



Australian  
Competition &  
Consumer  
Commission

# SMALL BUSINESS IN FOCUS



SMALL BUSINESS, FRANCHISING AND INDUSTRY CODES HALF YEAR REPORT

NO. 5

July–December 2012

The Australian Competition and Consumer Commission is committed to protecting the interests of small businesses. This twice-yearly report provides a summary of the ACCC's work and activities amongst the small business sector.

## Facts and figures

**2 338** is the number of complaints and enquiries recorded by the ACCC Infocentre from small businesses, franchisees and franchisors over the last six months

**20 132** is the number of hard copy publications distributed to small businesses and associations

**108** is the number of presentations, expos and field days that the ACCC participated in

**3 590** is the number of registrants who have signed up to the ACCC-funded free online franchising education program since it began in 2010

## Complaints and enquiries<sup>1</sup>

The ACCC receives a large number of complaints and enquiries from small businesses about competition and consumer issues. The following number of contacts were received from the small business sector:

	This period: Jul–Dec 2012	Last period: Jan–Jun 2012
Small business	1471 complaints and 366 enquiries	1803 complaints and 872 enquiries
Franchising <sup>2</sup>	454 complaints and 47 enquiries	271 complaints and 76 enquiries

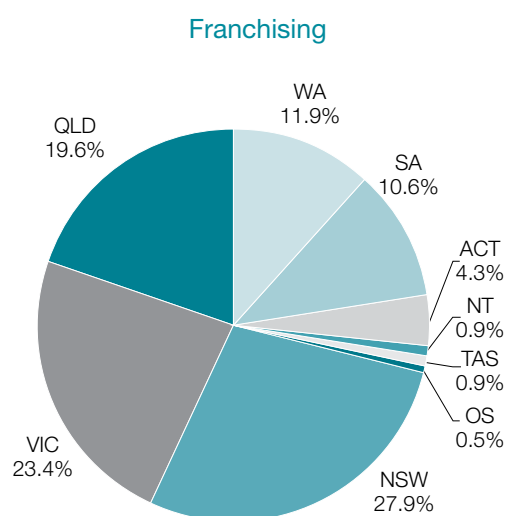
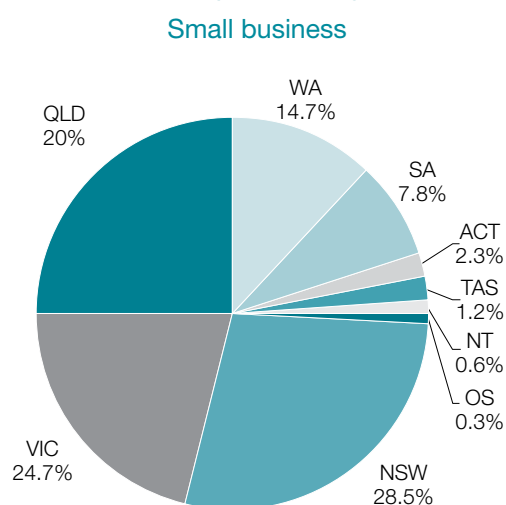
To find out more about your rights and obligations, or to make a complaint, contact the ACCC via the Small Business Helpline:

**1 300 302 021**

<sup>1</sup> The data provided reflects complaints and enquiries received by the ACCC from various sources and is provided as general guidance only. Upon further investigation, the conduct being complained about may not amount to a legislative breach. Care should be taken when drawing any conclusions based on this data.

<sup>2</sup> Primarily from franchisees, but includes a small number from franchisors.

### Breakdown of complaints by location where supplied



### Breakdown of complaints by key issue<sup>3</sup>

Issue	Small business		Franchising	
	This period Jul–Dec 2012	Last period Jan–Jun 2012	This period Jul–Dec 2012	Last period Jan–Jun 2012
Consumer protection related issues				
Misleading conduct/false representations	389	678	65	59
Consumer guarantees	135	307	4	18
Unsolicited goods/services	25	50	0	0
Unconscionable conduct	68	71	47	31
Product safety standards	25	54	2	4
Other ACL issues	25	108	6	5
Unlikely to raise ACL issues <sup>4</sup>	158	334	19	30
Competition related issues				
Exclusive dealing	35	66	15	9
Misuse of market power	47	102	4	0
Other competition related issues	22	46	4	8
Unlikely to raise competition issues <sup>5</sup>	62	65	11	4
Franchising Code of Conduct related issues				
Disclosure	N/A	N/A	62	43
Termination of franchise agreement	N/A	N/A	26	12

For more information about the principles adopted by the ACCC to achieve compliance with the law and the ACCC's enforcement powers, functions and priorities, see our *Compliance and Enforcement Policy*.

