



New disclosure obligations for NSW businesses

There are new disclosure requirements for how businesses (including intermediaries such as agents and brokers) communicate with customers before completing a sale.

These new obligations require businesses to disclose certain terms or conditions of contracts, and for intermediaries to disclose if they accept commission or referral fees.

These new obligations require:

- Businesses to disclose terms or conditions of contracts that substantially prejudice the customer.
- Intermediaries to disclose if they have commission or referral arrangements with another supplier.

These reforms start on 1 July 2020 and improve transparency for consumers without overly burdening businesses.

What are the changes?

Businesses

Before supplying goods or services, a business must take reasonable steps to make customers aware of the substance and effect of terms or conditions that may substantially prejudice the interests of consumers. This includes at least the following terms which:

- limit the liability of the supplier
- provide that the customer is liable for damage to delivered goods
- permit the supplier to provide data about the customer, or data provided by the customer, to a third party in a form that may enable the consumer to be identifiable by the third party
- require the consumer to pay an exit fee, a balloon payment, or other similar payment.

Intermediaries

Also, intermediaries must take reasonable steps to make customers aware of any commission or referral arrangements where the business receives a financial incentive from another supplier.

This means that customers will need to be informed that an arrangement exists, however intermediaries do not need to disclose the nature or value of the financial incentive.

Do any exemptions apply?

There are no exemptions from either disclosure requirement.

What if I have other disclosure obligations?

Businesses may already be subject to existing disclosure obligations under other legislation. These reforms will apply in addition to any existing obligations. For many businesses it might mean no change to existing operational practices if you are already subject to disclosure obligations. For other businesses this change will require disclosures for the first time.

If you operate in an industry that has existing disclosure requirements, you should check whether your existing business practices are already compliant with these new disclosure requirements. To do this, you should consider what is being disclosed, the timing of the disclosure and how it is being disclosed.

Will I have time to transition to the new requirements?

Fair Trading recognises that businesses will need time to adapt their operational requirements to the new law.

To help businesses adapt, we will take an educational approach to compliance and enforcement focused on educating businesses and raising consumer awareness. This approach will apply for six months from 1 July 2020 to 31 December 2020.

This means that, during this period, Fair Trading will not penalise businesses that have been identified as failing to comply with the requirements. However, Fair Trading expects businesses who are made aware of the new law to take appropriate steps to inform their customers of their right to lodge a complaint and commence changes to their operations.

Who needs to disclose terms or conditions?

Any supplier, who in the course of doing business, supplies goods or services to a consumer may have terms or conditions that they will need to disclose.

Who needs to disclose a commission or referral arrangement?

You need to disclose that you are under a commission or referral arrangement if you are an intermediary.

You are an intermediary if you, under an arrangement that provides for a financial incentive:

- arrange contracts for the supply of goods or services from another supplier on behalf of a customer as an agent, or
- refer a consumer to another supplier of goods or services.

Examples of common types of intermediaries

Agents

An agent is generally a person who is part of an agent-principal relationship, meaning that agents are generally expected to act on behalf of the principal (usually the client who has contracted them).

Common examples of agents include real estate agents and travel agents.

Brokers

A broker is someone who buys and sells goods or services on behalf of others. This can involve arranging or negotiating services.

A common example is a mortgage broker who supplies tailored information and advice or arranges for the mortgage to be agreed between the consumer and financial institution.

Other intermediaries

The requirement to disclose can also include intermediaries who may not necessarily arrange the contract or agreement but may refer a consumer to another supplier. An arrangement in which an intermediary receives a referral fee (also known as a kickback), spotter's fees or finder's fees, should be disclosed to the consumer.

An example is an aggregator website that compares services or products from multiple providers and receives payment for directing consumers to engage with those providers.

If you are unsure if you are an intermediary, you should seek independent legal advice.

What needs to be disclosed and when?

What terms or conditions am I required to disclose?

Under the new section 47A of the Fair Trading Act 1987, starting 1 July 2020, businesses must take reasonable steps to ensure that consumers are aware of the substance and effect of at least the four terms listed below. However, this list is not exhaustive, and businesses must disclose other terms or conditions that may substantially prejudice the interests of consumers.

Terms that exclude the liability of the supplier

Example: An indoor recreation centre includes a term, in their written terms and conditions, which states that they are not liable for any injuries arising from participation in the activities they provide.

