



Australian  
Competition &  
Consumer  
Commission

# Industry associations, competition and consumers



Australian Competition and Consumer Commission  
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# Foreword



Industry associations play an important role in providing a voice for individual businesses. They not only provide educational support—and, frequently, set and maintain standards which benefit businesses and consumers—but also advocate the interests of their members to government and other key bodies.

When working together, industry associations and their members must be mindful of their obligations under the *Competition and Consumer Act 2010* (the Act). The Australian Competition and Consumer Commission (ACCC) has a role in ensuring that industry associations provide maximum benefits to their members, the broader business

community and consumers, and does this by enforcing the Act.

The Act contains a number of provisions that prohibit anti-competitive conduct and promote consumer protection. It is important that the self-regulation mechanisms, education standards and member rules do not unduly restrict existing or potential members, and that association policies and codes of conduct comply with the consumer protection rules.

The competition and consumer protection provisions of the Act are also available to businesses and industry associations if they feel that their competitors are acting in a manner which may breach the Act and this adversely impacts on them.

This publication explains the provisions of the Act most likely to impact on the operation of industry associations and provides an overview of the issues which members often seek guidance on. Most importantly, this publication outlines simple steps that associations can take to minimise the likelihood of breaching the Act, so that they can focus on their main role of supporting their members.

The ACCC has developed this guide with the assistance of a number of industry, business and trade associations, and I would like to both acknowledge and thank those who have assisted the ACCC in this process for their invaluable contributions.

A handwritten signature in black ink, appearing to read 'M Schaper', written in a cursive style.

Dr Michael Schaper  
Deputy Chairman



# Contents

<b>Foreword</b>	<b>iii</b>
<b>Introduction</b>	<b>1</b>
<i>The Competition and Consumer Act 2010</i>	2
<b>1 Industry associations' rights and obligations</b>	<b>3</b>
Self-regulation	3
Member compliance and education	8
<b>2 Members' obligations</b>	<b>10</b>
Dealing with fellow members—the competition rules	11
Dealing with consumers	16
<b>3 Group action by association members: collective bargaining, notifications and authorisations</b>	<b>21</b>
Notification	22
Authorisation	23
<b>4 Other considerations under the Competition and Consumer Act</b>	<b>24</b>
Unconscionable conduct	25
Business scams	26
<b>5 How can the ACCC help my association?</b>	<b>28</b>
<b>6 Frequently asked questions and further information</b>	<b>30</b>

# Introduction



Industry associations bring together individual businesses within an industry to form a body that represents and acts in the collective interests of its members. Membership often requires businesses to comply with certain standards and rules that promote ethical behaviour and maintain quality.

Associations advocate on behalf of members to government and other key organisations and also provide education for members on relevant laws—including the Act.

While sharing information and discussing issues with other association members may be undertaken for legitimate reasons, such as setting best practice standards or compiling industry data, the structure of industry associations—a collective group of competitors—places them and their members at risk of breaching the Act's rules prohibiting collusive behaviour.

In order to ensure they do not breach the Act, associations should be careful not to impede competition by imposing rules about membership, industry standards and other types of conduct that are overly restrictive. Members must not use the association network and meetings as an opportunity and venue to make anti-competitive agreements—such as those relating to cartel conduct by way of price fixing, output restrictions, market sharing or bid rigging.

# The *Competition and Consumer Act 2010*

The purpose of the Act is to promote fair and efficient competition for businesses and to provide protection for consumers. To achieve this, the Act confers rights and obligations on businesses in their dealings with each other, and on their dealings with consumers. The Act also allows for certain types of anti-competitive conduct to be authorised where this is deemed to be in the public interest. It also provides for the regulation of certain industries.

The parts of the Act that are most relevant to industry associations are the provisions dealing with anti-competitive conduct (contained in Part IV) and consumer protection (contained in the Australian Consumer Law (ACL), which is a schedule to the Act).

The Act also gives businesses and industry associations a right of private action if they have been adversely affected by any conduct which may breach the Act. The ACCC has the power to take action against businesses or industry associations where there is strong evidence that the business or association has breached a provision of the Act. However, the ACCC does not have a broad power to force businesses to comply with the law.

If court action is taken against a business or association, there are a range of penalties that the Federal Court may impose where it finds there has been a breach of the Act. These are dependent on the nature of the conduct that has been engaged in. Breaches of the competition rules attract the most significant consequences—for example, a civil penalty of \$10 million or three times the total financial gains made by the cartel. An individual found to have been involved in cartel conduct may be sentenced to a term of imprisonment of up to 10 years.

Penalties for breaches of the ACL are also substantial—for example, criminal fines, civil pecuniary penalties, disqualification orders which disqualify an individual from company directorship and corrective advertising.

*Industry associations, competition and consumers* tells you about the application of the Act in relation to key activities such as:

- self-regulation
- rules and codes of conduct
- recommended price lists
- advertising restrictions
- membership restrictions
- member compliance.

It also looks at issues your members may want to know about including:

- cartel conduct
- other collusive behaviour
- dealings with consumers
- unconscionable conduct
- unfair contract terms
- business scams
- authorisations and notifications.

# 1 Industry associations' rights and obligations



## Self-regulation

Many industry associations apply their own standards that promote quality, consistency and ethics—usually through association rules or codes of conduct. Breaches of these obligations often attract sanctions and provide recourse for affected consumers. While industry associations have their own sanctions, the practices of an association, including their policies or codes, are still subject to the law—including the Act.

Industry associations should take particular care when imposing restrictions on members or membership to avoid engaging in anti-competitive conduct. Common situations where industry associations impose restrictions on members and membership are outlined below.



## Association rules and codes of conduct

An association is entitled to make rules regarding member behaviour and impose sanctions if the standards are not met. Many industry bodies do this by requiring that members comply with a code of conduct that is drafted and enforced by the association. These are known as voluntary codes of conduct. They can deliver increased protection for consumers and reduce the regulatory burden for members if they are used correctly.

Associations must ensure that their codes of conduct are well designed, effectively implemented and properly enforced. The ACCC can provide information about developing voluntary codes, but associations should also consider seeking professional advice about possible issues arising out of the operation of their code of conduct.