<sup>3</sup> Multiple issues may be identified from a single complaint. Complaints not within the remit of the ACCC are excluded.

<sup>4</sup> The nature of contacts within this category primarily concern issues related to disputes that are better resolved under the terms and conditions of the specific contractual arrangements and other matters where it is evident that no breach of ACL provisions exist.

<sup>5</sup> The nature of contacts within this category primarily concern issues where it is evident that no breach of competition provisions exist, including refusal to deal/supply.

## New ACCC small business guidance

### Unconscionable Conduct Business Snapshot

The ACCC's latest Business Snapshot provides practical tips for you to minimise the risk of becoming a victim of unconscionable conduct, and to avoid engaging in such conduct towards other businesses or consumers.

The Australian Consumer Law prohibits what is known as 'unconscionable conduct'—but it can be a difficult concept to nail down. Certain conduct may be unconscionable if it is particularly harsh or oppressive to another party—either another business or to a consumer. Conduct may also be considered unconscionable where one party knowingly exploits the special disadvantage of another. But it needs to be more than just hard commercial bargaining.

The ACCC snapshot uses examples of cases where the ACCC has successfully prosecuted businesses for engaging in such conduct towards small-business owners, franchisees and Indigenous and elderly consumers. The snapshot was published in September 2012.

Factors to consider when assessing whether conduct is unconscionable include:

- What are the relative bargaining strengths of the parties?
- Were any conditions imposed on the 'weaker' party that were not reasonably necessary to protect the legitimate interests of the 'stronger' party?
- Did the 'stronger' party use undue influence, pressure or unfair tactics?

The snapshot is available at [www.accc.gov.au](http://www.accc.gov.au).

### Small Business and the Competition and Consumer Act: your rights and responsibilities

The ACCC has revised one of its key publications for small businesses. The *Small Business and the Competition and Consumer Act* is a handy, comprehensive guide to the main competition and consumer laws you need to be aware of and your rights as a business operator.

The guide also gives some practical tips when it comes to:

- refund and return signs
- sales practices including proof of transactions and itemised bills
- product safety bans and recalls
- advertising and promoting your business
- working with other businesses in the supply chain, and
- competing fairly.

You can download or order a copy of this publication from [www.accc.gov.au](http://www.accc.gov.au).

### The Marker



The ACCC has released *The Marker*—a short film showing the devastating effects involvement in a cartel can have on both individuals and businesses. *Businesses compete, cartels just cheat* is the theme and message of the ACCC's cartels-awareness campaign.

A cartel is formed when two or more competing businesses agree to work together to profit by engaging in conduct such as:

- Fixing prices—so there is no competition and buyers have no choice.
- Allocating customers, suppliers or territories—to remove competitors.
- Rigging bids—so that cartel members can rotate winning jobs at inflated rates.
- Controlling output or limiting the amount of goods and services available to buyers—so they have no choice but to pay higher prices.

Civil and criminal sanctions apply, including up to 10 years in jail.

The ACCC runs an immunity program that enables past or present cartel members to confess their actions and cooperate with investigations in exchange for immunity from ACCC-initiated civil and (through the Commonwealth Director of Public Prosecutions) criminal proceedings.

For more information about cartels or to watch *The Marker* visit [www.accc.gov.au/cartels](http://www.accc.gov.au/cartels).

### ACCC Shopper App



In December 2012 the ACCC released a free ACCC Shopper app for Apple and Android smartphones and tablets. The app provides instant advice to consumers while they are shopping, and answers commonly asked questions about refunds, returns, warranties, and lay-bys. Some

consumers might use the app to store photographs of receipts as proof of purchase on their smartphone or tablet.

