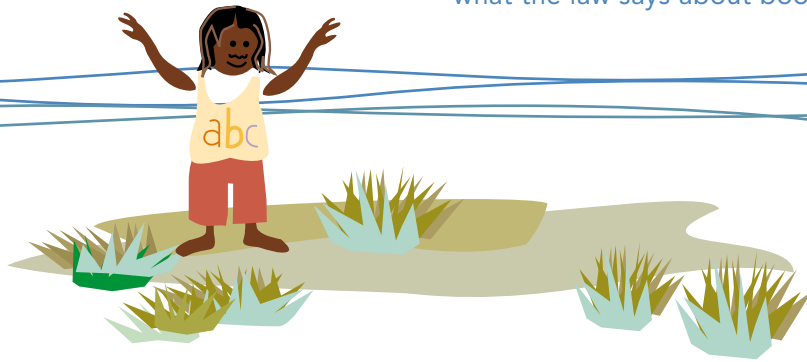
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what it says about book up

Businesses that offer credit services (like book up) to consumers have important legal obligations, especially if they charge interest or fees, or if they require security in exchange for credit.

This chapter includes information about these legal obligations, and other legal rules that may affect book up.





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6.1 Fraud and theft

If a person takes money or other property that belongs to another person, they are guilty of a criminal offence and may be prosecuted. The victim of the theft also has a right to recover the stolen property from the thief.

For example, a trader may hold a debit card and PIN number for a consumer and be authorised by the consumer to withdraw money for certain goods. If the trader withdraws money for other purposes without the consumer's authorisation, the trader is likely to have committed an offence such as theft. In this case, the police may charge the trader with the offence. The consumer will also have a right to recover the stolen money in court.

If the trader and the consumer have an agreement authorising certain transactions, the consumer may need to prove the terms of that agreement and that it was breached. Good record keeping (for example, a written contract and/or copies of receipts for purchases) will help.

>> see 6.4 *Contract between the store and the consumer*, page 106 >>



If the consumer has given their PIN number to the trader they will not be able to claim the money from their bank, because the bank requires consumers to keep their PIN number secret.

> > see 6.5 *Contract between the bank and the consumer*, page 107 > >



Someone else besides the trader could use the consumer's card and PIN number (for example, a store employee, or a thief who has broken into a store and stolen cards and PIN numbers held by the store). While the thief may be prosecuted if found, this may not help the consumer get their money back if the thief has no money.

However, the store may have to pay money back to the consumer if the store has been negligent in looking after the cards and PIN numbers (for example, if they kept them together, or in a place where a thief or dishonest employee was likely to find them).

²⁶Section 12CA and 12CB of the *Australian Securities and Investments Commission Act 2001* applies to unconscionable conduct for credit. Similar provisions in the *Trade Practices Act 1974* (s51AA and s51AB) apply to other goods and services. There are equivalent provisions under state law.

6.2 Unfair conduct

What is unfair conduct?

The law prohibits a store or other trader from engaging in unfair or 'unconscionable conduct'.²⁶

One common type of unconscionable conduct is where one party to a transaction takes advantage of the 'special disability' of another person (and the outcome is unfair).

A 'special disability' may be anything that prevents a person from protecting their own interests, such as illiteracy, illness, infirmity due to age, inability to speak English, lack of education, or drunkenness at the relevant time. The stronger party must be aware of the disability for the transaction to be unconscionable.

How is this decided?

In deciding whether something is unconscionable, a court may consider any matter it thinks is relevant including:

- * the relative bargaining strengths of the trader and the consumer,
- * whether the trader required the consumer to comply with conditions that were not reasonably necessary to protect the trader's legitimate interests,
- * whether the consumer could understand the written agreement (if one was used),
- * whether the trader or a person acting for them used undue influence or pressure (or unfair tactics), and
- * the price and terms on which the consumer could have got the same or equivalent goods or services elsewhere.