Association rules may benefit members not only by assisting with broader compliance but also by giving their business added credibility through an affiliation with the association. The regulation and enforcement of association rules also ensures that the entire industry's reputation remains intact. For example, it is common for association rules to regulate members' dealings with their clients where their conduct may reflect on the industry (and association) more broadly.

Association rules and codes of conduct also benefit consumers by providing a trusted and reputable body which oversees the conduct of a business, and an avenue for recourse in the first instance should a dispute arise with a member. The ACCC is generally supportive of association rules that can be shown to have a benefit to consumers.

However, industry associations must ensure that the rules are transparent, do not relate to pricing policies and that any disciplinary procedures are not exclusionary in any way—that is, they do not restrict and reduce competition in the industry. Associations cannot make rules that breach the Act and the ACCC has previously taken action against associations that do so.

**EG:** The industry association for Tasmanian Atlantic salmon growers facilitated an agreement with farmers (including Tassal Ltd) to cull 10 per cent of their salmon stocks in 2002. The intention of the cull was to limit the amount of salmon available for sale in 2002–03, reducing the scope for any price reductions caused by supply exceeding demand.

The association sought legal advice, which indicated that this would not raise any competition concerns; however, this advice was based on a misunderstanding of facts. One farmer, Tassal Ltd, subsequently culled 70 tonnes of salmon, giving effect to the agreement.

This type of behaviour raises competition concerns as it is illegal for competitors to make an agreement that has the purpose or effect of controlling output and therefore the price of goods or services. The ACCC contacted the association, and the conduct stopped after they obtained separate legal advice.

The Federal Court declared that culling the fish had the likely effect of controlling prices through reducing any consumer benefit from increased (or over) production.

*Key points on rules and codes of conduct:*

- Ensure association rules and codes of conduct are transparent.
- Ensure association rules do not relate to pricing.
- Ensure any disciplinary procedures relating to breaches of the rules or code are reasonable and not exclusionary in any way.

## Restrictions on association membership

In many industries, people need to obtain certain qualifications or skills to be able to carry out their activities or trade to a requisite standard. For this reason it is often necessary for associations to ensure that their members are suitably qualified and to limit membership to people who have fulfilled these prerequisites, as this protects the interests of consumers, other members and the industry more generally.

However, while industry associations may impose minimum membership requirements, they should ensure that they are *reasonable* and not so onerous that they create a barrier to entry in that field. A barrier to entry is the imposition of restrictions or qualifications that are so high they are unreasonable and heavily restrict entry into the industry, thereby limiting competition within the market.

Membership requirements should be clear and transparent and applied in a consistent and equitable manner to all potential members, with an appeals process available for those who are denied entry. The association should be able to substantiate the reasons for the imposition of these rules, which should be for the genuine purpose of maintaining the quality of the products and services provided. Again, these rules should not be used in an attempt to restrict competition for the benefit of existing members under the pretext of helping consumers.

**EG:** The Royal Australian College of Physicians (RACP) and the Royal Australian and New Zealand College of Radiologists (RANZCR) set and enforce accreditation standards for nuclear medicine practices.

The ACCC expressed concern to these organisations that the standards raised competition concerns through creating artificial boundaries that protected service providers in certain locations by restricting the provision of services through electronic means.

The RACP and RANZCR then reviewed the standards, which had been developed before the technology enabling electronic services providers to operate was available. They made changes to the standards so that the unintended anti-competitive effects were removed.

This matter illustrates that standards should not be applied in such a way that they restrict competition and highlights the need to regularly review standards to ensure they maintain currency as markets and technologies evolve.

#### *Key points on restrictions of membership:*

- Ensure membership rules are transparent and applied equally to all potential members.
- Ensure the reasons for accreditation or qualification requirements can be substantiated.
- Ensure that the rules are not overly restrictive and do not have the effect of limiting competition in an industry.

## Recommended price lists

Any time an association deals with pricing issues—including recommended price lists or fee schedules—it is at risk of engaging in price fixing. All agreements between competitors that fix, control or maintain prices, either directly or indirectly, are illegal. Where an industry association recommends prices for its members, this can often have the effect of price fixing through creating a minimum price that all goods or services are sold at by these competing businesses. Requiring, directly or indirectly, that members follow any pricing guide is likely to breach the Act.

While an association may wish to help its members, particularly new and inexperienced operators, on the issue of pricing, and provide consumers with benchmark price information, the provision of any price needs to be for *information only* and it needs to be clear that *practitioners are free to set their own prices*. An alternative option for an association is to assist members in working out their own profit margins and overhead costs, and therefore their pricing schedule. As the individual costs for each individual business will vary, this may be a practical solution for both parties.

To avoid breaching the price fixing rules, it is important that associations allow members to set their own prices and do not seek to impose any disciplinary action on members for using their own pricing policies.

**EG:** A motor vehicle mechanic association provides a recommended price list to its members for various services, including wheel alignments, basic servicing, tyre changing and also retail products sold by mechanics. When members choose to sell below this price they are advised by the association that if they continue to do this their membership will be terminated.

This type of pricing behaviour by the industry association, i.e. setting and enforcing minimum prices for mechanical services, is likely to amount to price fixing and breach the Act.

#### *Key points on pricing:*

- If you do provide recommended prices, ensure these are strictly for 'information only'.
- Ensure that members understand they must independently determine the prices they charge for their goods or services.
- Do not impose disciplinary action for breaches of association 'pricing policies'.
- Consider providing advice and assistance to your members on how they can calculate and set their own prices, taking into account the costs and needs of their own business, rather than issuing recommended price lists.

## Advertising restrictions

Advertising is another area associations often regulate, to ensure consistency across the industry and that the advertisements themselves comply with the law. While associations want to ensure that consumers are protected from misleading advertising, if the rules are too restrictive they may have the effect of actually reducing the information available to consumers and result in consumers being less informed in their decision making. Placing restrictions on members' advertising also places the association at risk of engaging in anti-competitive conduct.

Industry bodies should ensure that individual members are educated about good advertising practices and how to comply with the law. Any advertising rules applied must be for the genuine purpose of protecting consumers and not unnecessarily limit the information available to them. Restrictions should not be imposed in the guise of protecting consumers when they are ultimately for the purpose of controlling competition and the business activities of association members.

It is important to also keep in mind that there may be a significant information gap between businesses and consumers and that consumers are often heavily reliant on the information provided to them, whether this information is provided through advertising or other means.