Terms that provide that the consumer is liable for damage to goods that are delivered

Example: A courier company has a term in their online contract that the client bears the risk of any good that is transported by the company and that the company is not responsible for any loss, detriment or damage suffered by the client or any other person.

Terms that permit the supplier to provide data about the consumer, or data provided by the consumer, to a third party in a form that may enable the third party to identify the consumer

Example: An online food delivery service has a term that allows them to disclose their customers' personal information to other people, including third party service providers, and third parties that collect and process data such as Google Analytics.

Terms that require the consumer to pay an exit fee, a balloon payment or other similar payment

Exit fee

An exit fee is a fee charged to exit or terminate an agreement, including if the contract is ended early. An exit fee may also be called a cancellation fee, termination fee or other similar name.

Example: a gym has a term that require customers to pay a cancellation fee in order to cancel their membership.

Balloon payment

A balloon payment is a large final payment at the end of a loan to clear the debt, usually where the borrower pays reduced monthly instalments on the loan.

Example: a car dealership offers finance plans that include balloon payments at the end of the loan. This means that at the end of the loan the customer will have to pay the remainder of the principle amount in one large sum.

When do I need to disclose terms and conditions?

Disclosure must be made before a business supplies the goods or services. For example, before the consumer signs the contract, makes a payment, or otherwise commits to the supply of goods or services.

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- | Early disclosure is a proactive step that can lead to less complaints down the road.

What commission or referral arrangement am I required to disclose?

Under the new section 47B of the Fair Trading Act 1987, intermediaries must take reasonable steps to make consumers aware of any commission or referral arrangements where they receive a financial incentive from another supplier. This means that customers will need to be informed that an arrangement exists, however intermediaries do not need to disclose the nature or value of the financial incentive.

What is an arrangement?

An arrangement can be formal, such as a written contract, or it can be something informal like a verbal agreement. An arrangement which provides for a financial incentive will involve a supplier who is an intermediary (who receives the incentive) and one or more other suppliers (who provide the incentive). The intermediary may supply goods or services to the consumer as an agent (for which they receive a commission from the other supplier), or they may be referring the consumer to another supplier.

In commission arrangements, the consumers usually make their purchase through an intermediary, with the payment going to the third-party supplier and the intermediary receiving a portion of that payment. This portion is commonly called a commission and is generally paid out as a percentage of the sale, but it may be a flat fee.

In referral arrangements, a third-party supplier pays a fee to the intermediary for directing a consumer to the supplier. In this case, the purchase is made directly from the third-party supplier and not through the intermediary. In general, it is better to disclose any third-party arrangements to consumers. If you are in doubt as to whether your particular arrangement is captured under this reform, you should seek independent legal advice.

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Examples of a commission arrangement

1. A website offers comparisons of retail energy packages. Consumers coming to the site give their details and preferences, and the website makes a recommendation based on those preferences. The consumer pays no fee for this service. Instead, the site signs up consumers with energy providers and it is the providers who pay the website. For every new consumer signed up to a provider, the website will get a percentage of the payments.
2. A customer goes to a travel agency to help book a hotel for their holiday. The travel agent finds a hotel through their database that is suitable and makes the booking. The customer pays at the travel agency. The agency relays the money to the hotel but receives a percentage of the amount as their payment for connecting the customers to the hotel.

Example of a referral arrangement

1. A builder is assisting their client with the construction of a new house. The client needs tiles for the kitchen and bathroom, and the builder recommends a particular tile supplier. The builder has a previous arrangement with the tile supplier that the builder will receive a flat fee for every client she refers to their business.

When do I need to disclose the arrangement?

This disclosure must be made before you act under an arrangement where you stand to receive a commission or referral fee. For example, before the consumer is redirected from the intermediary to the supplier or before the consumer makes the purchase.

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- | In order to avoid a perceived conflict of interest, early disclosure of the arrangements you have with other suppliers is best.

What reasonable steps can I take?

What are reasonable steps?

Taking reasonable steps will mean taking actions that one would reasonably expect would create awareness in a consumer. Put another way, the steps you take to disclose must be:

1. appropriate in the circumstances, and
2. sufficient to create awareness in the consumer.

Some examples of reasonable steps are outlined below. It is not necessary to take all the steps outlined below, as what is reasonable will vary from business to business, but you may use them as a guide to what might work best for you.