An example: unconscionable conduct

A small outback town has only one taxi. The residents regularly need to travel to a larger town and the taxi is the only way of getting there, especially for the elderly and those who have difficulty walking. The taxi driver agrees to provide taxi services on book up, by retaining debit cards. He begins by charging \$5 for each ride on top of the taxi fare. After a few weeks he increases the fee to \$30 for each ride. He also tells everyone he will only give a ride to people who do not use other forms of transport to get to the larger town.

The driver may be engaging in unconscionable conduct because:

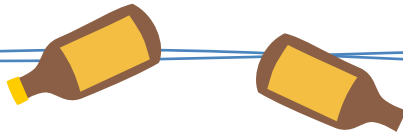
- * he is certainly obtaining an advantage (the fee plus exclusive custom),
- * he is almost certainly aware of the special disability of the consumers, and
- * it is likely that he has obtained the advantage by exploiting the special disability of the consumers.

What happens if a trader acts unfairly?

If a trader does act unconscionably, the consumer or a consumer affairs agency may be able to take legal action to prevent the conduct continuing and to recover the consumer's loss.

It can be very difficult for a consumer to recover relatively small amounts of money that have been obtained unconscionably. They may not be able to get legal aid for this type of matter and it would not be worth paying a lawyer. However, if a store engages in unconscionable conduct that affects a number of people, consumer affairs agencies will often be willing to intervene.

< < see 3.2 Taking action against unfair traders, page 47 < <



What about book up and alcohol?

In the Northern Territory, it is illegal to use book up for alcohol. In other states, the liquor licensing authority has power to take action where a licensee contributes to increased consumption of alcohol, or alcohol-related harm.

< < see 'Guidelines on book up for liquor licensees' page 44 < <

The licensing authority may be able to warn the licensee or punish them with a fine or a suspension of their right to trade, or even cancel their liquor licence altogether.

6.3

Consumer credit regulation

The (Uniform) Consumer Credit Code applies in all states and territories in Australia. If the Code applies to a book up arrangement, the trader must meet requirements for written agreements, and the consumer will have various legal rights.

When does the Code apply?

The Consumer Credit Code does not apply if:

- * there is no fee charged for using credit and the goods are sold at the same price as they would be for cash, or
- * the credit offered is less than \$50 (regardless of any fee charged).

If credit is for more than \$50 and a fee is charged then the Consumer Credit Code *may* apply. Where the fee is more than 5% of the amount of credit (or an interest rate of 24% per year or more is charged), it is very likely that the Code *will* apply.²⁷



²⁷ The Consumer Credit Code does not apply if:

- the credit offered is for a period of no more than 62 days, and
- the maximum amount of credit fees and charges that may be imposed or provided for does not exceed 5% of the amount of credit, and
- the maximum amount of interest charges that may be imposed does not exceed an amount (calculated as if the Code applied to the contract) equal to the amount payable if the annual percentage rate were 24% per annum.



An example: where the Code would apply

A store provides credit to consumers in the form of book up. It charges a fixed fee of \$5 for up to \$50 of credit and \$9 for larger amounts of credit.

A consumer spends \$64 on one day (and is charged a \$5 fee). Three days later, the consumer spends \$36 (and is charged an additional \$4). The trader and consumer agree that the credit will be paid in full the next time the consumer gets their benefit from Centrelink. In this example the Code applies because:

- * the credit offered is greater than \$50,
- * there is a charge for credit,
- * the credit is not a continuing credit contract as the fees vary according to the amount of credit provided, and
- * the fee is more than 5% of the amount of credit (the amount of credit is \$100 and the fee is \$9—that is, 9% of the amount of credit).



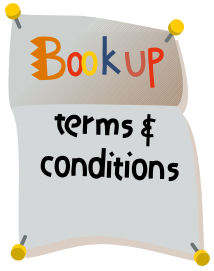
What happens if the Code applies?

