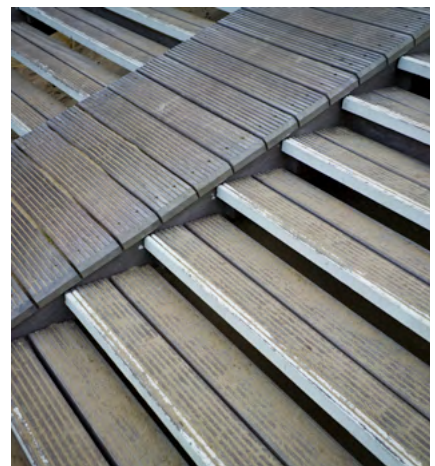


# A guide to competition and consumer law

For businesses selling to and supplying consumers with disability



# Contents

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Introduction	1
The Competition and Consumer Act 2010 (Cth) and the Australian Consumer Law	2
Summary of business obligations and rights	3
Dealing with consumers fairly	4
Guarantees and warranties	10
Selling safe products	15
Competing fairly	17
Supply related issues	21
Authorisations, notifications and collective bargaining	23
Penalties for breaching the CCA or the ACL	24
Further information and contacts	25

# Introduction

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## About this guide

This guide is for businesses that supply goods or services to consumers with disability or participants in the National Disability Insurance Scheme (**NDIS**). This guide sets out an explanation of the key competition and consumer protection obligations that apply to such businesses, including not-for-profit businesses.

Under the NDIS, participants will be able to receive funding to purchase their own disability related goods and services, rather than receiving goods or services chosen and supplied by the state. As the NDIS rolls out nationally, it is attracting new entrants to the market who are supplying goods or services to consumers for the first time. Similarly, existing not-for-profit suppliers may not have any previous experience of operating in a competitive market. These businesses may have limited experience complying with competition and consumer protection obligations.

Australian Consumer Law (**ACL**) regulators have prepared this guide to help businesses, including not-for-profit organisations that supply goods or services to consumers with disability (including NDIS participants and their support providers) to understand their obligations under Australia's competition and consumer protection laws.

## What this guide covers

This guide gives a general overview of the most relevant areas of competition and consumer law to businesses supplying consumers with disability.

The guide provides an introduction to the law in simple language—it is not an exhaustive guide and does not cover all areas of the competition and consumer law. This guide gives general information, examples and case studies—it does not provide legal advice or a definitive list of situations where the law applies.

# The Competition and Consumer Act 2010 (Cth) and the Australian Consumer Law

The *Competition and Consumer Act 2010 (CCA)* (formerly the *Trade Practices Act 1974*) is a national law that governs how all businesses in Australia must deal with their competitors, suppliers and customers. The law is designed to enable all businesses to compete on their merits in a fair and open market, while also ensuring businesses treat consumers fairly.

Consumer protection provisions are in the ACL, which is contained in a schedule to the CCA. The ACL governs business behaviour when advertising and interacting with consumers. It also sets out a number of consumer rights, including specific guarantee rights.

State, territory and federal regulators including the Australian Competition and Consumer Commission (ACCC) enforce the ACL.

Only the ACCC enforces the competition law, which is set out in the CCA.

If a business fails to comply with its obligations under the ACL or CCA, it is breaking the law.

## Operating as a business

In most circumstances, the CCA/ACL will apply to organisations operating in a business or commercial way. That is, buying and selling goods or services. The actual structure of the organisation does not matter. Both for-profit and not-for-profit organisations can be operating as a business. Generally, if an organisation sells goods or services, it will be a business.

Many of the provisions in the ACL, and some of those in the CCA, apply where a person engages in conduct in trade or commerce. Conduct is in trade or commerce where it occurs regularly or in the course of carrying on a business. Generally, if an organisation engages in repeated transactions where it provides goods or services in exchange for payment, it will be operating a business and doing so in trade or commerce.

# Summary of business obligations and rights

The CCA and ACL create a number of obligations that businesses must comply with. Many of these obligations are discussed in detail in this document. This section sets out a brief overview of some of the most important obligations.

