



Australian
Competition &
Consumer
Commission

Professions and the Competition and Consumer Act



Australian Competition and Consumer Commission
23 Marcus Clarke Street, Canberra, Australian Capital Territory 2601

First published by the ACCC 2010

© Commonwealth of Australia 2011

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

Important notice

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

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

ISBN 978 1 921887 67 3

ACCC 05/11_41157_305

www.accc.gov.au

Foreword



The services provided by practising professionals—doctors, lawyers, accountants and architects, to name just a few—play a vital role in the lives of almost all Australians. The professional sector, and the individual professions within it, has distinctive characteristics which separate it somewhat from other businesses. However, professionals, like all businesses, operate within markets, where market forces determine outcomes.

A relatively high degree of regulation impacts on the competition that takes place within the market for professional services. This includes government imposed restrictions—legislation—and privately imposed restrictions that operate through the self-regulatory arrangements of professional associations.

Professional associations are a fundamental part of providing a voice for individual practising professionals. They not only provide a sense of collegiality within a profession but also set and enforce codes of conduct, provide educational support and advocate the interests of professional persons to government and other key bodies.

Where associations are responsible for the imposition and enforcement of professional or ethical standards and rules, the opportunity for anti-competitive conduct or effects can arise.

While self-regulation mechanisms ensure that the high level of skills required to carry out professional services are not compromised, offering benefits for both the profession and consumers, it is important that they do not unduly restrict existing or potential members. Individual professionals should be mindful of not engaging in anti-competitive conduct. Policies and codes also need to comply with the consumer protection rules in the Australian Consumer Law (ACL).

The Australian Competition and Consumer Commission (ACCC) has a role in ensuring that professional associations provide maximum benefits to members, the broader business community and consumers—by administering the *Competition and Consumer Act 2010* (the Act). The Act contains rules that prohibit anti-competitive conduct and promote consumer protection (the ACL).

The Act also provides processes that enable the ACCC to grant protection from legal action to parties engaging in anti-competitive conduct when it is in the public interest. In doing so, the Act achieves a balance between ensuring the benefits of competition are delivered and allowing certain conduct that might otherwise reduce competition where that conduct delivers an offsetting public benefit.

This publication provides an overview of the common competition and consumer protection issues which may impact on the activities of professionals in practice and also explains those provisions of the Act most likely to impact on the operation of professional associations. Most importantly, it outlines simple steps professionals and their representative associations can take to minimise the likelihood of breaching the Act so that they can focus on their main role of providing professional services to Australian businesses and consumers.

The ACCC has developed this publication with the assistance of a number of professional associations, and I would like to both acknowledge and thank these parties 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

Foreword	iii
Introduction	1
The <i>Competition and Consumer Act 2010</i>	2
1 Professional associations' obligations	4
Self-regulation	4
Association rules and codes of conduct	5
Recommended price lists	6
Advertising restrictions	7
Restrictions on association membership	8
Member compliance and education	9
2 Professionals' obligations	11
Dealing with fellow professionals—the competition rules	11
Dealing with clients—the Australian Consumer Law	18
3 Collective bargaining, notifications and authorisations	22
Authorisation	22
Notification	24
4 Other competition and consumer law considerations	26
Unconscionable conduct	26
Franchising	27
5 How does the ACCC help professionals?	28
6 Frequently asked questions	30

Introduction



The Australian Council of Professions defines a profession as a 'disciplined group of individuals who adhere to high ethical standards and uphold themselves to, and are accepted by, the public as possessing special knowledge and skills in a widely recognised, organised body of learning derived from education and training at a high level, and who are prepared to exercise this knowledge and these skills in the interest of others'.

Professional associations bring together individual practitioners within a profession to form a body that represents and acts in the collective interests of its members. Professional associations are also, in the majority of cases, the bodies responsible for setting and maintaining the high ethical standards and discipline referred to in the above definition.

Membership of such an association will generally require that professionals comply with certain codes of conduct, often supported by legislation, that promote ethical behaviour and maintain the standards of highly specialised services. Professional associations advocate on behalf of the profession they are representing to government and other key organisations, and provide compliance tools to ensure that business activities are carried out in accordance with the law, including the Competition and Consumer Act.

