



Many businesses have their own policies about

exchanges and refunds. They should not give consumers the impression they have no basic statutory rights. For example, a 'no refunds' sign may mislead consumers to believe that they have no right to a refund in any circumstances.

Comparative advertising

Consumers like comparative advertising because it says that a business is confident about its product being superior to others.

However, comparisons need to be accurate — a top of the range car needs to be compared to another top of the range car.

» For example, a supplier of international telephone services runs advertisements comparing its special Chinese New Year rate with the standard rate of a competitor. However, the competitor actually had three different rates available including a corresponding special rate.

Businesses need to think about how competitors will react. If you begin a two-week campaign advertising price comparisons, a competitor could change its own prices overnight, rendering your campaign misleading. You would need to change your advertising immediately.

Country of origin advertising

Highlighting the place or country of origin of a product can be a real selling plus.

Under the Trade Practices Act you don't have to state where your goods are from. However, other laws may say you must indicate origin, such as the *Commerce (Trade Descriptions) Act 1905*.

» For example, for an apple and cranberry juice to be able to carry a 'produce of Australia' label, both juices would have to be sourced from Australia. This is despite the cranberry juice being, on average, about 5 per cent of the total volume.

What the Trade Practices Act says is that if you do make these claims they must be accurate.



Keep these in mind to avoid misleading consumers.

What is the overall impression you have created?

Step into the shoes of a consumer and take another look at your message. If they really want the product or service are they going to read the message differently? Are all of the important details included? Is the message ambiguous or 'technically accurate' (i.e. if you read the offer one way it says one thing, if you read it another you see that it may say something else)?

Who is likely to see your message?

You may have a target audience in mind but there may be others who are likely to respond to your message. Remember you may not be able to control who gets the message. Could your message be read differently?

What are the right media for your message?

Is your offer simple or complex? Can you get all of the important details of a leasing arrangement into a short commercial? Would it be better to use the commercial to advertise your company and then have information that you can send to interested customers?

Using agents such as sales people, advertising people and newspapers

If someone is acting on your behalf or providing you with advice, they also need to follow these basic rules. They can be held responsible if they adopt, endorse or advise you to put out a misleading message. And you can still be held responsible if they mislead consumers on your behalf.

More information?

The ACCC has publications on advertising and selling, warranties and refunds, and country of origin claims. They are available from all ACCC offices, or check out the publications range on the ACCC website at <<http://www.accc.gov.au>>. A training video on advertising and selling will be available soon.

Primary producers — protecting their interests

Import competition, the need to lift productivity and deregulation require farmers to become more competitive to ensure that they get the best returns from their produce. Processors, wholesalers and retailers will seek to drive hard bargains. In a market where margins are fine, farmers should protect themselves by negotiating unambiguous terms of trade. At the same time they need to know how to utilise their rights and also understand their obligations under the Trade Practices Act.



Collective bargaining

Negotiation can be difficult when there's only one business in the region that can process your produce and that of other growers. However, the Trade Practices Act says that you can't get together and agree on a price unless the ACCC has assessed the proposal and found that there is significant public benefit. The ACCC can then grant authorisation for the conduct usually only for a limited time. This happened in the dairy industry after deregulation when farmers needed some time to adjust to the new way of doing business.



Voluntary codes of conduct may be an option

Producers and processors may seek agreement on fair terms of trade, appropriate standards for produce and how to resolve disputes. This can result in a code of conduct or agreed quality standards. These could apply industry wide or just between one processor and a group of growers in a particular region. If the agreed outcome has the potential to restrict competition it may still need authorisation by the ACCC. Your industry association may be able to negotiate this type of option.

Form good relationships

The wholesale market on the other hand has many wholesalers competing to get the best quality produce from the best farmers. Anecdotal evidence suggests that farmers who form good relationships with their wholesaler usually get the best service both in terms of price and attention. The tips below may help you find a good wholesaler.