1. Any advertising material or statements made by a business must be truthful and accurate. This includes any impressions created by what is said or displayed. Businesses cannot rely on small print or disclaimers to justify a misleading overall message.
2. The law places a number of requirements on businesses that use direct marketing like door-to-door or telemarketing:
  - a. There are certain days and times when they must not contact consumers.
  - b. Salespeople must inform the consumer of the purpose of the call and the name of the business they represent.
  - c. Consumers have a 10-day cooling-off period.
3. Businesses must not demand payment for goods or services the consumer did not request.
4. Businesses must not engage in conduct that is unconscionable when compared to normative standards of conscience defined by acceptable community values.
5. Businesses must not unduly harass or coerce consumers.
6. The law creates a number of automatic guarantees when a business supplies goods or services to a consumer. Businesses must honour these guarantees. There are different obligations, depending on whether a failure to comply with a guarantee is major or minor.
7. Generally, it is illegal for a business to say that it does not provide refunds, if the good or service is faulty.
8. A business can refuse to provide a refund if the consumer has changed their mind.
9. Businesses must sell safe goods and services.
  - a. There are certain products that businesses must not sell—these products have been banned by the government.
  - b. If a business recalls a product because it is unsafe, it must notify the ACCC.
  - c. If a business becomes aware that a product has caused an injury, it must notify the ACCC.
10. Businesses must not collude. This means that they must not enter into contracts, arrangements or understandings with competitors (a competitor is an unrelated business selling the same or similar goods or services) about things such as:
  - a. the price they will charge
  - b. the goods or services they will supply
  - c. where they will sell or who they will sell to.

# Dealing with consumers fairly

It is important that businesses that deal with consumers treat them fairly. They should take particular care when dealing with consumers that may be disadvantaged or vulnerable. Some consumers with disability may be vulnerable, such as those with intellectual disability. The ACL sets out a number of protections for consumers, and obligations that apply to businesses when dealing with consumers.

The ACL regulators expect that businesses supplying consumers with disability will act with fairness and integrity and comply with their legal obligations. Where businesses seek to take advantage of a consumer's disability or vulnerability, the ACL regulators will not hesitate to take strong enforcement action.

## Advertising and promoting your business or products or services

### Misleading or deceptive conduct and false or misleading representations

Statements and claims made by businesses must be accurate and truthful. This includes advertisements or statements in any media (print, radio, television or online) and any statement made by a person representing your business, including sales people. It is illegal for a business to make statements to their customers that are not correct or are likely to create a false impression.

Any statement about your products or services should be accurate and able to be substantiated. Businesses may face fines or other penalties if they have made false or misleading representations in regard to their business. It does not

matter whether a false or misleading statement was intentional or not.

When providing information about your products or services, it is important to consider whether a statement made in your advertising or when dealing directly with your customers will create an incorrect impression in the mind of a customer. For example, a business is likely to break the law if it creates a false or misleading **overall impression** about the price, value or quality of the good or service. Failing to pass on all relevant information may also be misleading if it means that a customer gets the wrong idea about your product or services.

### Case study

In 2016 a retailer of adjustable beds paid fines of \$20 400 for representing in advertising brochures that its beds had been awarded a certificate from the Therapeutic Goods Administration, when this was not the case. The brochures also represented that the motors in the beds were manufactured in Germany, when they were actually manufactured in China.

In 2016 a separate retailer of adjustable beds and mobility products paid fines of \$20 400 for falsely representing its products met an Australian design standard. A logo containing an image of a kangaroo and four ticks accompanied by the words 'Australian Standard and Design' was included in its brochures. The ACCC considered that this represented that the products complied with an Australian Design Standard when no standard existed.

### **Example**

A customer is deciding whether to buy new voice to type software and seeks advice from the supplier. The customer mentions the brand of computer they have and buys the software recommended by the supplier. However, the software is not compatible with the customer's computer.