Sharing premises and information and discussing issues with other professionals may bring about benefits such as minimising overheads, setting best practice standards or compiling industry data. However, as a collective group of competitors, the professionals within such a structure may be at risk of breaching the Act's rules on collusive behaviour.

While professional associations also need to be careful not to impede competition by imposing rules about admittance or standards that are overly restrictive, their members must take care not to use the operation of an association as an opportunity and venue for making anti-competitive agreements, such as about prices.

The Competition and Consumer Act 2010

The purpose of the Act is to promote fair and efficient competition within markets and to provide protection for consumers. To achieve this, rights and obligations are conferred on businesses in their dealings with each other, and on their dealings with consumers. The Act also allows for some anti-competitive conduct to be authorised where it is found to be in the public interest, and certain industries are also regulated.

The Act has, since its inception, applied to the businesses of all incorporated professionals. Since 1996, professionals operating through partnerships or as sole practitioners have also been subject to its competition provisions through the operation of the competition codes enacted in each state and territory. The competition codes mirror Part IV of the Act but apply to 'a person' rather than 'a corporation'. This means that non-incorporated professionals are also subject to prohibitions on anti-competitive conduct such as price fixing, market sharing and collusive tendering.

Professionals are competitors, for the purposes of Part IV of the Act, which contains a range of prohibitions on anti-competitive conduct. This is notwithstanding the fact that many professionals operate within cooperative, collegiate structures such as associateships and may not consider themselves to be competing with the other practitioners they work with every day.

Professionals are also providers for the purposes of the ACL, which provides for consumer protection. Professionals may also be viewed as consumers in their dealings with other businesses such as suppliers or landlords. The Act, therefore, not only confers obligations on professionals but also provides them with protection in their own dealings with other businesses and suppliers.

Breaches of the Act can attract a wide range of penalties. These are dependent on the nature of the conduct that has been engaged in, with breaches of the competition rules attracting the most significant consequences. This may include, for example, a penalty of \$10 million or a criminal jail sentence of up to 10 years for an individual. Penalties for breaches of the ACL are also substantial including, for example, criminal penalties, compensation orders, damages, corrective advertising, civil pecuniary penalties and disqualification orders.

This guide outlines the application of the Act in relation to key activities such as:

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

It also looks at the issues on which professionals may seek guidance, including:

- cartel conduct
- other collusive behaviour
- dealings with clients and consumers
- authorisations and notifications
- unconscionable conduct
- franchising.

1 Professional associations' obligations



Self-regulation

Many professional associations have developed their own codes of conduct and standards that promote ethical behaviour and a high level of quality and consistency in the services carried out by individual practitioners. They also often operate concurrently with state, territory and Commonwealth laws, with prerequisites being applied before a person is able to qualify as a 'professional' in a particular field.

Breaches of an association code of conduct often attract sanctions, and recourse is provided for affected consumers. However, the practices of an association, including such codes, are still subject to the law, including the Act. There are certain areas of self-regulation, where restrictions may be imposed on professionals, that industry associations should approach with caution so as to avoid engaging in anti-competitive conduct. These areas are outlined below.

Association rules and codes of conduct

An association can make rules regarding the behaviour of individual practitioners and impose sanctions if these standards are not met. Many professional bodies choose to do this through requiring their members to comply with a code of conduct and/or ethics that is usually drafted and enforced by that association. These are known as voluntary codes of conduct and, if used correctly, can deliver increased protection for consumers and reduce the regulatory burden on members. Associations should make sure that codes are well designed, effectively implemented and properly enforced. The ACCC publication *Guidelines for developing effective voluntary codes of conduct* provides useful information about developing voluntary codes, but associations may also like to consider seeking professional advice about possible competition or consumer law issues arising out of their codes' operation.