- If practical, visit the wholesaler at their place of business so that you both understand how the other operates and what you need from each other.
- Ask other growers and buyers about their experiences in dealing with the wholesaler.
- Ask the wholesaler whether they know about the Retail Grocery Industry Code of Conduct (see below) or if they have any memberships or accreditation that requires performance with particular standards.
- If you don't live close by, ask them if they participate in a credit scheme, or electronic trading system.
- If the person claims to be acting on behalf of another buyer, check their authority with the buyer.
- Ask how they handle complaints if a disagreement arises.





Get agreements in writing

When you form agreements, do so in writing. Make sure both you and the wholesaler have the same understanding of the terms of the agreement. It should include:

- the basis on which the wholesaler is acting (buying produce outright or selling on commission);
- whether the price quoted is a reported price or the actual sell price;
- fees, commissions etc. that will be deducted from the sell price;
- specifications of produce (size, shape, colour etc.);
- any variables that are likely to influence the sale or final price; and
- what your options are if the sale does not proceed or in the event that the produce is returned.

If the agreement is verbal

A buyer or wholesaler may only make the agreement based on a handshake. If so:

- make sure that other people are present when the details are negotiated;
- ask as many questions as possible and repeat your understanding of the agreement back to the buyer or wholesaler; and
- record your understanding of the agreement and even forward it to the buyer or wholesaler as soon as possible.

Next time you might choose not to do business with someone who is reluctant to confirm the details of an agreement in writing.



Commissioner for small business

John Martin is the ACCC Commissioner for small business. He came to the organisation in 1999 with a wealth of

experience, having been executive director of the Australian Chamber of Commerce and Industry. Commissioner Martin has been committed to resolving the concerns of small business, especially in the regions and the bush, where access to information and advice is much more limited. He energetically promotes the concept (and the reality) that a good understanding and commitment to fair trading benefits a business' performance, both ethically and economically. Commissioner Martin's appointment with the ACCC is until 2004.

If something goes wrong

The Retail Grocery Industry Code of Conduct is a voluntary code that is designed to promote fairness and open communication in vertical relationships in the fresh produce sector. It provides a non-legalistic dispute resolution service that anyone can access. In particular it provides guidelines on conduct in relation to:

- produce standards and specifications;
- contracts;
- labelling, packaging and preparation; and
- notification of acquisitions.

The Retail Grocery Industry Ombudsman mediates disputes under the code. If you would like to find out more about the code or the Ombudsman scheme see the website at <http://www.mediate.com.au/rgio/ombudsman.htm> or call 1800 004 444 (free call).





Benefits for small operators

The ACCC recognises that the Trade Practices Act is one of many forms of regulation affecting small business operators. However, the Act can be a valuable management tool — a good knowledge of the Act and compliance with its provisions can help businesses become more successful and profitable.

The Act promotes a fair and competitive business environment. It prevents any business, large or small, from

gaining an unfair advantage over its competitors by engaging in any misleading or anti-competitive behaviour.

Small business operators should know about several recent developments in various areas of the Act:

- unconscionable conduct;
- misuse of market power; and
- avoiding disputes.

Unconscionable conduct

In 1998 the unconscionable conduct provisions of the Act were amended, strengthening the existing protections for small business.

Unconscionable conduct goes beyond driving a hard bargain. It involves situations of power imbalance where the stronger party engages in unacceptable business conduct, taking advantage of a weaker party.

The new section 51AC sets out a range of factors that a court may consider when determining whether a business has been subjected to unconscionable conduct. These include:

- the parties' relative commercial strengths;
- whether undue influence was exerted;
- whether the contract exceeded what was reasonably necessary for the legitimate interests of the larger business;
- the requirements of any applicable industry code; and
- whether there was evidence of disclosure, good faith and willingness to negotiate.

The ACCC has taken several section 51AC court actions.