The retail assistant knew it was not compatible yet did not advise the customer about this. Their conduct might be considered misleading by silence or omission as they did not disclose information that would have significantly changed the customer's mind about buying the product.

### *Fine print qualifications*

Businesses cannot rely on small print and disclaimers as an excuse for a misleading overall message. If your business needs to qualify its advertisements, make sure the qualifying statements are clear and prominent so that consumers know what the real offer is.

The fine print qualification cannot directly contradict prominent features of the advertisement (such as advertising a product as 'free' when the fine print indicates some payment must be made). It is the overall impression of the advertisement which is important.

### **Example**

An in home care provider offers a special deal—after four paid services, the fifth visit is half-price.

The offer is made through a series of radio advertising segments. The end of the ad quickly mentions 'terms and conditions apply' without further detail. The terms and conditions are in fact quite onerous, requiring the customer to live in a two kilometre radius of the business and applies to visits on Monday mornings only. The failure to clarify or explain important elements of the offer is likely to mislead customers and therefore is likely to breach the ACL.

### **Price displays—multiple pricing**

A business that displays more than one price for the same good must either:

- sell the goods for the lowest 'displayed price', or
- withdraw the goods from sale until the price is corrected.

This includes discrepancies between prices displayed through labelling (a price label attached to the goods or anything connected or used with the goods), published online and published in catalogues or advertisements.

## Total price

When you present prices to your customers, you must state the total price. If you promote a price that is only part of the total price of goods or services, the total price must also be displayed (as a single figure) at least as prominently as the part price.

The total price must include any charge payable, along with the amount of any tax, duty, fee, levy or other additional charge (for example GST, import tax or agent fee).

### Example

A supplier of in-home care services advertises its services at \$40 per hour. However, the supplier also imposes a booking fee of \$3 per hour on all customers. The supplier's services also attract a 10 per cent GST.

The correct way to advertise this is:

\$47.30 or

$\$43 + \$4.30 \text{ GST} = \$47.30$ , or

$\$40 + \$3 \text{ booking fee} + \$4.30 \text{ GST} = \$47.30$ .

## Other sales practices

### Direct marketing

If your business engages in sales methods such as door-to-door sales, telemarketing, or approaching customers in public places such as communal areas in shopping centres, consumers have additional protections under the ACL.

Under the law, these types of sales are called 'unsolicited consumer agreements'.

An unsolicited consumer agreement takes place when:

- it results from negotiations by phone or at a location other than the seller's place of business, and
- a seller, or their sales agent, approaches or calls a customer uninvited, and
- the total value is more than \$100 (or cannot be determined when the agreement is made).

The ACL prohibits telemarketing calls and door-to-door sales calls from being made on certain days and at certain times.

Door-to-door sales people must inform the consumer of the purpose of the visit, provide identification including their name and the business they represent and also inform the consumer that the consumer can request the salesperson to leave and that they are required to leave at the consumer's request. If the consumer asks them to leave, they must leave immediately. Similarly, telemarketers must explain upfront the purpose of their call and identify the business they are calling on behalf of.



### **Case study**

In 2013 the Federal Court ordered AGL to pay penalties of approximately \$1.5 million after several of its sales agents failed to leave a number of consumers' premises when requested to do so. One consumer had a do not knock sign on the front door that informed sales people to leave the premises. The sales person ignored the sign and attempted to make a sale. The Court also found that the sales people had engaged in misleading and deceptive conduct regarding the purpose of their visit.

### **Receipts**

Businesses are required to provide a proof of transaction to customers for goods or services valued at \$75 or more (excluding GST). A proof of transaction may be a tax invoice, a cash register receipt, a credit card or debit card statement, a handwritten receipt, or a confirmation or receipt number provided for a telephone or internet transaction.

### **Unsolicited goods or services**

'Unsolicited supplies' are goods or services supplied to someone who has not agreed to buy or receive them. It is illegal to request payment for goods or services that the customer has not agreed to buy.