How do I take reasonable steps?

The best way to disclose is to be clear, upfront and automatic.

- A clear disclosure is easy to understand.
- An upfront disclosure doesn't require the consumer to seek out the information themselves.
- An automatic disclosure is a standard part of each transaction.

To make the customer aware of terms or conditions or commissions or referral arrangements, draw their attention to them and provide an explanation. To determine what steps would be reasonable to do this you should:

1. consider what tools are available to you, and
2. decide which of those are the most appropriate for your business and customers.

What tools are available?

Here are some examples of how businesses or intermediaries might disclose.

Key terms or conditions

- Use short, plain English summaries on the front page of a contract
- Provide information in short chunks at key times for the customer. i.e. on the information or payment page.
- When online, make information appear on screen in a scrollable text box
- Use comics, illustrations or icons to highlight and explain relevant information.

Commission or referral arrangements

- Include a disclosure on quotations provided to the customer
- Direct customer attention to appropriate signage
- When online, disclose relevant information on the same page as the product or service's description
- When online, have the disclosure appear in a pop-up box
- Put an automatic disclaimer on the bottom of emails.

How do I decide which tool is appropriate?

When considering which steps would be appropriate for your business, consider:

1. The nature of your business.
 - What goods or services do you sell?
 - How do your customers interact with your business?
 - How does the business influence customers to make a purchase?
 - Who is your target market? Are they young, from diverse language groups, or otherwise vulnerable?
2. The nature of the term or condition that you must inform the consumer about.
 - What is the impact on the consumer?
 - How may the consumer be substantially prejudiced by the existence of the term?
3. The nature of the third-party commission or referral arrangement to be disclosed.
 - Which arrangement is in place?
 - Are you clearly disclosing the existence of the arrangement?
4. Where is the transaction taking place? In store, over the phone or online?
5. Any procedures that the business already has in place to inform your customers of these matters.
 - Existing signage that discloses key terms or conditions, or commission or referral arrangements.

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- | Accessibility: Ensure that your website has screen reader compatible web pages, using inclusive colour schemes and alternative text for images, will help people of all abilities to use your site.

How will I know that I have taken reasonable steps?

The best way to know that they have taken reasonable steps to make the customer aware is to check with them directly. Ask the customer to confirm if they are aware. There are several ways this could be done, such as verbal confirmation, initialling a contract, or checking a box on a web-form.

With their confirmation, the customer should be acknowledging that they are aware of and understand:

- the existence of commission or referral arrangements, or
- the substance and effect of key terms or conditions.

Examples of reasonable steps

Terms or conditions

1. A local tennis club has designed their membership agreements to feature a short, half-page summary of the key terms of the agreement on the front page. When a new member is signed up, staff have them initial the bottom of this front page to acknowledge that they have read the key terms.
2. A video streaming website has a term in their terms and conditions which states that they may share customers' personal information with third parties. When the customer is inputting their personal information to the webform to sign up for the service, a pop-up box appears to inform the customer of this term, and explain the effect, which is that their personal information will be provided to third parties to use for other purposes than what they originally provided.

Commission or referral arrangements

1. A graphic designer creates logos and other symbols for their customers who use on websites but does not create websites themselves. Instead, they have an arrangement to recommend customers to a web developer to create a website to a particular web developer. Before making the recommendation, they disclose that they will receive a referral fee if the customers decide to use the recommended developer. They verbally confirm with the customer if they wish to go ahead, and then follow the usual procedure to put customers in contact with the developer.
2. An aggregator website facilitates bookings for car hire by listing cars from a variety of providers, with the bookings made through the aggregator. The site has arranged that whenever a consumer clicks the button to proceed with a particular booking, a pop-up message appears on screen advising that the company has a commission arrangement with the provider of the vehicle. The customer can tick a box to confirm their awareness before being directed to the next page where they review the booking and proceed with payment.

Contact us

For questions about the changes to disclosure laws in NSW, including the transitional arrangements, call us on 13 32 20 or [lodge an enquiry](#).

For questions about how the new disclosure requirements impact other disclosure requirements in your industry, email disclosurereforms@customerservice.nsw.gov.au

<https://www.fairtrading.nsw.gov.au/resource-library/publications/new-disclosure-obligations-for-nsw-businesses>

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