The Consumer Credit Code requires lenders to provide particular information to consumers. If the Code applies to a book up transaction, a trader who has not complied with these requirements will have almost certainly have breached the Code. As a result, the trader will have committed various offences and may have to repay all fees charged on the transaction.

It may not always be possible to take enforcement action where a trader breaches the Code. For example:

- * the legal costs may be too high to warrant prosecution,
- * there may be no consumers willing to give evidence, and
- * legal aid may not be available for a private action.

However, if the trader is made aware of the risk that legal action may be taken against them, the trader may be more willing to comply with the Code.



6.4

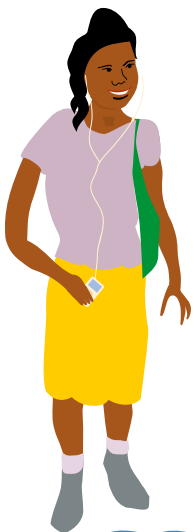
Contract between the store and the consumer

How does the contract work?

When a store and a consumer agree on a book up arrangement, a contract is formed between them. In most cases, this will be a contract based on their verbal agreement and their actions.

Sometimes there is a written agreement. If there is no written agreement, some of the terms of the contract will be explicitly agreed, some may be implied by the circumstances or some may be unclear. For example:

- * It will often be *explicitly* agreed that the consumer will have a certain amount of credit and that the store will hold the consumer's debit card and be paid on the consumer's next payday.
- * Other terms may be *implied* based on the past conduct of the trader and consumer (for example, if a consumer has allowed one of their children to book up on their account, it may be implied that the child has permission to do so in the future).
- * It may be *unclear* whether the consumer can ask for their debit card back if the debt has not yet been paid off.



Using standard contracts

Some government agencies promote the use of standard written contracts. Written agreements have the advantage of clarifying the rights of both the consumer and the trader.

Written agreements promoted by the Northern Territory Government include terms designed to protect the consumer, such as a requirement that all transactions are documented and receipts always provided.

However, other written agreements may put the consumer in a worse position. One example is if a consumer has signed an agreement saying that they cannot ask for their card back until the debt is paid in full.



Consumers will also be disadvantaged if they sign an agreement that:

- * they do not fully understand, or
- * they do not fully agree with.

< < *For examples of store contracts and written agreements, see 3.1 Setting standards for traders, page 34 < <*

Other people using the book up account

The contract between the store and the consumer will determine whether the consumer must pay for debts incurred by other people (for example, relatives).

Unless there is a specific agreement that the consumer will pay for someone else’s debts (or past practice that clearly implies that the consumer authorises another person to use their account), the consumer should not have to pay for these debts.



6.5

Contract between the bank and the consumer

When a consumer gets a bank account and debit card, they enter into a contract with the bank (or other financial institution). One of the terms of the contract is that the consumer must not give their PIN number to anyone else.

It is not 'illegal' for a consumer to give their PIN number to a trader, but it does mean that the consumer is in breach of their contract with the bank. As a result, they may have no protection if money is stolen from their account.

The Electronic Funds Transfer (EFT) Code sets out who will have to pay if money is stolen through the misuse of cards and PIN numbers. If the consumer has given or told their PIN number to another person and this has contributed to the loss of money, it is unlikely that the consumer will get their money back from the bank.

< < *For more information about the EFT Code, see page 93 < <*



6.6

Contract between the bank and the store

Stores that have EFTPOS enter into a contract with a bank to supply those facilities. Currently, it appears that not all banks have contracts with provisions that relate directly to book up. ASIC is reviewing this together with the banks.



6.7

More information

For a general description of consumer protection law, see *The Law Handbook* for your state or territory. You can:

- * contact the publishers of each law handbook

go to www.moneysmart.gov.au for their contact details.

or

- * call the Legal Aid Commission or a community legal centre in your state or territory >> see 7.2 Community, page 120 >>