Professional association rules benefit members not only by assisting with broader compliance but also by giving their services added credibility through accreditation and an affiliation with the association. The regulation and enforcement of standards also ensures that the profession's reputation remains intact and creates greater confidence in the services provided by members of that profession. For example, it is common for association rules to regulate the dealings of professionals with their clients where their conduct may reflect on the profession (and association) more broadly. Associations also provide benefits to consumers by providing a trusted and reputable name and an avenue for recourse in the first instance should a dispute arise with a member. The ACCC is generally supportive of professional association rules that can be shown to have a benefit to consumers.

However, professional associations should ensure that the rules are transparent, that they do not relate to pricing policies and that any disciplinary procedures are not exclusionary in any way—restricting and reducing competition in the industry. Associations should not make rules that contravene the Act, and the ACCC has previously taken action against professional bodies 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 to 2003, 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, it was based on a misunderstanding of facts. One farmer, Tassal Ltd, subsequently culled 70 tonnes of salmon, giving effect to this agreement.

This type of behaviour raises competition concerns as it is illegal for competitors to make an agreement having 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 also 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.

Recommended price lists

Because professional associations comprise members who compete with each other, any time an association deals with pricing issues—including recommended fee schedules—they are 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 association recommends prices for its members, this can often have the effect of price fixing through creating a default price that all goods or services are sold at by these competing businesses. Requiring, directly or indirectly, that professionals follow any pricing guide is likely to amount to a breach of the Act.

While an association may wish to help its members, particularly new and inexperienced practitioners, 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*. It is illegal for an association to impose a pricing structure on its members. 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 for members' individual pricing policies.

EG: An architecture association provides a recommended fee schedule to its members for various services, including drafting and design. However, when an architect chooses to provide these services at a cost that is less than what has been recommended, they are advised by the association that if they continue to do this their membership will be terminated.

This type of pricing behaviour, in setting and enforcing minimum fees for architecture services, by the professional association 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 to charge for their services.
- Do not impose disciplinary action for breaches of association 'pricing policies' or fee schedules.
- Consider providing advice and assistance to your members on how they can calculate and set their own prices, taking into account the needs of their own business.

Advertising restrictions

Advertising is another area that professional associations often regulate to ensure consistency across the industry, to ensure a professional image is maintained and to ensure the advertisements themselves comply with the law. While associations want to make sure that consumers are protected from misleading advertising, if these rules are too restrictive, this may have the effect of actually reducing the information available to consumers and making them less informed in their decision making.

Professional bodies should make sure that individual practitioners 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, due to the often highly specialised nature of professional services, there is often a significant information gap between the practitioner and consumers. Consumers are therefore heavily reliant on the information and advice given to them on these types of services, whether it is through advertising or otherwise. This, therefore, places a greater obligation on professionals to ensure that their clients (or potential clients) are fully informed before making any decisions.

Key points on advertising:

- Educate professionals about misleading advertising.
- Ensure that any advertising rules are genuinely in the interests of consumers (rather than a way of restricting individual professionals from promoting their particular skills).
- Bear in mind the often significant information gap between professionals and clients, and ensure messages are not overly complicated or reliant on technical language that the average consumer may not properly understand.
- Ensure any rules are not overly restrictive.

Restrictions on association membership

It is essential that individual practitioners are fully qualified and accredited to enter into a profession and undertake their services with the level of skill and knowledge necessary to perform their duties to a high standard. Therefore, it is an important function of professional associations that they limit membership to persons who have fulfilled these prerequisites as this protects not only the interests of the profession but also consumers more generally.

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

Professional association entry 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 reasons for the imposition of these rules should be able to be substantiated by the association, and for the genuine purpose of maintaining the quality of services provided. Again, these rules should not be used in an attempt to restrict competition for the benefit of existing practitioners under the pretext of helping consumers.

EG: The Royal Australasian 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 geographic 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 service 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 review standards and 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 these accreditation or qualification requirements are able to be substantiated.
- Check that the rules are not overly restrictive and do not have the effect of limiting competition in a profession.