**EG:** A beauty therapy association introduces a rule that its members who provide laser hair removal services can no longer advertise using 'before' and 'after' photos.

This rule goes beyond broad requirements which require that any 'before' and 'after' photos must be accurate and not misleading or deceptive, and actually limits the information available to consumers when deciding which service provider to use.

### *Key points on advertising:*

- Educate members about misleading advertising.
- Ensure that any advertising rules are genuinely in the interests of consumers.
- Bear in mind the information gap between businesses and consumers and ensure that consumers are well informed.
- Ensure any rules are not overly restrictive and do not have the effect of limiting competition in an industry.

# Member compliance and education

A key function of an association is to educate its members about the rules on how they should deal with other businesses and with consumers. Associations play an important role in helping businesses work together in a legitimate way for the benefit of members and the association as a whole. However, they also have a responsibility to promote members' compliance with the Act and to minimise the risk of members using the association network and member events for anti-competitive purposes.

Whenever competitors meet, whether formally or informally, there is a risk that this will provide an opportunity for collusion, such as forming an agreement on prices or making market sharing arrangements. Records of all association meetings should be made to record what was discussed, in the event that allegations of anti-competitive conduct are raised at a later date. Associations should also remind members attending these events that collusive behaviour puts both them and the association at serious risk of breaching the Act rules on anti-competitive conduct.

## Unfair contract terms

One of the services that industry associations may provide their members is assistance in developing standard form contracts for use in their businesses. A standard form contract is one that has been prepared by one party to the contract and is not subject to negotiation between the parties—that is, it is offered on a 'take it or leave it' basis. Standard form contracts enable members to contract with consumers without needing to seek legal advice every time they enter into a contract.

The ACL sets out that any unfair term in a standard form consumer contract entered into, varied or renewed on or after 1 July 2010 can be declared void. The contract itself will continue to operate as though the unfair term does not exist, to the extent that the contract is capable of operating without the unfair term.

The ACL defines an unfair contract term as one which:

- causes a significant imbalance in the parties' rights and obligations arising under the contract; and
- is not reasonably necessary to protect the legitimate interests of the business; and
- would cause detriment to another party if it were to be applied or relied on.

In deciding whether a term is unfair, the court must also consider how transparent the term is and the contract as a whole.

The ACCC cannot determine whether a contract term is unfair. Rather, a court may make this decision and declare an unfair term void. An example of a contract term which is likely to be considered unfair is one which allows one party to unilaterally vary the contract, including the type of goods or services to be supplied under the contract.

If the ACCC or a party to a standard form contract is of the view that one of the terms is unfair, they may apply to the Federal Court to declare that term unfair. If a court declares that a term is unfair, a party that seeks to apply or rely on the unfair term will breach the ACL. In such cases the court may grant a remedy such as an injunction or an order to provide redress to parties affected by the conduct.

Associations that provide standard form contracts for their members' use should ensure that the contracts do not contain any terms which a court may deem unfair. This will minimise the risk of a court declaring terms in an industry association's standard form contracts void and will help maintain the reputation of the association and the industry more generally.

## 2 Members' obligations



All businesses must abide by a number of rules. They must comply with:

- any rules of an industry association that they are a member of
- competition rules (Part IV of the Act) in their dealings with other businesses
- consumer protection rules (the ACL) when dealing with consumers.

It is important to remember that compliance with codes of conduct or rules set by an association does not always ensure compliance with the Act. This means that association members must be aware of their individual obligations and the rights and protections afforded by the Act.

# Dealing with fellow members—the competition rules

Any agreements or arrangements made between members of an industry association put them at risk of breaching the competition rules in Part IV of the Act, for which there are serious consequences.

## Cartel conduct

Some of the most important rules in Part IV are those that prohibit cartel conduct. Cartel conduct occurs when businesses agree, whether formally or by way of an understanding reached between them, to act together to reduce genuine competition, through *price fixing*, *market sharing*, *bid rigging* or *restricting output*, instead of competing with each other.

Individuals and businesses will breach the Act if they make an agreement that contains a provision of this type and also if that agreement is put into effect. It is not uncommon for more than one type of cartel arrangement to be used at the same time. The four types of cartel conduct are explained on the following pages.

### Price fixing

Price fixing involves competitors agreeing on prices, or pricing mechanisms, instead of competing with each other. This type of conduct is not limited to the ‘fixing’ of prices but also includes the control or maintenance of prices. The agreement may be in writing but more often takes the form of an informal verbal arrangement.

The agreement between competitors may be about:

- a selling or buying price (but this does not necessarily mean all parties set all prices at the same level)
- a minimum price
- a method for discounting or pricing rebates, allowances or credit terms that relate to supply.

**EG:** The Australian Karting Association (NSW) Inc. and its members agreed at the association’s 2008 annual general meeting to fix minimum prices for the hire of their circuits by non-members of the association.

The Federal Court declared that the association and its members had engaged in price fixing in breach of the Act and ordered that the association pay a \$10 000 penalty and implement a compliance program.

*What all businesses must know:*

- Avoid discussions and, most importantly, agreements with competitors about prices.
- Take care to ensure that prices are set independently.



## Market sharing

When competitors agree to divide or allocate consumers, suppliers or territories between themselves, they are engaging in market sharing. This conduct is prohibited as it results in businesses sheltering from competition and denying consumers the benefit of choice.

Such actions include:

- allocating consumers by geographic area
- dividing contracts within an area
- agreeing not to compete for established consumers
- agreeing not to produce each others' products or services
- agreeing not to expand into a competitor's market.

**EG:** Barton Mines Corporation and Barton International Inc. entered into a market sharing arrangement which restricted each other from supplying alluvial garnet in certain geographical areas.

The two companies gave effect to this agreement by informing distributors of the agreement and referring consumers where they fell into the other's allocated territory.

The Federal Court declared that the two companies breached the Act and ordered them to pay penalties totalling \$1.525 million.

*What all businesses must know:*

- Agreements between competitors to divide or allocate any consumers, suppliers or territories are prohibited.
- Markets should operate freely, and should be driven by competition, not agreements between competitors.

## Bid rigging

Where competitors agree to ensure that bids for a tender are submitted (or withheld) in a particular way, they are engaging in bid rigging. This type of conduct is also known as collusive tendering. It breaches the cartel provisions of the Act as it interferes with the genuine bidding process, often fixing the outcome so that a particular business is able to obtain the jobs it wants through providing the most attractive tender.