Where a business supplies an unsolicited good it has three months to recover the good. If the consumer writes to the business and states their name and address, that the good is unsolicited and that they do not want it and also provides details of where the good can be collected, the recovery period reduces

to one month. If the business does not collect the good by the end of the recovery period, the good becomes the property of the consumer.

### **Example**

A business delivers a disability aid to a consumer with disability. The consumer had not ordered the aid, and did not want it. The business sends the consumer an invoice for the aid and demands payment. By demanding payment for the aid without reasonable cause, the business is breaking the law. The consumer does not have to pay for the aid and if the business does not collect the aid by the end of the recovery period, the aid becomes the property of the consumer.

### **Unconscionable conduct**

Conduct that fails to meet the normative standards of conscience defined by acceptable community values will be unconscionable. The ACL contains rules that prohibit unconscionable conduct in connection with the supply, or possible supply, of goods or services. Businesses are prohibited from acting in this manner against their customers and against other businesses. Conduct may be unconscionable if it is particularly harsh or oppressive, and more than just hard commercial bargaining. The law sets out a list of factors in relation to the supply or possible supply that courts may consider when deciding whether conduct is unconscionable, including (but not limited to):

- the relative bargaining strength of the supplier and the customer

- whether the supplier's conduct meant the customer was required to comply with conditions that were not reasonably necessary to protect the supplier's legitimate interests
- whether the customer was able to understand any relevant documents
- whether the supplier exerted any undue influence on or used unfair tactics against the customer
- the amount for, and circumstances in which, the customer could have acquired identical or equivalent goods elsewhere.

It is important to understand that an assessment of unconscionability focuses heavily on the particular circumstances, including any special disadvantage applying to the consumers. When dealing with especially vulnerable consumers (for example, consumers with an intellectual disability) businesses must be particularly careful not to engage in unconscionable conduct.

### Case study

In 2013, the Full Federal Court found that a vacuum cleaner company engaged in unconscionable conduct when its sales representative called upon three elderly women in their homes under the premise of a free vacuum cleaner maintenance check. The company then subjected each of the women to unfair and pressuring sales tactics to induce them to purchase a vacuum cleaner for up to \$2280. A financial penalty of \$370 000 was imposed in relation to the conduct.

### Harassment and coercion

It is illegal to use physical force, coerce or unduly harass someone about the supply or possible supply, or payment for, goods or services.

Undue harassment means repetitive unnecessary or excessive contact or communication with a person, to the point where that person feels intimidated, tired or demoralised.

Coercion involves force (actual or threatened) that restricts another person's choice or freedom to act. Unlike harassment, coercion does not have to involve repetitive behaviour.

### Unfair contract terms

There are laws protecting consumers from unfair terms in standard form consumer contracts. In broad terms, a standard form contract will typically be 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.

If a court finds that a contract term is unfair the term will be void, meaning that it is treated as if it never existed. However, the contract will continue to bind the parties to the contract to the extent that the contract is capable of operating without the unfair terms.

A term of a contract may be unfair if it:

- causes a significant imbalance between your rights and obligations and those of the consumer arising under the contract
- is not reasonably necessary to protect the legitimate interests of your business

- would cause the consumer detriment (financial or non-financial) if you tried to enforce it.

The fairness of a term must be considered in the context of the contract as a whole and the extent to which it is transparent (e.g. expressed in reasonably plain language).

This law does not apply to terms that define the main subject matter of a contract.

### Example

A consumer rents a motorised wheelchair. Under the rental agreement the consumer pays a fee to limit their liability for any loss or damage to or caused by the wheelchair to \$1000. The agreement contains the following term:

'If you breach any term of this agreement, including late payment, you will be liable for all loss or damage to or caused by the wheelchair, regardless of whether it was your fault or not.'

This term is likely to be unfair because it causes a significant imbalance between the parties, is not reasonably necessary to protect the legitimate interests of the business and would cause the consumer detriment if it were applied or relied upon.