Member compliance and education

Another role of professional associations is educating practitioners about their compliance requirements in dealing with other professionals and consumers. Associations play an important part in helping individual practitioners to work together in a legitimate way for the benefit of their members and the profession as a whole. However, they also have a responsibility to promote behaviour that is compliant with the Act and to minimise the risk of using the association network and profession events for anti-competitive purposes.

Whenever competitors meet, whether formally or informally, there is a risk that this provides an opportunity for collusion, such as forming an agreement on prices or making market sharing arrangements. Records of all professional association meetings should be made to provide evidence of what was discussed, should it be required at a later date. At these events, professionals should also be reminded that collusive behaviour puts both them and the association at serious risk of breaching the Act's competition rules.

Unfair contract terms

One of the services that professional 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 Australian Consumer Law 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 a professional association’s standard form contracts void and will help maintain the reputation of the association and the industry more generally.

2 Professionals' obligations



There are a range of obligations relevant to all professionals, regardless of how and where they practice. They must comply with:

- any rules of their professional association
- competition rules (Part IV of the Act) in their dealings with other professionals (and businesses)
- consumer protection rules (the Australian Consumer Law) when dealing with clients.

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

Dealing with fellow professionals— the competition rules

Any agreements or arrangements made between competing professionals, whether as incorporated bodies, as partnerships or as sole traders, may risk breaching the competition rules contained in Part IV of the Act and the various competition codes. Any discussions about price, market sharing or other exclusionary arrangements may, for example, be collusive behaviour, for which there are serious consequences.

Cartel conduct

Some of the most important rules in Part IV prohibit agreements that reduce competition. Such agreements are frequently referred to as cartel conduct.

Cartel conduct is prohibited. It 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. A business will be in breach of the Act, first, if it makes an agreement that contains a provision of this type and, second, 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 below.

Price fixing

Price fixing involves competitors agreeing on prices, or pricing structures, 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 informal verbal agreements.

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.

What all professionals must know:

- *Avoid discussions and, most importantly, agreements with other professional practitioners about prices.*
- *Take care to ensure that prices are set by each individual practitioner independently.*
- *If assistance in working out fee schedules or other pricing information is required, professionals should ask their association for assistance. An association should only provide general advice in this area and not seek to impose pricing policies or structures.*

EG: In 2007, the ACCC took action in the Federal Court against an orthodontist practice in Tasmania for price fixing and market sharing.

A number of orthodontists entered into a shared premises agreement, which they had sought legal advice about. Terms of the agreement had the effect of:

- fixing the price of the orthodontic services they each provided to consumers
- restricting their respective supply of orthodontic services to new patients when an orthodontist had more consumers than the others
- restricting the ability of the orthodontists to supply their respective services from separate premises or work with other orthodontists within 20 kilometres of the existing practices
- stopping another orthodontist from setting up a competing practice in northern Tasmania.

The ACCC was concerned that this conduct amounted to anti-competitive behaviour, which was confirmed by the Federal Court. Penalties were not imposed, due to the orthodontists having received incorrect legal advice and their cooperation with the ACCC.

Allocating consumers, suppliers or territories

When competitors agree to divide or allocate consumers, suppliers or territories among themselves, they are sheltering from competition, denying consumers the benefit of choice and engaging in cartel conduct.

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 other's products or services
- agreeing not to expand into a competitor's market.

The key is that competitors agree among themselves how the market will operate, rather than allowing competitive market forces to work.

What all professionals 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.*

EG: The ACCC accepted court enforceable undertakings from St Vincent's Private Hospital Sydney and the hospital's Department of Anaesthesia over an alleged anti-competitive arrangement between the private anaesthetists in the department. The members of the department adopted and put into effect an arrangement for allocating amongst themselves all permanent anaesthetic work performed at the hospital.

The ACCC conducted an investigation into the anaesthetists' conduct and was concerned that the arrangement was likely to have amounted to an anti-competitive arrangement.

To address the ACCC's concerns, the department and hospital provided undertakings to the ACCC that the department of anaesthetists will no longer allocate amongst themselves the permanent anaesthetic work performed at the hospital. The undertakings also provide that St Vincent's Private Hospital Sydney will be responsible for allocating all permanent anaesthetic work and will establish procedures under which hospital proceduralists can request the allocation of their preferred anaesthetist to their lists or sessions.