While collusive tendering is prohibited, there is an exception to the cartel offences and civil penalty provisions for joint ventures. In summary, businesses claiming the joint venture exception must ensure that the portion of their agreement that contains a cartel provision is contained in a contract. They also need to ensure that the joint venture is for joint production or supply. The joint venture defence to the cartel provisions is a complex legal area and any parties contemplating a joint venture which may otherwise breach the cartel provisions should seek legal advice in advance.

There are a number of different types of bid rigging behaviour to be aware of and avoid.

These include:

- Cover bidding—where competitors agree that one member of the group will ‘win’ the tender, as all the other competitors agree to bid over a certain amount.
- Bid suppression—where one or more competitors agree not to submit a tender.
- Bid withdrawal—where a business withdraws a winning bid so another will be successful.
- Bid rotation—where businesses agree to take turns at winning tenders so that each business receives an equal amount of jobs.
- Non-conforming bids—where one or more competitors deliberately include unacceptable terms and conditions so that their tender will be excluded and another will be successful.

**EG:** Admiral Mechanical Services Pty Ltd, Direct Engineering Pty Ltd, Envar Engineers and Contractors Pty Ltd, and Scott Mechanical Services Pty Ltd agreed between them to rig bids for public and private tenders for the supply and installation of air conditioning and mechanical services on major construction projects in Western Australia.

The conduct was engaged in through the provision and acceptance of ‘cover prices’. Cover pricing involves one company colluding with another during the tender process to obtain a price that is intended to be too high to win the contract for the project on price alone. The company then submits this price as a genuine tender.

The Federal Court declared that the companies had engaged in price fixing and other cartel conduct and imposed a total of \$9.2 million in pecuniary penalties. The court also declared that six individuals were directly or indirectly knowingly concerned in, or party to, the conduct.

*What all businesses must know:*

- Do not make any agreements with your competitors about how you will tender for bids.
- Make sure that when you do submit a tender you do this completely independently, to enable the business or government body concerned to make a genuine decision about who should win that job.
- The joint venture defence to the Act’s cartel provisions is complex, and legal advice should be sought by anyone considering a joint venture that may otherwise breach the cartel provisions.

## Output restrictions

This occurs when competitors agree to prevent, restrict or limit the supply of goods and/or services, with the purpose or effect of driving the price of these items higher due to their lack of availability. While an individual business can make a legitimate decision to do this for its own reasons, the cartel rules are breached where a coordinated agreement is made between businesses to collectively control the supply of goods or services. This type of behaviour reduces competition and increases the price of the product or service, to the detriment of consumers.

**EG:** A number of pearl cultivators in a small geographic region have regular meetings to discuss the output of each of their businesses. At one of these meetings the cultivators agree that the best way to maximise profits—and to increase the value of Australian pearls—is to only cultivate a specific number each year.

In this example the pearl cultivators are likely to have breached the Act by entering into an anti-competitive agreement which limits the output of pearls.

*What all businesses must know:*

- Do not make any agreements with your competitors about controlling (including limiting) the supply of goods or services to consumers.
- Any decision to limit the output of your business—for example, by supplying only a small amount of a product—must be made independently.

## Boycotts—exclusionary agreements with your competitors

Businesses are generally free to choose who they wish to deal with, and on what terms and conditions. However, if an agreement is made between competitors that prevents, restricts or limits dealings with an individual supplier or consumer, or group of suppliers or consumers, those competitors are engaging in exclusionary behaviour in breach of the Act. This also applies where one business attempts to induce other businesses to enter into such an agreement.

These types of arrangements, also known as primary boycotts, are prohibited by the competition rules as they usually substantially lessen competition. However, they are permissible in certain circumstances, such as where they are for the purposes of a joint venture. It is advisable to seek legal advice if you wish to confirm whether the joint venture defence applies to a particular arrangement or agreement.

The Act also prohibits secondary boycotts if they are engaged in for the purpose and would have, or are likely to have, the effect of causing substantial loss or damage to a business or competitor. As the name suggests, a secondary boycott could, for example, involve conduct by two businesses to hinder or prevent another business from supplying to, or acquiring goods or services from, a fourth person.

**EG:** A number of abalone suppliers made an arrangement for the supply and pricing of abalone. This arrangement was carried out by a company formed by these suppliers exclusively for this anti-competitive purpose.

The arrangement stipulated that processors would only be supplied if they were nominated by the company and agreed to pay a premium on top of the market price.

This type of conduct raises concerns as it is an exclusionary agreement between competitors, harms competition for abalone supply, and involves the fixing of prices.

The parties admitted the breaches and submitted agreed penalties of \$927 500 to the Federal Court.

*What all businesses must know:*

- Do not make boycott agreements with your competitors for the purpose of preventing, restricting or limiting your dealings with suppliers or consumers.
- Do not attempt to induce anyone to limit their dealings with other businesses.
- Set the terms and conditions of your agreements with suppliers and consumers independently, while taking care that they comply with the Act more broadly.

## Agreements to deal exclusively

Exclusive dealing arrangements involve the imposition of limitations by one business on the supply or acquisition of products or services by another business or consumer. These limitations often take the form of restrictive anti-competitive conditions. While a business is, of course, able to decide who it would like to do business with, including who it will use as a supplier, it is illegal for one party to impose certain types of restrictions on the other. It is also illegal to refuse to supply or acquire, or cease supplying or acquiring, goods or services from a business because that business has not accepted the restrictions.

The types of arrangements that involve exclusive dealing are where a business:

- supplies goods or services on the condition that the purchaser does not acquire items from a competitor
- only acquires goods or services on the condition that the supplier accepts restrictions on supplying third party businesses
- supplies goods or services on the condition that the purchaser acquires other goods or services from a third party. This, also known as third line forcing, is strictly prohibited by the competition rules.

Some of these types of conduct require a substantial lessening of competition to occur if they are to be considered a breach of the Act. For others, just the existence of the arrangement will be a breach.

**EG:** A supplier of exclusive Italian designer marble bench tops insists that it will only supply a kitchen installation company provided the company does not purchase any other wholesale products from the vendor's competitors. Due to the exclusivity of the marble product this may have the purpose and effect of substantially lessening competition and may amount to exclusive dealing in breach of the Act.