The unfair contract term provisions will extend to cover small business standard form contracts entered into or renewed after 12 November 2016 where:

- it is for the supply of goods or services or the sale or grant of an interest in land
- at least one of the parties is a small business (employs less than 20 people, including casual employees employed on a regular and systematic basis)
- the upfront price payable<sup>1</sup> under the contract is no more than \$300 000 or \$1 million if the contract is for more than 12 months.

<sup>1</sup> See <https://www.accc.gov.au/business/business-rights-protections/unfair-contract-terms/unfair-contract-terms-faqs#upfront>.

# Guarantees and warranties

## Consumer guarantees

Under the ACL, suppliers and manufacturers automatically provide customers with a basic set of consumer guarantees when they purchase goods or services. These guarantees set out the circumstances under which your business is required to provide a consumer with a remedy if the goods or services you supply or manufacture fail to meet certain standards.

The consumer guarantees apply regardless of any voluntary or extended warranty given by a supplier or manufacturer of goods and services, even if such a warranty has expired. They cannot be excluded and any contract term that purports to limit a consumer guarantee right has no effect. Similarly, anything that misleads consumers about their guarantee rights is likely to be illegal.

## Case study

In July 2013, the Federal Court ordered that Hewlett-Packard, a manufacturer and retailer of computer hardware, pay a \$3 million penalty for making false or misleading representations to consumers and retailers regarding consumer guarantee rights. The representations were made by Hewlett-Packard call centre staff located around the world. Representations included that:

- the remedies available to consumers were limited to the remedies available at the business' discretion
- consumers were required to have their product repaired multiple times before they were entitled to a replacement
- the warranty period for products was limited to a specified express warranty period
- consumers were required to pay for remedies outside the express warranty period
- products purchased online could only be returned at the business' discretion.

## Goods

Under the consumer guarantees, when goods are sold to customers they come with a number of guarantees, including that they:

- are of acceptable quality (i.e. that they are fit for all the purposes for which goods of that kind are commonly supplied, are acceptable in appearance and finish, free from defects, safe and durable)
- are fit for any purpose that the consumer or the supplier has disclosed
- accurately match their description (e.g. in a catalogue or television commercial) or correspond with the sample or demonstration model in quality, state or condition, and
- will have facilities and spare parts available for their repair for a reasonable period after they are supplied.

Most of the consumer guarantees relating to goods are given by both the supplier and the manufacturer of the goods. Notably, the guarantees relating to spare parts and facilities for repair and express warranties are given by the manufacturer only.

This list of guarantees is not exhaustive. Information on all of the consumer guarantees that apply to goods is available on the ACCC website.

## Services

Under the consumer guarantees, when a business supplies services to a consumer the services must be:

- provided with due care and skill
- reasonably fit for any disclosed purpose or reasonably achieve any disclosed desired result
- supplied within a reasonable time of being purchased, if there is no agreed timeframe.

### Failing to meet a guarantee

If consumers have a problem with a good or service they have bought and believe that it does not meet one or more of the consumer guarantees, they have a right to approach either the seller or manufacturer (or importer if the manufacturer does not have a principal place of business in Australia) to obtain a remedy and businesses cannot tell them otherwise. This is particularly important for suppliers, who cannot simply refer the consumer to the manufacturer to seek a remedy.

The type of remedy will depend on the circumstances, but may include:

- a repair
- a replacement
- a refund
- having the service performed again, or
- compensation for a drop in value of the goods.

The type of remedy, and who decides what kind of remedy it is will depend on the extent of the problem.

## Goods

Generally, if the problem is minor, the supplier can choose whether to remedy the problem with a replacement, repair or refund.

If the problem is major or cannot be fixed within a reasonable time, the consumer can choose to:

- reject the goods and obtain a full refund or replacement, or
- keep the goods and seek compensation for the reduction in value of the goods.

## Services

If the problem is minor and the consumer requires it to be fixed, the supplier can choose to fix it by for example fixing the problem free of charge and within a reasonable time or offering the consumer a refund. If the supplier refuses to fix the problem or take too long, the consumer can use a different supplier to fix the problem and recover the reasonable costs from the original supplier, or cancel the service (if it is ongoing) and get a refund.