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 competition rules 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 prohibitions for joint ventures. In short, parties 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 contravene the cartel provisions should seek legal advice before doing so.

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

- Cover bidding—agreeing that one member of the group will 'win' the tender, as all the other competitors agree to bid over this amount.
- Bid suppression—where one or more competitors agree not to submit a tender.
- Bid withdrawal—where a business withdraws a winning bid so that another will be successful instead.
- 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, or fail to comply with the required conditions of the tender, so that their tender will be excluded and another will be successful.

What all professionals must know:

- *Do not make any agreements with competing professionals 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 of driving the cost of these items higher due to their lack of availability. While individual businesses or professionals can make a legitimate decision to do this for their own reasons, it is where a coordinated agreement is made between businesses to collectively control the supply of goods or services that the competition rules risk being breached. This type of behaviour reduces competition and increases the cost of the product or services, to the detriment of consumers.

It is also worth noting that it is often the key business players within a profession that will make these types of agreements. If only small players are involved, it is unlikely to have the desired effect of increasing prices overall.

What all professionals 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 cutting back on your hours—must be made independently.*

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 unlawful to refuse to supply or acquire, or cease supplying or acquiring, goods or services because that business has not accepted the restrictions.

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

- supplies goods or services on the condition that the purchaser does not acquire those items from a competitor

- is only acquiring 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 is also known as third line forcing and 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, the existence of the arrangement will be a breach.

EG: An accountant will only provide their services to a business if the business agrees to take out their business insurance from a nominated third party insurer.

The accountant is engaging in third line forcing as they will only supply their services on the condition that the business acquire insurance from a nominated third party. This type of arrangement is prohibited.

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, which is 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 are also known as primary boycotts and are prohibited by the competition rules as they are likely to substantially lessen competition. However, they are permissible in certain circumstances, such as joint ventures. It is advisable that you consider seeking legal advice if you wish to confirm whether this 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. An example of boycott activity that resulted in ACCC action is outlined below.

EG: In 2007, the ACCC instituted proceedings against two Adelaide cardiothoracic surgeons who attempted to prevent competition from two other cardiothoracic surgeons in their local area. The ACCC action was taken under the Competition Code of South Australia, which forms part of a single National Competition Policy that applies Australia-wide.

The Federal Court declared that the surgeons had made an arrangement to hinder or prevent a newly qualified surgeon from entering or supplying his services in the market before he had undertaken further training, despite the fact he was legally qualified to practise as a cardiothoracic surgeon.

The court also declared that the surgeons had given effect to that arrangement on six occasions by advising hospitals at which the surgeon sought to operate or advising cardiothoracic surgeons who had been asked to support the surgeon's applications to work at those hospitals that the surgeon was insufficiently trained, had not completed his training and should not be allowed to operate at those hospitals—which the ACCC maintained was not the case.

The surgeons were ordered to each pay a pecuniary penalty of \$55 000 and to make a contribution of \$5000 each to the ACCC's costs in relation to the proceedings.

What all professionals must know:

- *Do not make boycott agreements with your competitors for the purpose of preventing, restricting or limiting dealings with suppliers or consumers.*
- *Do not attempt to induce other businesses to do this.*
- *Set the terms and conditions of your agreements with suppliers and consumers independently and take care to ensure they comply with the Act more broadly.*

Dealing with clients—the Australian Consumer Law

The ACL contains a number of rights and obligations that apply to professionals in their dealings with clients. It is important that practitioners understand these rules and how they apply to their day-to-day operations.

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 clients are outlined below.

Misleading and deceptive conduct

Misleading and deceptive conduct—whether that conduct actually misleads clients or is merely likely to mislead them—is prohibited. Generally this type of conduct involves leading someone into error, or being likely to, and 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, professionals, like 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 clients directly, or in any other way. Any representations made by a professional must be accurate and able to be substantiated.