Alternatively, if the Italian designer business will only supply the bench tops on the provision that the acquiring business also purchases tiles from another specific third party business, this would amount to third line forcing which breaches the Act, regardless of whether the conduct substantially lessens competition.

*What all businesses must know:*

- Do not attempt to impose restrictions on your suppliers or consumers in their dealings with other businesses.
- Do not impose a requirement on your suppliers or consumers that they must deal with a specific third party business in order to deal with you.

## Dealing with consumers

The ACL contains a number of rights and obligations that apply to businesses in their dealings with consumers. It is important that industry associations are aware of these obligations and how they will apply to their members' day-to-day operations, as industry associations are often called on to assist members to assess whether their business policies and advertising meet the requirements of the ACL.

Some of the most important rules on dealings with consumers are outlined below.

### Misleading and deceptive conduct

Misleading and deceptive conduct—whether that conduct actually misleads consumers or is merely likely to mislead them—is prohibited. Generally this type of conduct involves leading someone into error.

It includes behaviour such as:

- lying
- leading someone to a wrong conclusion
- creating a false impression
- leaving out (or hiding) important information
- making false or inaccurate claims.

It is irrelevant whether these are done intentionally or not. A business can break the rules by both deliberate and inadvertent actions.

When advertising goods or services, businesses need to consider the overall impression that the advertisement gives the audience. It should be accurate and contain all essential information. The same applies when negotiating or dealing with consumers directly, or in any other way. Any representations made in business must be accurate and able to be substantiated. Businesses should also remember that there will always be varying levels of knowledge among your consumers, which means that an advertisement that is clear to some may still mislead others.

**EG:** **Pick** the tiles, **Pay** their cost, and we will **Lay** them for you free of charge!

When the consumer goes to purchase the advertised item, they are informed that there is a 12-month waiting period to have the tiles laid and a \$200 labour fee applies.

This advertisement is likely to mislead consumers as it does not outline the waiting period, or that a \$200 fee applies, meaning that the tiles are not in fact laid for free.

## Misrepresentations

A misrepresentation is where something is conveyed to consumers that is not correct or is contrary to fact. This may be through the use of, for example, pictures, words or statements.

The ACL prohibits a range of misrepresentations in relation to specific matters, including:

- the characteristics of a good or service
- the price of a good or service
- the buyer's need for a particular good or service
- future matters (where you have no reasonable grounds for doing so)
- the existence, exclusion or effect of any condition, guarantee, right or remedy, including the consumer guarantees
- testimonials.

As with the prohibition on misleading conduct, intention is irrelevant. The rules may be broken regardless of whether the misrepresentation was deliberate or whether the maker did not know the representation was false at the time it was made.

It is particularly important to think about whether a representation could be creating, or does create, a wrongful impression in the mind of a consumer when making representations about goods and services.

**EG:** A jewellery store advertises a pair of diamond earrings in a catalogue as being 0.5 carats each. However, this description is actually a typo which the store manager did not notice when they approved the catalogue for print. The earrings are actually 0.25 carats each (0.5 carats in total).

Here, the jewellery store has misrepresented the weight of the diamonds, and the advertisement is likely to breach the ACL.

*How to avoid misleading consumers or misrepresenting your goods or services:*

- Sell goods and services on their merits.
- Be honest about what you say and do commercially.
- Look at the overall impression of your advertisement—ask yourself who the audience is and what the advertisement is likely to say or mean to them.
- Remember, at a minimum it is the viewpoint of a layperson with little or no knowledge of the product or service you are selling that should be considered.

## Discount pricing (or two-price advertising)

Discount pricing involves a comparison of two prices—commonly taking the form of ‘was/now’ pricing—and is also often referred to as two-price advertising. When using this pricing practice, it is important to ensure that any comparison drawn is genuine and accurately compares the previous (most recent) price with the discounted amount.

**EG:** As part of an advertising campaign, a hardware store increases all recommended retail prices for toolkits, then crosses this amount out as a ‘was’ price and puts the original price as the ‘now’ price. No kits were ever sold at the increased price.

This advertisement is likely to give consumers the impression that the toolkit has been discounted from the ‘was’ price and that by purchasing at the ‘now’ price, they will make a real saving. However, this reduction and any ‘savings’ are illusory and at serious risk of breaching the ACL.

*When making price discount representations:*

- A ‘was’ price needs to be the price at which the good or service was offered for sale in a sufficient number and for a reasonable period of time before being discounted—you need to be able to substantiate the offer.
- Any previous price should be genuine and not inflated, so the discount is real.
- A discounted price or special offer should only be available for a limited period of time. A discount that is offered for a lengthy period of time effectively becomes the new price, so continuing to use two-price advertising will not reflect a genuine discount to consumers.
- If discount pricing is used on the basis of how much something is ‘worth’, this needs to be supported by objective evidence. This is particularly relevant for used or second-hand items.

## Component pricing

Component pricing is advertising a price for a good or service in multiple (component) parts. The rules on component pricing require that, where a partial price representation is made to consumers, a prominent single (total) price must also be provided. The total needs to be the minimum amount required for a consumer to obtain the good or service as it is advertised, to the extent it can be calculated at the time the price representation is made. A number of exceptions apply, including quotes provided directly to another business and contracts for the provision of services via a periodic payment scheme for a term.

**EG:** An advertisement for an abdominal workout machine states 'Only \$150', but obscures the fine print which states 'total price \$170 including compulsory warehouse storage fee' at the bottom in small print in a colour similar to the background design.

The total single price (\$170) is not as prominent as the most prominent component, \$150, and the advertisement is likely to breach the component pricing rules in the ACL.

*When using component pricing:*

- The single price needs to include all the components able to be quantified when the price representation is made.
- A business should be able to substantiate why it is not able to quantify a particular component if it is not included.
- The total price should be stated as it is able to be calculated. When some components vary, they should be calculated on information available at that time, and consumers should be clearly advised of this.
- Component pricing does not just apply to representations made in advertisements; it also applies to the prices shown on tickets or provided in verbal representations to consumers.

## Cash-back or rebate offers

Cash-back or rebate offers involve the reimbursement of part of the purchase price for a good or service to the purchaser. Where these types of offers are advertised, it is important that any price representation does not include the reimbursement unless this is given to the consumer at the time of purchase. As many of these offers provide for the reimbursement to be made at a later date, the dollar amount the consumer must pay to take ownership of the item or obtain the service in full should be clearly advertised. Any advertising must also make it clear exactly what the consumer is entitled to walk away with.