If the problem is major, the consumer can choose to:

- terminate the contract and claim a refund
- keep the contract and recover compensation for any reduction in value of the services.

Whether the failure is minor or major, the consumer can also recover any loss or damage suffered as a result of the supplier's failure.

## Example

Tim uses a wheelchair and has just bought a new home. He is looking to install a concrete ramp and pathway from his front door to the street footpath.

After seeking a few quotes from potential suppliers, Tim selects the offer that best suits his needs. He has explained to the supplier that he needs the ramp and the path to provide him with full wheelchair access to the street.

The ramp and path are installed by the concrete paver on a day when Tim is at work. When he arrives home he notices that the newly paved pathway in his front garden ends a metre short of the street footpath, making it difficult for his wheelchair to cross.

### What can Tim do?

Tim explained his needs clearly to the supplier when he purchased the project. The supplier agreed to accommodate them, so he has the right to have the problem fixed.

Tim can:

- Contact the supplier and explain the problem, reminding them that he had clearly explained his needs before they commenced the job, and ask for the problem to be fixed at no charge within a reasonable time.
- If the supplier refuses to fix the problem or does not fix it in a reasonable time, Tim can engage someone else to complete the path and recover the cost from the original supplier.

### *Major or minor*

Generally, a problem with a good or service will be major if:

- the consumer would not have bought the good or service had they known about the nature and extent of the problem
- the good or service can't be used for what it is normally used for and can't be repaired within a reasonable time
- the good or service can't be used for a purpose or does not achieve the result made known to the supplier and can't be fixed in a reasonable time
- a good is significantly different from its description, sample or demonstration model
- the good or service is unsafe.

Information on when a problem with a good or service will be major is available on the ACCC website.

#### **Example—major failure**

A consumer purchases a mobility aid. When they go to use it, the battery catches fire and destroys the mobility aid. This would be a major failure and the consumer could choose a replacement or a refund.

#### **Example—minor failure**

If a consumer bought the same mobility aid and found that it had a scratch on its side that did not impact the safety or functioning of the mobility aid, this would be a minor failure and the supplier could choose how to remedy the defect.

If costs are incurred or losses suffered as a result of the failure to comply with a consumer guarantee, the customer can also claim compensation from the seller or manufacturer (but not both), provided that the cost or the loss was a reasonably foreseeable consequence of the failure of the goods or services.

#### **Example—consequential loss**

If a consumer bought the same mobility aid and when the battery catches fire, it burns their house down. The failure of the battery would be a major failure and the damage to the house is consequential loss caused by a failure to comply with a consumer guarantee.

### **Suppliers' rights against manufacturers**

When a supplier provides a remedy because goods:

- are not of acceptable quality due to a manufacturing defect
- do not match a description provided by the manufacturer, or
- are not fit for a purpose specified by the manufacturer

the supplier can recover the costs incurred from the manufacturer. This also extends to compensation for any reasonably foreseeable consequential loss paid to the consumer. A supplier has three years (from the date the supplier fixed the consumer's goods or the consumer took action against the supplier) to take action against a manufacturer for reimbursement.

## Change of mind

Consumers' rights are not limitless—the consumer guarantees only require a remedy if one of the guarantees has not been met. You are not legally required to provide a remedy if the consumer:

- simply changes their mind, decides they do not like the purchase or decides they have no use for it
- discovers they can buy the goods or services at a cheaper price elsewhere
- damages the goods by using them in a way that is unreasonable or unintended.

## Refunds and returns signs

Signs that state 'No refunds' are unlawful. The following signs are also unlawful:

- 'No refund on sale items'.
- 'Exchange or credit note only for the return of sale items'.

However, signs that state 'No refunds will be given if you have simply changed your mind' are acceptable.

