



Australian  
Competition &  
Consumer  
Commission

# Refusal to Deal

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**Important notice.** This booklet is a guide only and should not be taken as legal advice. It is not possible here to explain many of the qualifications that apply to the provisions of the Trade Practices Act.

Contact your nearest ACCC office for more information.  
Addresses are at the back.

# Contents

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<b>This guide</b>	<b>1</b>
<b>What the Act says</b>	<b>1</b>
<b>When refusing to supply is legal</b>	<b>2</b>
<b>Conduct that may be a refusal to deal</b>	<b>3</b>
Agreements (s. 45)	3
Boycotts	4
Primary	4
Secondary	4
Misuse of market power (s. 46)	6
Exclusive dealing (s. 47)	7
Full line forcing	7
Third line forcing	7
Bundling	8
Resale price maintenance (s. 48)	9
Constructive refusal	9
Loss leaders	10
Accepting payment without intending to supply (s. 58)	10
<b>Self help</b>	<b>10</b>
<b>What can the ACCC do?</b>	<b>11</b>
<b>Penalties and remedies</b>	<b>12</b>
<b>Authorisation and notification</b>	<b>13</b>
<b>Competition test</b>	<b>14</b>
<b>ACCC contacts</b>	<b>18</b>



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## This guide

Businesses small and large often complain to the Australian Competition and Consumer Commission that manufacturers or distributors have refused to supply them with goods or services.

They believe that the *Trade Practices Act 1974* gives them an absolute right to be supplied, whatever the circumstances.

Manufacturers and distributors also ask about their obligations in relation to whom they have to supply, and when.

The answer is the same in both circumstances.

**In general, businesses may decide for themselves with whom they wish to deal. No one has an absolute right to be supplied.**

There are a few circumstances only in which a refusal to deal is illegal under the Act. These are dealt with in the following pages.

## What the Act says

The Trade Practices Act is fundamentally concerned with preventing anti-competitive conduct and providing appropriate safeguards for consumers.

Whether or not a refusal to deal is a breach of the Act often depends on the effect the refusal has or would have on competition in the market concerned.

There are situations where refusal to deal is prohibited outright, and others in which the prohibition is subject to a competition test.

Some conduct can also be exempted from legal proceedings by the processes of authorisation or notification.

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## When refusing to supply is legal

There may be sound commercial reasons—legal ones—why a customer is refused supply of goods or services.

For example, a wholesaler or manufacturer may find it too costly or inconvenient to sell to people who walk in off the street, or may dislike supplying outlets which are located too close to each other.

Perhaps the supplier believes that a reseller is a bad credit risk, does not promote the goods or services properly or lacks particular skills or expertise relevant to the business.

Or it may purely be a personality clash between the two parties that is causing the problem.

There are legitimate commercial reasons for refusal to supply. But suppliers should not attempt to use one of these as a front for illegal conduct.

Business owners who have been refused supply should look at all the circumstances leading up to the refusal.

### Example

In a previous Federal Court action between a bank and a manufacturing company, the company allegedly took advantage of its market power by refusing to supply equipment until a debt had been paid. The court said there had to be a causal connection between the conduct and the market power in that the conduct was a use of that power.

In this case it was found that the purpose of the conduct was to collect a debt. The judge was satisfied that the refusal to supply was not linked with market power.

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# Conduct that may be a refusal to deal

## Agreements (s. 45)

Agreements involving competitors that involve restricting the supply of goods are prohibited **if they have the purpose or effect** of substantially lessening competition in a market in which the businesses operate.

### Examples

- In December 1995 the Federal Court imposed penalties totalling more than \$20 million on three pre-mixed concrete suppliers and some executives after finding they had engaged in conduct that included market sharing.
- In 1994 three express freight companies were penalised a total exceeding \$20 million. The companies had entered into and put into effect an anti-competitive arrangement or understanding that included reducing the soliciting of each other's customers.

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# Boycotts

## Primary boycotts: agreements that contain an exclusionary provision (s. 45 (2))

Agreements between two or more competitors to refuse to deal, or limit dealings with another supplier or particular customer, or a class of competitor or customer, are known as primary boycotts. They are **illegal**.