**EG:** A computer with a total price of \$1000, but with a cash rebate of \$200 when a form is completed and sent to the manufacturer, is advertised on television at \$800. No mention of the cash-back offer is made within the advertisement and consumers are only advised of this when they inquire with the seller about the price of the computer.

As this advertisement does not provide the correct purchase price (with the total cost payable for the computer and rebate as separate amounts) or refer consumers to important terms and conditions, it is likely to breach the ACL.



*When using cash-back offers:*

- Ensure that any good or service advertised with a cash-back offer or rebate is available for purchase on those terms at your business.
- Ensure that the advertisement clearly identifies the rebate or cash-back as a separate reimbursement that will be made after the product is purchased and other requirements are complied with (if this is the case).
- Clearly state any limitations or conditions that apply to the reimbursement with equal prominence to the cash-back offer itself.

## **Bait advertising**

The ACL prohibits a business from advertising a good or service at a specified (often discounted) price if that business is aware or should reasonably have been aware that it would not be able to supply the good or service at that price—in reasonable quantities and for a reasonable period. Bait advertising occurs when a product is advertised at an attractive ‘bait’ price, but when the consumer goes to buy the item, it is not available and the business seeks to switch the consumer to a higher priced or differently optioned alternative. Consumers must be given a reasonable chance of actually buying the goods promoted in a special offer.

**EG:** A department store conducts a stocktake of its vacuum cleaners prior to a new range being released. The store finds that it only has a small amount of stock of a model that will soon be phased out. In order to ensure that the vacuum cleaners are sold, the store puts a picture of the particular model on the front page of its catalogue with large print stating ‘\$100—over 75% off’.

The vacuum cleaner has been a very popular model, and it sells out within five minutes of the sale period commencing. The department store may have engaged in bait advertising as it did not have sufficient quantities of the vacuum cleaner to meet consumer demand.

*What all businesses should know about bait advertising:*

- With any promotion, ensure that the good or service advertised is available in reasonable quantities, at the advertised total price for a reasonable period.
- Do your research so that you are able to anticipate demand as much as possible—look at previous promotions or other market data.
- Prepare contingency plans in case you do not have enough stock to meet consumer demand—consider whether or how you could supply the item at a later date (within a reasonable time). Could you source a substitute from another business, for example?
- Where you have genuinely misjudged demand and will not be able to supply the good or service advertised, you should offer the consumer a reasonable alternative.
- If you only have a limited quantity of a product, ensure that you clearly disclose this to consumers in any advertising.

### 3 Group action by association members: collective bargaining, notifications and authorisations



Part 2 of this guide outlined a range of agreements, conduct and behaviours that will breach the Act, including arrangements in which competitors agree on ways they will, or will not, deal with other businesses. In some instances, the ACCC can grant protection against legal action under the Act for the operation of such arrangements where they are in the public interest. This is done through the processes of authorisation and notification, which can apply to certain collective bargaining, exclusive dealing and third line forcing arrangements.

Associations can play an important role in assisting their members with the authorisation and/or notification processes, in some cases lodging on their behalf. It is not uncommon for associations, on behalf of their members, to lodge applications for authorisation or notification of collective bargaining arrangements, or other conduct, with the ACCC. Some associations also engage in collective negotiations with relevant suppliers or businesses on their members' behalf.

# Notification

Notification is a process through which parties proposing to engage in certain conduct—collective bargaining, exclusive dealing or third line forcing—approach the ACCC to seek immunity from legal action under the Act for the proposed conduct.

The notification process differs slightly according to the conduct being notified.

## Collective bargaining notifications

Collective bargaining occurs when two or more competitors in an industry agree to negotiate terms and conditions (which can include price) with a supplier or a consumer (also known as the ‘target’). Behaviour of this type will ordinarily raise concerns under the competition provisions of the Act.

Any party to the collective bargaining arrangement can lodge a notification and can lodge on behalf of the other businesses that are involved in the arrangement. A nominated representative who is not a member of the collective bargaining group—for example, an industry association—can also lodge a notification. When a notification is lodged on behalf of other businesses, the notification must clearly identify all the businesses involved and show that they all consent to the lodgement of the notification on their behalf.

Immunity from prosecution begins 14 days after the lodgement of a valid notification. However, if the ACCC issues a draft objection notice within that period, immunity does not commence.

If a draft objection notice is issued after the 14-day period, protection from legal action does commence and continues until the revocation is complete. Should the ACCC issue a final objection notice, any immunity provided by the notification is removed on the 31st day after the date of the objection notice (or on a later day specified by the ACCC).

**EG:** The ACCC allowed a collective bargaining notification to stand which was lodged by the South Australian Farmers Federation on behalf of 18 South Australian chicken growers. The notification allows the parties to collectively negotiate the terms and conditions of their growing contracts with Inghams Enterprises Pty Ltd.

## Exclusive dealing notifications

Exclusive dealing, as explained in Part 2 of this guide, generally involves a business imposing restrictions on another business’ freedom to decide with whom, in what, or where they deal. Some forms of exclusive dealing will only raise concerns under the Act if they substantially lessen competition. Another form—third line forcing—is prohibited outright, regardless of its effect on competition.

Immunity from prosecution under the Act for exclusive dealing conduct, other than third line forcing, begins on the day a valid notification is lodged with the ACCC. If, however, the ACCC is satisfied that the proposed conduct will result in a substantial lessening of competition, and that any potential public benefit arising from the conduct would not outweigh the resulting detriment, the ACCC may remove the immunity.

For notification of third line forcing arrangements, immunity from legal action begins 14 days after the lodgement of a valid notification. Again, the ACCC may remove the immunity if the likely benefit to the public from the notified conduct would not outweigh the likely detriment resulting from the conduct.

## Authorisation

The ACCC may also authorise businesses to engage in arrangements or conduct that would otherwise be anti-competitive when it is satisfied that the public benefit from the arrangement or conduct outweighs any public detriment. The authorisation makes the arrangement or conduct immune from legal action under the Act.