The app answers questions such as:

- 'What do I do if a product is faulty?'
- 'What happens if I don't have a receipt?'

The app allows consumers to set reminders for lay-bys and the expiry date for warranties and gift vouchers. It also explains common labelling terms like 'Made in Australia'.

You can download the free app from the Apple App Store and Google Play—search for 'ACCC Shopper'.

*The ACCC acknowledges Consumer Affairs Victoria's assistance in developing this app.*

## Advertising and selling

### 'Was/now' and 'strikethrough' pricing

'Was/Now' and 'strikethrough' pricing are forms of two-price advertising commonly used by businesses.

#### Example of was/now price statements

Was \$50 Now \$25 or ~~\$100~~ Now \$75

A likely impression conveyed by this pricing is that consumers will save an amount, which is the difference between the higher price—the 'was' or 'strikethrough' price—and the lower price (if the item is purchased during the sale period). You are free to make these statements but you need to be accurate about any claim you make.

Where this type of pricing statement is made it is likely to breach the ACL if consumers would not make the represented savings—in other words, if a customer would not have paid the 'was' or 'strikethrough' price during a reasonable period, immediately before the start of the sale.

How long this 'reasonable period' is may depend on factors such as the type of product or market involved and the usual frequency of price changes.

Consideration of the ticketed or 'offer' price of an item and actual sales data will help determine whether a consumer would or would not have paid the higher price.

### Carbon price claims—the first 100 days

Remember with carbon price claims it has always been business as usual and you are entitled to increase your prices as you see fit. However, if you make claims about the impact of the carbon price those claims need to be truthful and have a reasonable basis.

#### Carbon Price Claims

In the first 100 days since the commencement of the carbon price mechanism, the ACCC received close to 2500 carbon price related complaints and enquiries. To give that figure some context, the ACCC received just over 43 000 total complaints and enquiries in the same period. The majority of contacts came from small businesses and consumers seeking information or wishing to report concerns about carbon price claims. The low complaint levels show that most businesses have acted in accordance with the law during the first 100 days of the carbon price.

The ACCC has engaged extensively with business and industry as part of its dedicated carbon price related compliance activities. On 16 August the ACCC hosted an interactive webinar to give businesses an opportunity to learn from complaints and queries received by the ACCC, investigation outcomes to date and to link with updated guidance. A range of guidance material has been developed, including web FAQs, checklists and snapshot summaries.

The webinar and all ACCC carbon price guidance can be found at [www.accc.gov.au/carbon](http://www.accc.gov.au/carbon).

### ACCC continues to protect small businesses against misleading or deceptive conduct

In September the Federal Court ordered three publishing companies to pay penalties totalling \$400 000, and the companies' director, Mr Andrew Clifford, to pay \$100 000 after they admitted that they had engaged in misleading and deceptive conduct, harassment and coercion, and unconscionable conduct in relation to advertising services that were never requested or provided.

The publishing companies contacted mostly small businesses and told them that they had already paid for, or agreed to, advertising in one of the companies' magazines, when they had not. The companies would then send them a document and invite them to sign it in order to receive complementary copies of the magazines. The publishing companies then claimed the signed document was an agreement to buy advertising services, and demanded payment of around \$500 for each.

The companies also admitted they used harassment and coercion and acted unconscionably when pursuing payment from some businesses.

"...the ACCC will use its powers to take action against companies that make a living out of deceiving small businesses."—ACCC Chairman Rod Sims

Also in September, following ACCC action, the Federal Court ordered Ms Rosemary Bruhn to pay a civil pecuniary penalty of \$50 000 for conduct involving substituting cage eggs for free range eggs. The ACCC alleged that from March 2007 to October 2010, Ms Bruhn represented that eggs she supplied to 109 business customers in South Australia including retail outlets, bakeries, cafes and restaurants, were free range when a substantial proportion were in fact cage eggs.

## Dealing with your suppliers and competitors

### Resale price maintenance

Resale price maintenance occurs when a supplier requires a business customer to not sell or advertise goods below a minimum price specified by the supplier. This limits the ability of business to engage in price competition.

