



Australian  
Competition &  
Consumer  
Commission

## NEWS FOR BUSINESS



### Price fixing

'Price fixing' is one of the most common issues raised by callers to the ACCC Infocentre. Often businesses seem to have identical pricing for goods. Surely that must be illegal, these guys are supposed to be competing against each other!

### What is price fixing?

When businesses that are supposed to be competing agree with each other to set or maintain prices at a certain level, this is called price fixing. This does not have to be a formal arrangement set out in writing—a simple 'nod and wink' down at the local pub can be enough. Similarly, there does not have to be a specific price set.

Price fixing is one of the most misunderstood areas of trade practices law. The *Trade Practices Act 1974* contains provisions which prevent price fixing by targeting the cause—collusion. In essence, price fixing is about businesses colluding rather than competing.

## What does the law say?

There are two main sections of the Trade Practices Act relevant to price fixing.

Section 45 outlaws contracts, arrangements and understandings which restrict dealings or affect competition. In essence, it bars businesses from making agreements with their competitors that would substantially lessen competition. These agreements need not be concerned with price setting. Market sharing, boycotts and 'bid rigging' (agreeing on tenders) may all be captured by this section.

It is important to note that, in general, for arrangements to breach this section they must have the purpose or likely effect of 'substantially lessening competition'—if not, then they will not breach the section.

However, s. 45A adds that contracts, arrangements and understandings in relation to price will automatically be taken to have the purpose or effect of substantially lessening competition. In effect, price fixing arrangements become 'per se' breaches, that is, automatically illegal under s. 45 of the Act.

Price fixing 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 by individuals may result in penalties of up to \$500 000

Parties who have suffered loss or damage as a result of the conduct may also be able to apply to the court for compensation.

The ACCC can allow price fixing arrangements when the public benefit of the agreement outweighs the public detriment.

## What are the elements of a price fixing arrangement?

There are a few key elements which must be present to prove that a price fixing arrangement exists:

- a contract, arrangement or understanding between businesses
  - which are in competition with each other
- a provision of which has the purpose or likely effect of
  - fixing, controlling or maintaining prices.

When **all** of these elements exist, there may be a breach of the Act.

### Contract, arrangement or understanding

While the concept of a contract is relatively straightforward, those of arrangements and understandings can be much more subtle. In essence, they describe a plan between two or more people which is generally less concrete than a formal contract.

To prove there is an arrangement or understanding between parties, it is necessary to show that they arrived at the same conclusion—that there was a 'meeting of minds'. If only one of the parties intended to engage in the conduct, it will generally not meet the required threshold. There must be a consensus between the parties.

It is this requirement for consensus that results in much confusion. Just because two parties act in parallel does not necessarily mean that they are in collusion.

### Price leadership

A common example of parallel conduct is 'price leadership' when one business sets a price and competitors subsequently set the same price. This is often raised in relation to petrol stations.

Price leadership will not breach the Act, as there has been no agreement between the parties. One business has simply chosen to follow the lead of another. As a result, there was no requisite 'meeting of minds' between the parties, even if one business consciously chose to follow the prices set by another.

### Purpose or likely effect

The term 'purpose' does not have a fixed meaning under the Act. In previous cases, it has been taken to be both subjective (what the parties were thinking) and objective (what a dispassionate onlooker would infer from the situation). Purpose means the effect that is sought (rather than the motive).

Additionally, it is the purpose of the **provision** in question which is important, not the purpose of the entire contract or arrangement. If the provision was included for the substantial purpose of fixing, controlling or maintaining prices, then the fact that there may be a legitimate purpose for the entire contract or arrangement will not prevent a breach of the Act.

## Fixing, controlling or maintaining prices

Parties do not need to agree on a particular price to breach the section. Any provision which substantially affects price competition may be deemed to have this purpose. This might include:

- agreeing on a specific price
- agreeing on a formula to calculate prices, such as a set 'mark up' on trade prices, or a set amount under/over recommended retail price (RRP)
- agreeing to raise/lower prices by a certain amount
- a schedule of fees to charge.

However, genuine 'RRP' suggestions are specifically exempt, as long as they are simply recommendations and do not have the purpose of attempting to fix prices.

## Businesses in competition with each other

Finally, it must be demonstrated that the businesses in question are (or should be) in competition with one another. This is known as a 'horizontal arrangement', where the businesses all operate at the same functional level, be it manufacturing, wholesale or retail.

As a result of this requirement, genuine joint ventures (including joint buying or selling groups) will be excluded. The Act recognises that joint buying/selling can hold many advantages for businesses (particularly small business), and contains provisions specifically exempting them from the prohibition against price fixing, as long as the agreements in question relate to the collectively acquired goods.

However, it is important to note that this exemption applies only to s. 45A. If it is shown that the activities of the joint buying/selling group have the purpose or effect of substantially lessening competition, they may still breach s. 45.