A manufacturer may regard a particular distributor as unsuitable (e.g. a poor credit risk or one who does not provide an adequate after-sales service) and refuse to supply its own products, but it cannot seek agreement from other manufacturers to cut off supplies to the distributor.

Neither can two or more competitors threaten or force another firm not to deal with a customer.

## Secondary boycotts (ss. 45D–45EA)

Secondary boycotts are prohibited if **their purpose** is to cause substantial loss or damage to a business, or a substantial lessening of competition in a market.

They generally involve action by two persons engaging in conduct that hinders or prevents a third person from supplying to, or acquiring goods or services from, a fourth person.

Specific provisions cover situations including:

- 45D—conduct causing substantial loss or damage to the fourth person's business
- 45DA—conduct causing a substantial lessening of competition in any market in which the fourth person supplies or acquires goods or services
- 45DB—two persons hindering a third from engaging in trade or commerce involving the movement of goods in and out of Australia



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- 45DC—when two or more members of an organisation engage in conduct with one another, the organisation is taken to be involved unless it can prove otherwise
  - 45DD—permitted boycotts relating to employment, environmental protection or consumer protection matters
  - 45E—contracts, arrangements or understandings that affect the supply or acquisition of goods or services between one person and another where there has been an obligation or established custom to supply or acquire
  - 45EA—a provision giving effect to a contract, arrangement or understanding that contravenes s. 45E.

These descriptions are not exhaustive explanations of the secondary boycott provisions.

As with all the information in this booklet, readers should seek further advice if they think a situation may fit their own.

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## Misuse of market power (s. 46)

A firm with a substantial degree of power in a particular market (by market share or otherwise) cannot take advantage of that power **for the purpose** of damaging other businesses by refusing to deal or by offering to do business on such unrealistic terms that it is tantamount to refusal to deal.

However, this does **not** mean that the supplier has to supply everyone. The onus is on the customer to show that the supplier's action was taken with the purpose of deterring or preventing the business or class of business from entering or competing in that market.

Successful court actions have been mounted for misuse of market power, both by the ACCC and private litigants.

Provisions against misuse of market power also extend to companies involved in trans-Tasman trade, whether based in Australia or New Zealand. Australian legal proceedings can take place in New Zealand and vice versa.

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## Exclusive dealing (s. 47)

Broadly speaking, exclusive dealing involves one person trading with another imposing restrictions on with whom, or in what, that person can deal. There are two types of exclusive dealing: full line forcing and third line forcing.

### Full line forcing

If it would result in a substantial lessening of competition in the relevant market, a supplier could not refuse to supply goods or services because the intending purchaser will not agree to:

- refuse to buy, or limit the amount of goods or services it buys, from a competitor of the supplier
- refuse to resupply, or resupply to a limited extent, goods to particular persons or a particular class of person or in a particular place or places.

Small businesses often complain to the ACCC about what they see as the anti-competitive effect of restrictions that shopping centre leases place on their product ranges. However, it is unlikely that such restrictions would **substantially lessen** competition as the existence of the shopping centre is itself likely to increase the **overall** range of products available in competition with other shopping centres.

### Third line forcing

Third line forcing is a specific form of exclusive dealing **prohibited** by the Act. It is not subject to the substantial lessening of competition test.

It involves either the supply of goods or services on condition that the purchaser buys goods or services from a particular third party, or a refusal to supply because the purchaser will not agree to that condition.

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For example, it would be illegal for a finance company to make a loan conditional on the borrower buying cover from a specific insurance company.

Property lease agreements that have a similar effect are also prohibited.

### Example

In June 1995 the ACCC succeeded in an action against a Sydney car dealer and its finance manager when the court found that the company had been offering special deals on the condition that buyers obtained finance through its preferred credit provider.

## Bundling

It can be difficult to determine whether selling two distinct goods or services together as one (commonly known as bundling) contravenes the third line forcing provisions of the Act. It is, perhaps, best illustrated by a High Court example.