The authorisation process applies to a range of conduct, including that which might constitute a cartel provision, a primary or secondary boycott, another form of anti-competitive agreement, exclusive dealing or resale price maintenance.

The authorisation process is rigorous and transparent and subject to a six-month time limit. Once the applicant lodges an application and supporting submission, and pays the relevant fee, the ACCC conducts a comprehensive public consultation process before making a decision.

The ACCC must issue a draft determination stating whether it proposes to grant authorisation, and the reasons for that decision, prior to issuing a final decision. The applicant and other interested parties are invited to respond to the draft determination and can do so by providing written submissions or by calling a pre-decision conference. This provides an opportunity to discuss the draft decision and for views to be put to an ACCC commissioner. A final determination is then issued. The final determination may grant authorisation, grant authorisation subject to conditions, or deny authorisation.

**EG:** The Australian Newsagents' Federation was granted conditional authorisation by the ACCC to collectively bargain on behalf of its members with certain magazine and newspaper publishers and distributors. This arrangement may benefit members through placing them in a stronger bargaining position when dealing with publishers and distributors, assisting them to have more effective input into contractual terms and conditions, which would result in public benefits.

## 4 Other considerations under the Competition and Consumer Act



# Unconscionable conduct

The ACL contains rules that prohibit unconscionable conduct in small business and consumer transactions. While businesses are prohibited from acting unconscionably towards their consumers, they are also afforded protection from the unconscionable conduct of other businesses such as their competitors, suppliers or landlords.

Unconscionable conduct is difficult to define or describe as it varies on a case-by-case basis. It requires something substantially more than just being ‘unfair’ or hard commercial bargaining. As a general rule, unconscionable conduct involves serious misconduct or something clearly unfair or unreasonable—that is, when a business shows no regard for conscience.

The ACL provides a list of factors that the courts may have regard to when considering whether a business has engaged in unconscionable conduct. This list is indicative only, and does not limit the circumstances that a court will consider. These factors include:

- the relative bargaining strengths of the parties
- whether the stronger party required the weaker party to comply with unreasonable terms
- whether the weaker party was able to understand relevant documents
- whether undue influence, undue pressure or unfair tactics were used
- the price and terms on which the same or equivalent goods could be acquired or supplied elsewhere
- whether the stronger party’s conduct was consistent in dealings towards similar businesses
- whether the requirements of an industry code or voluntary code were met
- whether the stronger party unreasonably failed to disclose any intended conduct
- the existence and effect of any unilateral variation clause
- the extent to which the parties were willing to negotiate
- the extent to which both parties acted in good faith.

When considering whether conduct is unconscionable, the court may choose to have regard to one or more of the above factors, or to none. Assessment of unconscionable conduct is based on the particular factual circumstances of each case.

**EG:** Dukemaster Pty Ltd, a landlord of retail outlets in Melbourne, proposed rental amounts for four small business tenants. Dukemaster presented these rents as being reasonable and below market value, where this was not the case and there was no basis for seeking these amounts.

The small business owners had little or no ability to speak or read English, which was known to Dukemaster, and were given an ultimatum to accept the agreement within a short time frame. Furthermore, Dukemaster failed to comply with Victorian retail leasing legislation and engaged in threatening and demanding behaviour towards the tenants.

The ACCC took action against Dukemaster. The conduct was found to be unconscionable. The orders of the Federal Court included that the landlord pay in excess of \$275 000 compensation for loss and damage suffered by the small businesses.

## Business scams

It is common to hear stories of consumers falling victim to lottery, door-to-door selling or advanced fee fraud scams. Business scams generally operate on the premise that staff members or managers will be too busy to pay close attention to emails, or to double-check that invoices sent through for payment come from regular suppliers and relate to goods or services received by the business.

Business scams can take many forms, although there are several that are typical. It is important that industry associations and businesses are familiar with these types of scams and know what to look out for.

A common business scam involves issuing false bills or invoices for a listing or advertisement in a magazine, journal or business register/directory that the business has never agreed to or approved. In some instances the invoice may be for a directory that does not even exist, and documents sent out to businesses are often doctored to look very similar to those used by genuine directory publishers.

Another business scam involves sending businesses invoices for common office supplies such as paper, toner or stationery. As with the directory listing or advertisement scams, when a business inspects the invoice they find that the person attempting to charge the business for the goods is not one that the business actually purchased from.



In each of these examples, the scammer hopes that the business will not check the invoice closely and that they will be tricked into paying for goods or services that they did not request or receive.

Industry associations can play a key role in alerting their members to the existence of scams, the ways that those scams operate and steps members can take to stop themselves falling victims to scams. Industry associations can also assist by advising the ACCC of scams targeting their members that the ACCC may not be aware of.

*Ways to avoid becoming a victim of a business scam:*

- Ensure that the business billing you is one that you normally deal with.
- Always check that goods or services were both ordered and delivered before paying an invoice.
- Never give out or clarify any information about your business unless you know what the information will be used for and who you are dealing with.
- Limit the number of people who are authorised to make orders or pay invoices.
- Do not agree to any business proposal on the phone—always ask for an offer in writing.
- If you are unsure about any part of a business offer, ask for more information or seek independent advice.



## 5 How can the ACCC help my association?



The ACCC assists industry, business and trade associations and their members to understand and comply with the Act. It has a number of resources that are available to assist you in doing this, including:

- the provision of speakers at industry events or meetings
- publications for both associations and members, with further copies available upon request
- the provision of editorials on relevant topics for industry publications such as magazines or newsletters.

The ACCC also convenes a Small Business Consultative Committee, which enables the representatives of various industries and the ACCC to openly discuss current small business issues. Committee members also provide feedback on ACCC education and information strategies and identify emerging issues or market developments that may affect particular industries.

The ACCC also sends periodical updates about competition and consumer law issues in the small business sector through its Small Business Information Network. To receive this free service, please email 'SUBSCRIBE' (in the subject field) to [smallbusinessinfo@acc.gov.au](mailto:smallbusinessinfo@acc.gov.au) along with your details.

## Further information

Infocentre: 1300 302 502

Small business helpline: 1300 302 021

Website: [acc.gov.au](http://acc.gov.au)

## 6 Frequently asked questions and further information



*One of my association members thinks that a competitor is breaching the Act. They have asked my advice about what they can do about this. What should I tell them?*

The Act provides individuals and businesses with a right of private action if they have been adversely affected by a company that may have breached the Act. If your member has evidence that a competitor has engaged in conduct that is likely to breach the Act, they should seek legal advice about their rights and also make a complaint to the ACCC.