## Warranties against defects

Sometimes suppliers and manufacturers may choose to offer their own warranties against something going wrong with a good, in addition to the consumer guarantees available under the ACL. These are often called 'manufacturer's warranties' or 'voluntary warranties'. If suppliers and manufacturers choose to provide a warranty against defects to consumers (which could be evidenced by writing on a label or packaging), the warranty must comply with specific requirements (see the ACCC website for details of these requirements).



# Selling safe products

Businesses should take responsibility for the safety of the goods that they supply or sell. If a good is unsafe it may not comply with the consumer guarantee as to freedom from defects (discussed above). Similarly, continuing to sell goods that you know to be unsafe may amount to misleading or deceptive conduct.

Businesses should have active policies in place to test the products that they sell and detect any unsafe products.

## Case study

In 2016 the Federal Court ordered Woolworths to pay penalties of over \$3 million following its failure to remove a number of products from sale after becoming aware of serious injuries caused by those products. The Court found that by failing to recall the products and remove them from sale Woolworths had misled consumers as to the suitability of the products.

Under the ACL, the relevant Commonwealth, state and territory ministers can regulate consumer goods and product-related services by:

- issuing safety warning notices
- banning products on a temporary basis or permanent basis (Commonwealth minister only)
- imposing mandatory safety standards (Commonwealth minister only), or
- issuing a compulsory recall notice to suppliers.

## Liability for unsafe goods

Manufacturers or importers of goods will be liable for any loss or damage caused by a safety defect in a good supplied by them. If the manufacturer or importer is unknown, the supplier may be liable. A good will have a safety defect if its safety is not such as persons generally are entitled to expect.

Manufacturers, importers and suppliers may reduce their exposure to product liability action by using these responsible and sensible business practices:

- conduct regular reviews of product designs and production
- implement and review quality assurance procedures
- test products regularly to relevant standards, including batch testing
- conduct marketing that accords with the safe and intended use of the goods
- provide clear and thorough user instructions
- where necessary, conduct a quick voluntary recall of any products that are defective or unsafe.

## Bans and mandatory standards

If any of your products are subject to a ban, you must not sell them. There are severe penalties for supplying banned products and you should immediately recall any banned product that you inadvertently supply. Information on banned products is available at [www.productsafety.gov.au](http://www.productsafety.gov.au).

Mandatory standards are introduced when considered reasonably necessary to prevent or reduce the risk of injury to a person. If your product is subject to a mandatory standard, it must meet particular safety criteria before it can be sold in Australia. There are potentially severe penalties for supplying products that do not meet a mandatory safety standard. Information on products subject to mandatory standards is available at [www.productsafety.gov.au](http://www.productsafety.gov.au).

## Mandatory reporting

If you become aware of an incident, where a person suffered death, serious injury or illness that you believe may have been caused by the use of a consumer good you supplied, you must notify the ACCC within two days of becoming aware. There are penalties for not reporting and businesses can report the incident at [www.productsafety.gov.au/mandatoryreporting](http://www.productsafety.gov.au/mandatoryreporting).

## Recalls

You should recall products that you have supplied that present a safety risk or that do not comply with a mandatory standard or ban.

A supplier can voluntarily recall a product (either independently or in consultation with a regulatory authority) or a government authority can mandate a compulsory recall.

Where a supplier voluntarily recalls a consumer good because it will or may cause injury or does not comply with a safety standard or ban, they must notify the ACCC within two days of issuing the recall. Information about how to do this is at [www.recalls.gov.au](http://www.recalls.gov.au).

For more information on product safety, products bans, mandatory standards and recalls, visit [www.productsafety.gov.au](http://www.productsafety.gov.au) and [www.recalls.gov.au](http://www.recalls.gov.au).

### Example

The importer and seller of a mobility scooter discovers that a certain batch of scooters that it sold have a defective bolt connecting the front wheels to the body. This means that if the scooter hits a bump, one of the front wheels may come off, causing the scooter to tip over. The seller issues a voluntary recall to replace the defective bolts because scooters with this defect may cause injury. The seller must notify the ACCC of the recall within two days of issuing the recall.