### Example

A hotel in North Queensland ordered beer from a Brisbane brewery and it was delivered by a transport company nominated by the brewery. The brewery refused to supply the beer unless the hotel accepted it delivered to the door.

In other words, the brewery bundled the beer and delivery and supplied one product, delivered beer.

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The brewery's refusal to supply was challenged in the High Court with the court ruling in its favour.

However, in its judgment the court said:

... to successfully determine whether conduct does fall within s. 47(6) or (7) will depend on making an accurate analysis of the arrangements which are in issue ...

## Resale price maintenance (s. 48)

Resale price maintenance is **illegal**. Suppliers (including manufacturers and wholesalers) cannot specify to resellers a **minimum** price below which goods or services cannot be resold or advertised for resale.

A supplier may **recommend** an appropriate price but cannot force resellers—by refusing or threatening to refuse supply—to stop charging or advertising below that price or from advertising discounts.

### Example

- The Federal Court imposed penalties totalling \$3.5 million on a petrol company for its participation in Victorian price fixing and resale price arrangements. An employee was penalised a total of \$100 000.

Buyers can commit an offence if they pressure suppliers not to supply a discounter—this can induce others to breach the law.

## Constructive refusal

A constructive refusal is when a supplier offers to do business on such unrealistic terms that it is tantamount to a refusal to deal.

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## Loss leaders

Loss leader selling is selling particular goods or resupplying services below cost to promote business or to attract customers who are likely to buy other goods or services.

Suppliers are entitled to withhold goods from a person who has sold their goods in this way within the previous 12 months except for when:

- resellers engage in loss leader selling for a genuine seasonal or clearance sale (if the goods weren't bought specifically for the purpose of loss leading)
- the supplier consents to the sale.

## Accepting payment without intending to supply (s. 58)

It is a breach of s. 58 of the Act to accept payment where there is no intention to supply.

Section 58 falls in Part V of the Act. It is not subject to the competition test and the penalties and remedies are those that apply to Part V.

## Self help

If you think that any of the discussed situations fits yours, the first step should be to approach the supplier to discuss the reason for the refusal. Perhaps changes can be made which would satisfy the supplier's requirements.

For example, some guarantee of a credit rating could be given or steps taken to improve store presentation.

Trade associations or industry bodies may be able to help by suggesting improvements to marketing strategies or acting as an arbitrator to settle disputes.

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It may even be more practical for the reseller to shop around for another source of supply. An alternative supplier may be able to offer a better deal.

However, if these approaches are unsuccessful, and the refusal to deal falls into one of the illegal categories, then the business affected can take its own court action or complain to the ACCC.

## What can the ACCC do?

If self help doesn't solve the problem and you decide to make a complaint to the ACCC, it will need as much information and documentary evidence as possible to support an allegation that a supplier has contravened the Act.

When considering whether to take action, the ACCC must give prime importance to promoting competition in the particular market as a whole. It will look at all relevant information, including matters which may not be directly related to the complaint.

It will then decide whether to try to resolve the matter by talking to the supplier, accepting enforceable undertakings or by instituting proceedings in the Federal Court.

While the ACCC can get orders restoring supply or stopping the illegal conduct, it cannot always seek damages for the complainant.

If the ACCC successfully proves a breach of the Act the court may hand down penalties. Affected businesses can bring a 'coat tails' action in the court for damages.

If the ACCC institutes court proceedings, the complainant is likely to be required to give evidence.

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## Penalties and remedies

Various penalties and remedies are available in the Federal Court for breaches of the Act.

Breaches of the restrictive trade practices provisions (aside from the boycott provisions) by companies may result in penalties of up to the greatest of:

- \$10 million or
- where the value of the illegal benefit can be ascertained, three times the value of the illegal gain or
- where the value of the illegal benefit cannot be ascertained, 10 per cent of the turnover in the preceding 12 months.

Breaches of the boycott provisions may attract penalties of up to \$750 000. Breaches by individuals of any of the anti-competitive conduct sections may result in penalties of up to \$500 000.

In addition the court may impose other orders, such as:

- injunctions
- damages
- ancillary orders including specific performance, rescission and variation of contracts, damages, and provision of repairs and spare parts.