The ACCC cannot pursue all the complaints it receives; however, it will carefully consider each complaint. Even if the ACCC does not investigate immediately, the complaint will assist the ACCC in monitoring future conduct and whether there are any more widespread issues in the industry.

*One of my association members is concerned that they may have breached the Act. What should they do? Should they self-report to the ACCC?*

If a business is concerned that its conduct may breach the Act, it should always seek legal advice and also contact the ACCC about their concerns. The ACCC encourages individuals and companies who might have breached the Act to come forward and cooperate with the ACCC to address the possible breaches.

The ACCC may recognise cooperation by:

- permitting complete or partial immunity from ACCC action
- making submissions to the court for a reduction in penalty
- agreeing to an administrative settlement instead of litigation.

This policy is flexible, with the ACCC determining each case on its merits.

*I want to become a member of an association but they have denied my application because I don't have all the qualifications I need. Can they do this?*

Industry associations are able to regulate the conduct of their members and require businesses (or persons) to have certain qualification levels that enable them to carry out their duties to a satisfactory standard, and for the protection of consumers more generally. Associations must ensure that their members meet certain standards required by the law, such as licensing.

However, where an association's entry requirements go beyond what is needed to meet relevant legislative requirements and are unreasonable and overly burdensome, or are designed to limit competition to protect and benefit existing members, they are likely to raise concerns under the Act.

*My industry association membership has been revoked because they have received too many complaints about my work from consumers. Are they able to do this?*

Most associations require their members to comply with certain rules, policies and standards. This often takes the form of a code of conduct. Associations are entitled to sanction their members where these rules have been breached, and you will be likely to find you agreed to these terms and conditions when you joined. Any code should clearly set out the processes through which members will be sanctioned and ensure those processes are based on the concepts of procedural fairness, including transparency and provision for an appeals process. Industry association codes also must not have any anti-competitive purpose or effect.

### *Should I use the recommended retail prices set by my association?*

If your association provides recommended retail prices, these are for your information only and may be used as a general guide. An association cannot require you to follow these prices, as this would amount to price fixing and would breach the Act. If you need assistance with prices, you should consider asking your association to help you work out a method for calculating your prices. Every business's costs are different, so their prices should be too.

### *One of my competitors has approached me about making arrangements to allocate jobs by coordinating tenders. Business has been very slow so I am considering his offer, but is this allowed?*

Making an arrangement with one (or more) of your competitors about rigging bids or dividing up the market is likely to breach the Act. This type of behaviour is very serious and is referred to as cartel conduct. You should avoid any arrangements of this type and, more generally, any arrangements with your competitors.

### *An industry association I have inquired about joining has told me that I can only become a member if I agree to obtain all of my supplies from a preferred supplier. The preferred supplier is much more expensive than others, so I don't want to agree to this. Can they impose these restrictions on me?*

An association is able to require members to comply with its rules and policies, though these still need to meet the requirements of the Act. An industry association may be able to impose such requirements where it can clearly demonstrate that goods must meet certain quality or other special needs; however, it cannot do this for anti-competitive purposes.

You should seek further information from the association, including whether the conduct is the subject of a notification to, or authorisation by, the ACCC. If you can demonstrate that other suppliers meet the association's requirements, you could also ask whether they can be used as an alternative source. If you have serious concerns, you should contact the ACCC.

### *As a business I am able to choose who I will supply. Am I able to ask other suppliers not to supply my consumers?*

This type of conduct would amount to an anti-competitive agreement with your competitors—other suppliers. If you ask other businesses not to supply (or tender for) your clients, you are at risk of breaching the Act. In seeking to retain your clients, you should consider providing favourable terms and conditions and the most competitive prices you are able to.

# ACCC contacts

ACCC Infocentre: business and consumer inquiries 1300 302 502

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

Small business helpline: 1300 302 021

Small business email address: [smallbusinessinfo@accc.gov.au](mailto:smallbusinessinfo@accc.gov.au)

Callers who are deaf or have a hearing or speech impairment can contact the ACCC through the National Relay Service [relayservice.com.au](http://relayservice.com.au)

## Other publications

You can order publications through the ACCC Infocentre or download electronic copies from the ACCC website.

## ACCC addresses

### National office

23 Marcus Clarke Street  
Canberra ACT 2601

GPO Box 3131  
Canberra ACT 2601

Tel: 02 6243 1111  
Fax: 02 6243 1199

### New South Wales

Level 20  
175 Pitt Street  
Sydney NSW 2000

GPO Box 3648  
Sydney NSW 2001

Tel: 02 9230 9133  
Fax: 02 9223 1092

### Victoria

Level 35, The Tower  
360 Elizabeth Street  
Melbourne Central  
Melbourne Vic 3000

GPO Box 520  
Melbourne Vic 3001

Tel: 03 9290 1800  
Fax: 03 9663 3699

### Queensland

*Brisbane*  
Level 24, 400 George Street  
Brisbane Qld 4000

PO Box 12241  
George Street Post Shop  
Brisbane Qld 4003

Tel: 07 3835 4666  
Fax: 07 3835 4653

*Townsville*  
Level 6, Central Plaza  
370 Flinders Mall  
Townsville Qld 4810

PO Box 2016  
Townsville Qld 4810  
Tel: 07 4729 2666  
Fax: 07 4721 1538

### South Australia

Level 2, ANZ House  
19 Grenfell Street  
Adelaide SA 5000

GPO Box 922  
Adelaide SA 5001  
Tel: 08 8213 3444  
Fax: 08 8410 4155

### Western Australia

3rd floor, East Point Plaza  
233 Adelaide Terrace  
Perth WA 6000

PO Box 6381  
East Perth WA 6892  
Tel: 08 9325 0600  
Fax: 08 9325 5976

### Northern Territory

Level 8, National Mutual Centre  
9–11 Cavenagh Street  
Darwin NT 0800

GPO Box 3056  
Darwin NT 0801  
Tel: 08 8946 9666  
Fax: 08 8946 9600

### Tasmania

3rd floor, AMP Building  
86 Collins Street  
Hobart Tas 7000

GPO Box 1210  
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Tel: 03 6215 9333  
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