Court action by ACCC Simply No Knead

One case involved Simply No Knead, a franchisor that supplied breadmaking ingredients and equipment. In this case, disputes developed between the franchisor and some of its small business franchisees. The franchisor engaged in a range of conduct such as:

- demanding that franchisees wishing to negotiate must put their requests in writing, and that no joint meeting with franchisees was acceptable;
- refusing to supply franchisees with product because they disputed the content of advertising material or oversupply of raw materials to them;

- demanding that franchisees distribute brochures to customers that referred only to the franchisor and not the franchisee (even though the franchisees paid for the advertising and were denied products if they failed to distribute);
- directly competing within the franchisees' territories in a way calculated to damage the franchisees' business; and
- withholding disclosure documents unless each franchisee gave written consent to renew the agreement.

The court found 'an overwhelming case of unreasonable, unfair, bullying and thuggish behaviour' amounting to unconscionable conduct under section 51AC.

Cheap As Chips

Small business franchisees were also involved in another dispute with a carpet cleaning franchise, Cheap As Chips. In this case, the franchisor had:

- terminated a franchise over a payment dispute;
- threatened to terminate franchises rather than negotiate disputes;
- demanded attendance at seminars unrelated to the business of the franchise;
- threatened to suspend franchisees for associating with other franchisees; and
- refused franchisees access to business records.

The Federal Court decided that this conduct amounted to unconscionable conduct and ordered the franchisor to pay compensation, interest and the ACCC's legal costs. The franchisor was also directed to refrain from similar conduct, provide franchisees with reasonable access to records, notify all current franchisees about the outcome of the proceedings and implement a trade practices compliance program.



Leelee

The Leelee case involved a small business operating in the food court of a shopping centre. In this case, the Federal Court found that the retail landlord had engaged in unconscionable conduct by:

- failing to honour existing terms of the lease agreement;
- withholding crucial information about changes to the lease agreement; and
- not allowing the tenant to transfer the lease.

These cases have helped to clarify the scope of section 51AC. They show that unconscionable conduct is wider than unconscionable conduct in equity (or unwritten law) where a person has to establish a 'special disadvantage' which was exploited by a stronger party. This means that small businesses are better protected against exploitation by big businesses or businesses with market power.

The cases are also useful because they provide actual examples of behaviour that might be considered unconscionable conduct.

Misuse of market power

Section 46 of the Act prohibits a business with substantial market power from using that power to deliberately damage another business. Clearly this is another area of particular interest to small businesses, and again, there have been recent developments.

Boral Besser Masonry

In early 2001 the Federal Court clarified when predatory pricing could constitute a misuse of market power under the Act.

The ACCC alleged that Boral Besser Masonry had slashed prices below manufacturing costs in an attempt to drive the more efficient C&M Bricks out of the market. The court noted that when Boral Besser increased its production capacity, it publicised that fact to exert 'psychological pressure' on its rivals. It intended to signal to its rivals that it was willing to wage a price war for some time and that it would bear the losses that may result.

The court agreed, recognising that below-cost pricing can be a misuse of market power, even in markets where there is

more than one large player. This decision is currently under appeal.

Rural Press

Soon after the Boral decision, the Federal Court resolved another ACCC action claiming misuse of market power, against Rural Press and its subsidiary Bridge Printing Office Pty Limited. The court found that these companies had misused their market power in their dealings with another publisher of regional newspapers in South Australia, Waikerie Printing House Pty Ltd.

The court also decided that the three companies entered into an arrangement to withdraw the Waikerie Printing House publication, *The River News*, from the Mannum area. This breached section 45 of the Trade Practices Act, which deals with anti-competitive arrangements.

The ACCC took this action because it was clear that a powerful player in a market had used its power to threaten a family operated publisher.

Avoiding disputes

While recent cases have been useful for clarifying the law, small businesses are generally better off negotiating successful outcomes without recourse to litigation. When a problem arises, the ACCC recommends the following steps:

- raise the dispute quickly with the party involved;
- clearly set out what action is required to settle the dispute;
- check if the other party has a dispute resolution process in place and if so, talk to their dispute handling expert;

- if you are not confident about raising the matter yourself, consider asking your trade association for assistance; and
- if there is no trade association available, suggest to the other party a mediation service.