It is also important to remember that there will often be a real imbalance between the level of knowledge held by the professional and that of the general public. The use of technical or scientific terms or jargon may create a greater risk of misleading potential clients or consumers more generally.

EG: A dermatologist advertises a treatment cream for various skin disorders as providing a 'miracle transformation in 10 days' and uses before and after photographs to promote the cream.

When a consumer goes to purchase the cream, they discover the 'after' photos were taken after three months' use of the cream.

This advertisement is likely to mislead clients about the results that they are able to obtain from using the cream within the 10-day time period.

Misrepresentations

A misrepresentation is where something is conveyed to clients that is not correct or 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 and the characteristics of goods or services and, 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:

- 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 there is no reasonable ground for doing so)
- the existence, exclusion or effect of any condition, guarantee, right or remedy, including the consumer guarantees
- testimonials.

How to avoid misleading clients:

- *Sell your professional 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, that it is the viewpoint of a layperson with little or no knowledge of the professional 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 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 reflects the previous (most recent) price with the discounted amount.

EG: As part of an advertising campaign, a plastic surgeon increases all prices for facial cosmetic surgery procedures, then crosses this amount out as a ‘was’ price, and puts the original price as the ‘now’ price. No clients were ever charged the increased price. This advertisement is likely to give clients the impression that the cosmetic procedures have 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 ‘saving’ are illusory and at serious risk of breaching the ACL.

When making discount price representations:

- *A ‘was’ price needs to be the price at which the professional service was offered for sale in a sufficient number and for a reasonable period of time before being discounted. The practitioner needs 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 clients.*
- *If discount pricing is used on the basis of how much something is ‘worth’, this needs to be supported by objective evidence.*

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 clients, 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 optometrist advertises a pair of glasses with a prominent price representation of '\$150*'. The asterisk leads to fine print that explains the \$150 is the cost of frames only, and that the cost of lenses starts at \$100.

Because the minimum quantifiable cost of the advertised glasses will be \$250, that amount must be as prominent as the \$150 in order to comply with 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 practitioner should be able to substantiate why they are 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 with clients clearly advised.*
- *Component pricing rules do not just apply to representations made in advertisements; they also apply to the prices shown on consent forms or provided in verbal representations to clients.*

3 Collective bargaining, notifications and authorisations



Part 2 of this guide outlined a range of agreements, conduct and behaviours that 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 provide protection against legal action under the Act for the operation of those arrangements. This is done through the processes of authorisation and notification. Professional associations can play an important role in assisting their members with the authorisation and/or notification processes, and in some cases can lodge these on their behalf.

Authorisation

The ACCC may 'authorise' businesses to engage in arrangements or conduct that would otherwise breach the competition provisions of the Act when it is satisfied that the public benefit from the arrangements or conduct outweighs any public detriment.

The authorisation provides protection from legal action under the Act for the arrangement or conduct. Authorisation can be sought for a range of conduct, including that which might constitute cartel provisions, primary or secondary boycotts, other forms of anti-competitive agreements, exclusive dealing or resale price maintenance.

The authorisation process is transparent. Once a valid application¹ is lodged, the ACCC conducts a public consultation process before making a decision.

The ACCC issues a draft determination prior to issuing a final decision. The applicant and interested parties have the opportunity to respond to the draft determination 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. A six-month time limit applies to the ACCC's consideration of applications for authorisation.

It is not uncommon for associations, on behalf of their members, to lodge applications for authorisation of collective bargaining arrangements, or other conduct, with the ACCC. In some cases, associations will engage in collective negotiations with relevant suppliers or businesses on their members' behalf.

It is important to note, however, that any authorisation of particular conduct, and the legal protection it affords, applies only to the parties subject to that authorisation and to the specific conduct authorised. In the first example below, the Australian Medical Association (AMA) was authorised to collectively bargain with state and territory health departments on behalf of its general practitioner (GP) members who provide services such as Visiting Medical Officer services in public hospitals in rural and regional areas. An important aspect of this authorisation is that it did not extend to any collective boycott activities undertaken as part of the negotiations.