In October the Federal Court in Melbourne imposed penalties of \$90 000 against Eternal Beauty Products Pty Ltd (Eternal Beauty) and its Director, Penny Rider, a wholesaler and retailer of skin care products, for engaging in resale price maintenance.

The Court made declarations that Eternal Beauty and Ms Rider engaged in specific acts of resale price maintenance and Eternal Beauty was ordered to contribute \$10 000 to the ACCC's costs and establish a trade practices



compliance program. The declaration and orders were made by consent.

Noting the penalties, ACCC Chairman Rod Sims said “Businesses are free to sell their products at prices below suppliers’ recommended retail prices if they wish...The ACCC takes seriously any attempts by suppliers to prevent discounting of their products, which affects the fundamental right of traders to compete for business”.

Prior to the orders Eternal Beauty voluntarily sent letters to all of its retailers and informed them that resale price maintenance is illegal and retailers were entitled to independently set the price at which they offer those products for sale.

During the period, the ACCC also accepted a court enforceable undertaking from Chemical Formulators Pty Ltd, Valiant Enterprises Pty Ltd and Oticon Australia Pty Ltd for engaging in resale price maintenance.

### Collective bargaining

Under certain circumstances the ACCC can authorise an arrangement where two or more small businesses can come together to negotiate terms and conditions with a supplier or a customer.

These arrangements usually raise concerns under the *Competition and Consumer Act 2010* as they involve agreements between competitors, often in relation to pricing.

In the last six months the ACCC has authorised arrangements between Tasmanian lottery agents, small private hospitals, truck drivers providing concrete cartage services and potato growers.

If you want to know more about your rights to collectively bargain go to [www.accc.gov.au](http://www.accc.gov.au) or ring the Small Business Helpline.

### Spotlight on scams—be aware of scams targeting you

Beware that scammers are continuing to target you with false billing scams.

#### Warning signs for false billing scams

- You receive a call from a business directory or other publication you’ve never heard of, ‘confirming’ your entry or advertisement.
- You receive a document in the mail that appears to be an invoice from a publication you’ve never heard of.
- The caller reads out your listing or advertisement and you recognise it as a listing you put in a different publication.

#### Tips to protect yourself

- Make sure the business billing you is the one you normally deal with.
- Always check that goods or services were both ordered and delivered before paying an invoice.
- Try to avoid having a large number of people authorised to make orders or pay invoices.

In September the ACCC also issued a joint alert with the Australian Taxation Office urging you to be aware of scam calls or emails around deadlines for submitting tax returns—a known time for scammers to target busy businesses with tax-related and other scams.

For more information visit SCAMwatch, at [www.scamwatch.gov.au](http://www.scamwatch.gov.au) and view ‘small business scams’.

## Franchising and other industry codes

### Franchising

ACCC Education and Engagement Managers continued to deliver seminars and distribute publications to prospective franchisees.

The ACCC funds a free online franchising education program run by Griffith University which now has more than 3590 registrants. If you are interested in participating in this program visit [www.franchise.edu.au/pre-entry-franchise-education](http://www.franchise.edu.au/pre-entry-franchise-education).

### Audit notices

The ACCC has the power to audit businesses for compliance with prescribed industry codes. The ACCC can require a business to provide any information or documents it is required to keep, generate or publish under one of these codes. The business then has 21 days to produce the documents.

The ACCC audited 15 traders across Australia in the last six months—13 franchisors and two horticulture traders. The majority of the businesses that have been audited so far have been found to be complying with the relevant codes. Where audits reveal shortcomings, the ACCC engages with the business to bring about compliance.

### Voluntary industry codes

The ACCC continued to participate as an observer at Code Development Committee meetings for a port access code being developed for wheat export.

This period, the ACCC met with the Clean Energy Council regarding the voluntary Solar PV Retailer Code of Conduct it is developing. The ACCC also provided comments to the Complementary Healthcare Council on the recently revised Code of Practice for the Marketing of Complementary Medicines and Health Food Products.

## Energy–National Energy Retail Law

In 2012, the National Energy Retail Law (Retail Law) commenced in the Australian Capital Territory and Tasmania. South Australia expects to commence the new law on 1 February 2013 with New South Wales to follow on 1 July 2013.