Following a complaint by the owner of a small service station, the ACCC investigated price fixing cartels in the Victorian City of Ballarat. The ACCC alleged the respondents were involved in the distribution, or retailing, of petrol in the Ballarat area under the Swift, Apco, Mobil, BP, Shell and Ampol/Caltex brands and that they were part of a long-standing price-fixing arrangement between distributors and retailers of petrol.

Following Federal Court action by the ACCC, the court found that a price fixing arrangement had existed between a number of businesses and individuals in the city, who represented over 90 per cent of the petrol stations in the area. The effect of the agreement was to raise the prices between 4 cents and 10 cents per litre for significant periods of time. The arrangements had been present in one form or another since the early 1990s.

The court ordered penalties totalling \$23.305 million against the parties participating in the scheme.

The court also declared the conduct in breach of the Act and ordered injunctions against the parties, prohibiting them from communicating to or obtaining from competitors the retail price of fuel for a period of four years, and ordered that the respondents pay the ACCC's costs.

*ACCC v Leahy Petroleum [2004]  
FCA 1678*

## Price fixing or resale price maintenance?

Many complaints received by the ACCC regarding 'price fixing' actually concern resale price maintenance. The two offences are closely related. However, they concern two different business relationships.

Price fixing is a **horizontal** agreement between competitors to set prices at some level. Resale price maintenance is a **vertical** agreement between a supplier and a reseller. The important difference is the functional levels of the parties involved. In a price fixing arrangement the companies will be (or should be) competing against each other, as opposed to a supply arrangement.

For further information about agreements between businesses functioning on different levels, please see the ACCC's *News for business: resale price maintenance*.

Recently, the ACCC received an anonymous tip that six companies were involved in price fixing and bid rigging in the market for power and distribution transformers, including all main manufacturers and suppliers in both markets. The transformers are an essential part of the Australian energy infrastructure, with the market in Australia estimated to be worth approximately \$100 million per year.

Following action by the ACCC, the Federal Court found that there was extensive market sharing and price fixing cartel conduct in the market for distribution transformers from 1993 until 1999.

The court imposed penalties totalling over \$35 million for price fixing and market sharing in the markets for power and distribution transformers. Senior executives involved in the conduct were penalised a total of over \$1 million.

*Australian Competition & Consumer Commission v ABB Power Transmission Pty Ltd [2004]  
FCA 819*

## How can I avoid price fixing?

There are a number of steps that your business can take to avoid engaging in price fixing. Perhaps the most important is the step that you have already taken—reading this *News for business* and **knowing the law!** The ACCC has a wide range of guides to the Act, specifically written for small business, which discuss your rights and responsibilities. These can be obtained free of charge from the ACCC website at [www.accc.gov.au](http://www.accc.gov.au), or by calling the ACCC Infocentre on 1300 302 502.

One of the most obvious ways to avoid price fixing allegations is to ensure that you **don't discuss pricing with competitors**. Even a friendly chat over a few schooners at your local could lead to claims of price fixing! Avoiding the topic of pricing can go a long way to prevent illegal conduct, even if the discussions were intended to be entirely innocent.

To avoid allegations of price fixing, resale price maintenance and other prohibited conduct **always set your prices independently**. This doesn't mean that you have to ignore the rest of the market or prevailing commercial conditions, just that you should not let outside parties set your prices—particularly when you are supposed to compete with one another.

If you think that a contract or arrangement you are involved in (or considering) might breach the law, **seek professional advice**. As detailed above, the penalties for price fixing are significant (up to \$10 million at present). If it turns out that an arrangement you are considering might breach the Act, you can still apply to the ACCC to have the conduct allowed if there are public benefits.

## Where can I get more information?

The ACCC receives many calls each day regarding pricing issues—this *News for business* outlines some of the more commonly encountered questions and situations. If you require further information regarding price fixing, contact the ACCC Infocentre on 1300 302 502 or consult a legal professional.

The ACCC also has a wide range of publications available to assist businesses understand their rights and obligations under the Trade Practices Act, including:

- *Small business and the Trade Practices Act* (free)
- *Advertising and selling* (\$10)
- *Advertising and selling—CD ROM and video* (\$10 each)
- *A small business guide to unconscionable conduct* (free)

Publications can be ordered through the ACCC Infocentre or you can download electronic copies for free from the ACCC website: [www.accc.gov.au](http://www.accc.gov.au).

## ACCC contacts

ACCC Infocentre  
1300 302 502

Small business helpline  
1300 302 021

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

## Important notice

The information in this *News for business* is for general guidance only. It reflects the ACCC's views on what is required to comply with certain provisions of the Act. It does not constitute legal advice and should not be relied on as a statement of the law relating to the Act. You should obtain legal advice if there is doubt about whether any conduct may breach the Act.

Other federal or state-based laws may impose additional requirements or responsibilities on your businesses when dealing with other businesses or consumers, beyond the requirements of the *Trade Practices Act 1974*.

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