In the second example, the doctors were subject to the authorisation for doctors practising in an associateship to collectively negotiate with hospitals, but again that authorisation did not extend to boycott conduct.

EG 1: In December 2008, the ACCC authorised the AMA to collectively bargain with relevant state and territory health departments on behalf of its members who operate as rural GPs providing services as Visiting Medical Officers in public hospitals and health facilities in rural and remote areas of Australia. The negotiations covered the terms of the contracted services, including fees charged. The ACCC considered a single negotiation process could lead to a more informed and efficient outcome, compared to multiple negotiations. The collective arrangement was voluntary for both the AMA members and health departments, and the authorisation did not extend to any collective boycott activity should the negotiations have stalled.

¹ An application may be invalid if, for example, it is not made on the required form, the required fee has not been paid or the required information is not provided.

EG 2: The ACCC recently accepted undertakings from five country GPs following an investigation into concerns those doctors breached competition laws in their dealings with their local hospital. The five doctors operated as an associateship, making them competitors for the purposes of the Act.

In letters dated 1 October 2009, the GPs each wrote to the hospital's administrator, in identical terms, giving notice that they would not accept their current remuneration for after hours services to the hospital from 31 October 2009 and enclosing an interim contract for negotiations should the hospital wish to continue an on-call doctor arrangement for patients presenting or admitted to the hospital. Each was aware the other doctors had sent identical letters. While the doctors continued to provide services after 31 October, the ACCC was concerned the doctors had breached competition law by engaging in a collective boycott by agreeing to threaten to withdraw their services.

At the conclusion of its investigation, the ACCC was satisfied its concerns could be addressed by undertakings from each of the doctors that they would not in the future come to arrangements or understandings with one or more of their associates to withdraw services from the hospital.

It is also important to note, in relation to this example, that while the ACCC has authorised collective bargaining by doctors with hospitals where the doctors operate within an associateship, the authorisation does not allow collective boycotts.

Notification

Notification is a process through which parties proposing to engage in collective bargaining or exclusive dealing conduct may, by lodging a notification with the ACCC, obtain protection from legal action under the Act for the proposed conduct.

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

Exclusive dealing notification

Exclusive dealing, as explained in part 2 of this guide, generally involves a business imposing restrictions on another business's 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.

For a notification of exclusive dealing conduct (other than third line forcing), immunity from legal action begins on the date the valid notification is lodged with the ACCC.

The ACCC may remove that immunity at any stage if it is satisfied that the proposed conduct will result in a substantial lessening of competition and the public benefit that may result from the proposed conduct would not be sufficient to outweigh the detriment to the public caused by the lessening of competition.

For a notification of third line forcing conduct, immunity from legal action begins 14 days after a valid notification is lodged. Again, the ACCC may at any stage remove that immunity where it is satisfied that the likely benefit to the public from the notified conduct would not outweigh the likely detriment to the public resulting from the conduct.

Collective bargaining notification

Collective bargaining arrangements can also be the subject of notifications. In a competition context, 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. Although collective boycott arrangements can also be the subject of a notification, the Australian Competition Tribunal has found that collective boycotts have the potential to inflict significant damage on the target of the boycott, its employees, consumers, and also the boycotters themselves. In light of the tribunal's decision, parties seeking protection for collective boycott proposals bear a heavy onus to demonstrate that there is such a benefit to the public that the boycott should be permitted.

A collective bargaining notification may be lodged by any business in the group on behalf of others in the group or can be lodged by a nominated representative, such as an industry association on behalf of its members.

For a notification to be valid each party named in the group must reasonably expect that the value of the transactions it will conduct with the counterparty as part of the collective bargaining arrangement will not exceed \$3 million in any 12-month period. There are regulations which amend the transaction threshold for particular industries.

The legal protection provided by a notification begins 14 days after the lodgement of a valid notification and remains in place for three years.

4 Other competition and consumer law considerations



Unconscionable conduct

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

Unconscionable conduct is difficult to define or describe as it is circumstantial and varies on a case-by-case basis. It requires something substantially more than just being 'unfair' or hard commercial bargaining. As a general rule, it is conduct that is against what is right or reasonable. That is, it goes against good conscience.