The ACCC has the power to seek monetary penalties, injunctions or divestiture. Individuals and corporations may, through private action, seek injunctions, damages and divestiture.



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# Authorisation and notification

Some anti-competitive conduct may be permitted if there are public benefits which offset the detriments.

## Authorisation

The authorisation process within the Act provides for immunity from court action for some restrictive practices that could otherwise breach the Act, if they can be shown to have public benefit. Parties to the arrangement must apply to the ACCC. However, immunity does not operate until authorisation has been granted.

Authorisation is available for anti-competitive agreements, primary boycotts, secondary boycotts, exclusive dealing including third line forcing, and resale price maintenance. It is not available for misuse of market power.

## Notification

An exclusive dealing arrangement, including third line forcing, can also gain immunity from court action if the supplier lodges notification of the arrangement with the ACCC.

This immunity operates from the date of lodgment. However, the ACCC can remove the immunity if it decides that benefit to the public does not outweigh any lessening of competition in the relevant market.

Similarly, the ACCC can allow certain small business collective bargaining arrangements. If the ACCC does not object within a certain timeframe, the arrangement is taken to be allowed.

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For more information regarding collective bargaining, see the ACCC's *Guide to collective bargaining notifications*.

This publication is available from the ACCC Infocentre or the ACCC website.

## Competition test

It is impossible in a publication of this size to give more than an indication of what factors are considered when the ACCC looks at the effect conduct has on competition in a market.

For those who are interested, ACCC publications such as its merger and misuse of market power guides give more detail.

However, the following gives an indication of how the ACCC assesses a situation.

Often, situations are not clear cut and depend on what effect the refusal to deal has, or would have, on competition in the market concerned.

Say, for example, a firm will supply a reseller only on condition that it does not also buy from a competitor or does not sell outside a certain territory.

Such arrangements are quite common and often have very little effect on the general level of competition, although they may adversely affect a particular business that is refused supply.

New entrants to markets sometimes enter into an exclusive dealing arrangement with a supplier or retailer to attract a dedicated and motivated distributor base. Such arrangements can be pro-competitive.

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## Assessing whether competition has been substantially lessened by a refusal to deal

It is not enough merely to show that an individual business has been damaged. The wider market for a particular product must be considered.

For example, take the case of a manufacturer or distributor who refuses to supply a reseller who won't give an undertaking not to buy competing products.

Put simply, in that situation you would have to look at the overall market for the particular product (and its substitutes) and decide whether or not the refusal would severely restrict availability of that type of product to consumers.

When territorial restrictions have been imposed as a condition of supply, you need to assess whether consumers are severely restricted in their ability to buy a product or its substitutes **within** the territory.

As a general guide, the more unique or special the product, and the more powerful the supplier, the more likely it is that competition will be affected.

## Factors that could affect competition

The courts consider a number of factors when determining the level of competition in a market. They include:

- the number, size and distribution of buyers and sellers, and especially the degree of market concentration
- the height of the barriers to entry, that is the ease of importing products and the ease with which new firms can enter and secure a place in a viable market
- the extent to which the products in the market can be characterised by extreme product differentiation and sales promotion

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- the character and the extent of the vertical relationships between the customers and suppliers
  - the nature of the stable, formal and fundamental arrangements between the firms which restrict their ability to function as independent entities.

## **How to define a market**

In the Act, 'market' is defined as a market in Australia for goods or services that could be substituted by, or are competitive with, other goods or services.

Both demand- and supply-side substitution must be taken into account in determining the relevant market. Substitution possibilities must be considered in three dimensions:

- product (substitute or near substitute products)
- geographic (limits on degree to which customers will travel or products can be supplied over)
- functional (such as retail, wholesale and manufacturing).

Markets should also be considered within a timeframe—over a longer timeframe substitution possibilities will usually be expanded.

An alternative method for defining a market is to look at the nature and extent of competitive constraints on a particular firm from that firm's point of view.



## ACCC contacts

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Infocentre **1300 302 502**

Small business helpline

**1300 302 021**

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

For other business information  
go to **[www.business.gov.au](http://www.business.gov.au)**.