The new laws set out the rights and responsibilities of residential and small business gas and electricity customers.

Knowing your rights helps small businesses to make informed choices about the energy services you purchase. If you are a small energy customer your energy retailer must:

- provide fair contracts with clear terms and conditions so you can fully understand the energy offer
- provide clear and transparent bills
- tell you about your right to complain if you have problems with your energy service.

Energy customers in states and territories that have commenced the Retail Law can also use the Australian Energy Regulator's 'Energy Made Easy' website. It can help you compare all of the electricity and gas offers generally available for your business, making it much simpler for you to find an energy offer which meets your needs.

For further information on the new energy laws visit [www.aer.gov.au](http://www.aer.gov.au) or you can visit Energy Made Easy at [www.energymadeeasy.gov.au](http://www.energymadeeasy.gov.au).

## Telecommunications Consumer Protection Code review

The Telecommunications Consumer Protection (TCP) Code is the key industry-developed regulation that sets out rules for telecommunications service providers about consumer protection issues including advertising, billing, and complaint handling. Most of the TCP Code's rules cover small business consumers (defined as those that spend less than \$20 000 with a provider each year).

A revised TCP Code has been registered following an extensive review process. The ACCC actively participated in the review, which sought to address concerns that the TCP Code was not adequately protecting consumers.

The revised TCP Code contains a number of improvements over the previous version. In particular, it includes several measures supported by the ACCC, including:

- provisions to improve the clarity and accuracy of advertising, including a requirement to display 'unit' pricing in advertisements, and a ban on the use of 'cap' to describe mobile phone plans
- a pre-sale Critical Information Summary for all telecommunications products, that must include key pricing information, terms and conditions (this will be mandatory for all providers from 1 March 2013).

The ACCC will be observing the operation of new measures in the revised TCP Code to assess their effectiveness in improving practices across the sector.

## Small business engagement

### National Small Business Summit

The ACCC was a sponsor of the Council of Small Businesses Australia (COSBOA)/NAB National Small Business Summit, which was held on 1 and 2 August in Melbourne. Chairman Rod Sims presented on the ACCC's small business activities and launched the *Small Business, Franchising and Industry Codes Report* (January–June 2012). Deputy Chairman Dr Michael Schaper opened the evening networking session. The ACCC also hosted an exhibition booth.

## Contact us

**ACCC Small Business Helpline** 1300 302 021

**ACCC website** [www.accc.gov.au/forbusinesses](http://www.accc.gov.au/forbusinesses)

**Small business publications**  
[www.accc.gov.au/smallbusinesspublications](http://www.accc.gov.au/smallbusinesspublications)

**Small Business Information Network**—regular updates from the ACCC on issues relevant to small business—email your contact details to [smallbusinessinfo@accc.gov.au](mailto:smallbusinessinfo@accc.gov.au)

**Franchising Information Network**—regular updates from the ACCC on issues relevant to franchisees and franchisors—email your contact details to [franchisingcode@accc.gov.au](mailto:franchisingcode@accc.gov.au)

Australian Competition and Consumer Commission  
23 Marcus Clarke Street, Canberra, Australian Capital Territory, 2601  
© Commonwealth of Australia 2013

This work is copyright. Apart from any use permitted under the *Copyright Act 1968*, no part may be reproduced without prior written permission from the Australian Competition and Consumer Commission. Requests and inquiries concerning reproduction and rights should be addressed to the Director Publishing, ACCC, GPO Box 3131, Canberra ACT 2601, or [publishing.unit@accc.gov.au](mailto:publishing.unit@accc.gov.au).

### Important notice

The information in this publication is for general guidance only. It does not constitute legal or other professional advice, and should not be relied on as a statement of the law in any jurisdiction. Because it is intended only as a general guide, it may contain generalisations. You should obtain professional advice if you have any specific concern.

The ACCC has made every reasonable effort to provide current and accurate information, but it does not make any guarantees regarding the accuracy, currency or completeness of that information.

ISBN 978 1 921973 42 0

ACCC 02/13\_651

[www.accc.gov.au](http://www.accc.gov.au)