Dispute resolution processes are in place or proposed for many industry sectors, including franchising, retail tenancy, retail grocery and film exhibition and distribution.

For more information on the protections available to small business in the Act, contact the ACCC Infocentre on 1300 302 502 or visit the website <<http://www.accc.gov.au>>.

Merger laws give greater support

The ACCC has recently redefined the concept of markets, creating a stricter test for mergers in regional areas.

These recent changes to the mergers laws will benefit farmers, and other small suppliers and businesses, as well as consumers.

The new definition specifically refers to a substantial market in *regional* Australia. This means that the ACCC will closely review any mergers and acquisitions that affect competition in these areas.

How do these changes benefit businesses and consumers in regional areas?

Primary producers, for example, often have very few buyers for their product. Usually they are the large processors or agents who buy from many farmers. Because such markets are often characterised by heavy concentration, any merger between these large companies can compromise the interests of small businesses supplying goods to them.

On the other hand, small businesses in regional areas are often limited in their choice of supplier. A business's survival can hinge on the ready availability of particular supplies. If two competing suppliers merge in such a situation, the options available to small businesses shrink. The merged entity may then increase prices, restrict supply, or even misuse their market power to damage competitors.

If the prices a business pays for vital inputs rise, then inevitably this must be factored into the prices they charge consumers. In the end, the consumer is the one who suffers the anti-competitive effects of excessive market concentration — either through higher prices, less choice, or poorer quality goods or services.

The new definition of a market will enable the ACCC to take these concerns into consideration when deciding on whether to allow a merger, and under what conditions. The ACCC accepts submissions from all concerned parties.

If small businesses and consumers in regional areas have such concerns, they can contact the Regional Outreach Officers (ROOs). These officers can provide information and advice on how the ACCC deals with mergers, and listen to any concerns from people in regional areas affected by potential mergers.

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New on the bookshelf

The ACCC has released the following publications in the past few months.

Small business publications

Advertising and selling — updated guide on the consumer protection provisions of the Trade Practices Act to ensure that businesses trade fairly with consumers. \$10

Small business and the Trade Practices Act — a practical guide to the TPA for Australian small businesses.

Textiles, clothing and footwear industries — Country of origin guidelines to the Trade Practices Act. \$10

The franchisees guide — an updated guide to the Franchising Code of Conduct.

Small business leaflets about unconscionable conduct:

- Guaranteed a loan for someone? Lost your house?
- Are you happy with your retail tenancy lease?
- Bought a franchise without enough information?
- Do you supply goods or services to major retail chains?

Franchising Code of Conduct Compliance Manual — updated version, including amendments to the code. \$50

Are you being harassed about debts? — leaflet about what debt collectors can and cannot do.

Warranties and refunds — leaflet on small business' obligations about warranties and refunds for consumers.

Videos (\$10 each)

Competing Fairly Forum — proceedings from the 3rd forum in November 2001, featuring advertising and selling.

Fair Game or Fair Go — understanding unconscionable conduct.

Without fear or favour — short general video about the ACCC.

Advertising and selling — training video derived from the Competing Fairly Forum (to be released soon).

Other publications

ACCC Journal 34, 35, 36 — a bi-monthly subscription publication, also available on CD-ROM.

ACCC update 9 — free magazine, special consumers issue.

ACCC Annual Report 2000-01 — \$15

Network 8, 9 — a free magazine from the Utility Regulators Forum.

Report to the Minister under section 75AZ of the Trade Practices Act 1974 — the latest analysis on the effect of the GST.

Telecommunications competitive safeguards and Telstra's compliance with the price control arrangements — reports to the Minister.

The 'Working in' series — ACCC reports from each State and Territory highlighting the year's activities.

Container stevedoring — report No. 3 to the Minister. \$10

Product safety guide — children's nightwear.

News for business — genetically modified foods.

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