The ACL provides a list of factors that the courts may have regard to when considering whether a business (or professional) has engaged in this type of behaviour. This list is indicative only, and does not limit the circumstances that will be considered.

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: A landlord of retail outlets in Melbourne proposed rental rates for four small business tenants. The landlord presented these as being reasonable and below market value when this was not the case and there was no basis for seeking this amount.

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

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

Franchising

Increasingly, many professional services are being provided through franchise systems. Franchising is a popular business structure in the Australian market and is subject to the Franchising Code of Conduct—a mandatory code of conduct under the Act.

The Franchising Code of Conduct sets out the rights and obligations of franchisees and franchisors in relation to such areas as disclosure, the franchise agreement and dispute resolution. It is vital that anyone considering entering or establishing a franchised business model understand the Franchising Code of Conduct.

5 How does the ACCC help professionals?



The ACCC is committed to helping both professional associations and practitioners to understand and comply with the Act. It has a number of resources that are available to assist professionals in doing this, including:

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

The ACCC also convenes a Small Business Consultative Committee (SBCC) and a Health Sector Consultative Committee (HSCC), which enables representatives of various professional and industry groups to discuss current issues with the ACCC. SBCC and HSCC members also provide feedback on ACCC education and information strategies and identify emerging issues or market developments that may affect the sector.

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 along with your details.

Further information

Infocentre: 1300 302 502

Small business helpline: 1300 302 021

Website: www.accc.gov.au

6 Frequently asked questions



I want to become a member of a medical professional association but they have denied my application because I do not have all the qualifications I need. Can they do this?

Professional associations are able to regulate the conduct of their members and require practitioners to have certain qualification levels in order for them to carry out their duties to a satisfactory standard, and for the protection of consumers more generally. In many cases, there are legislative requirements underpinning that regulation for purposes such as public safety. Associations must ensure that their members meet the standards required by the law, such as accreditation and licensing.

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

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

Most professional associations require their members to comply with certain codes of conduct and ethics, policies and standards. Associations are entitled to sanction their members where these rules have been breached, and you will likely 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, a provision for an appeals process etc.

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 that would amount to price fixing and would breach the Act. In the event that you decide to use the recommended prices, you must make the decision independently.

One of my competitors has approached me about making arrangements to allocate 'jobs' by limiting the number of suburbs we accept jobs from. 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 dividing up the market, rigging bids or other forms of sharing work is likely to breach the Act. This type of behaviour is very serious and is referred to as 'cartel conduct' as it restricts competition to the detriment of other players within the industry and consumers. You should avoid any arrangements of this type and, more generally, arrangements with your competitors.

I am a GP in a small country town. Only two other GPs work in the area. We would like to establish a roster to ensure that one of us is available at the local hospital's outpatients ward each weekend but were told that that would breach the Act. Is that correct?

When a roster meets three conditions—that it has the purpose of facilitating patient access to medical care, that doctors on the roster must be able to practise even when not rostered on and that doctors on the roster are able to see any patients they choose—the ACCC is satisfied that it does not breach competition laws.

Concerns would arise where a roster was designed to prevent a doctor practising at or for a particular time, or where doctors could only provide services to a limited number of patients.

A professional 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. Their 'preferred supplier' is much more expensive than others so I do not want to agree to this. Can they impose these restrictions on me?

An association is able to require their members to comply with their rules and policies, though these still need to meet the requirements of the Act. A professional association may be able to impose such requirements where they can clearly demonstrate that goods must be of a certain quality or other special needs; however, they 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 their 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 professional I am able to choose who I will provide services to. Am I able to ask my colleagues not to provide their services to my existing clients?

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: www.accc.gov.au

Small business helpline: 1300 302 021

Small business email address: smallbusinessinfo@acc.gov.au

Callers who are deaf or have a hearing or speech impairment can contact the ACCC through the National Relay Service www.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
Hobart Tas 7001
Tel: 03 6215 9333
Fax: 03 6234 7796