The seller is aware of a consumer who suffered serious injury when their scooter tipped over after the front wheel fell off. The seller must report this injury to the ACCC within two days of becoming aware of it.

# Competing fairly

Because the NDIS is changing the way the specific needs of consumers with disability are funded and supplied, it will also change the way that suppliers of disability related goods and services engage with those consumers and with each other. In many cases, there has traditionally been limited competition between the suppliers of disability related goods and services. With the advent of the NDIS, some of the traditional suppliers will be facing competition for the first time.

When operating in a competitive market, the law imposes certain obligations on businesses by prohibiting certain practices that may limit or prevent competition. Anti-competitive conduct can increase prices along the entire supply chain; it can also stifle innovation, prevent small businesses from entering the market and lessen competition. The end result is higher prices and reduced choices of products and services for consumers.

It is important for businesses that supply goods or services to the disability sector to understand their competition obligations under the Competition and Consumer Act (CCA). The ACCC enforces compliance with the competition law.

This chapter outlines business behaviour that is illegal between competitors.

## Who are my competitors?

When you sell goods or services to consumers you will be operating in a market. The extent of a market is determined by, among other things, its geographic boundaries and what goods or services consumers would buy if your products were not available. Anyone else, whether an individual, company or other structure, such as a not-for-profit,

who is selling products to consumers in the same market as you will be your competitor.

If you have previously worked closely with someone who is a separate entity or organisation to yours and is a competitor, you may be breaking the law if you continue to work closely with them. However, the ACCC can authorise certain anti-competitive conduct if the conduct is beneficial to consumers. See the section on authorisations, notifications and collective bargaining on page 24.

## Anti-competitive agreements

It is illegal for a business to enter into contracts, arrangements or understandings with competitors about how they will or won't compete with each other. These agreements are referred to as anti-competitive agreements. A category of anti-competitive agreements are cartel agreements. Individuals who are involved in the entry (or seeking to induce entry) of a business into a cartel agreement can be imprisoned for up to ten years.

Anti-competitive agreements do not have to be in writing. For example, they can be oral agreements made over a drink at the pub, or at an association meeting. You don't even have to formally agree with your competitors on the actions to take for your conduct to be illegal. It is enough that there is an understanding between businesses, regardless of how long the agreement lasts or how effective it is.

Businesses may enter into an anti-competitive agreement because they think it is the best way to help consumers with disability. However, it does not matter whether the businesses had an altruistic motive for the agreement or not.

For example, two not-for-profit suppliers may think that they can best service consumers with disability if they each supply different goods or services, or supply to different categories of consumers or different geographic locations. They may think that this minimises duplication and maximises the use of their resources. However, agreeing to do this is illegal as the agreement has the anti-competitive purpose of preventing supply to certain consumers by one of the suppliers. Businesses can apply to the ACCC for authorisation of certain conduct, if the public benefit outweighs the public detriment. However, without authorisation, this sort of conduct is illegal.

The following types of conduct generally fall within the prohibitions against anti-competitive conduct.

### Price fixing

It is illegal for competing businesses to get together and agree on the price they will charge.

#### Example

A number of disability accommodation providers in the same market form an industry group. During the course of one of the meetings of the industry group, the CEOs of two of the members agree to charge the same price for accommodation services. This is illegal.

### Market sharing

Dividing a market up with your competitors and agreeing to only do business in specific market segments, known as 'market sharing', is illegal—no matter how you do it.

Market sharing can cover the following types of agreements:

- agreements about which competitor will supply to specified geographic areas
- agreements where the competitors agree who will supply particular customers or that they will not bid or tender for work from their competitor's existing customers
- agreements about which competitor will supply particular products or services.

#### Example

The sales managers of two suppliers of disability aids meet at the local pub. They decide that as each supplier is on a different side of town, they will each only supply customers from their side. They agree that if someone from the other side of town approaches either of them, they will give that person a quote for double the usual price so that the consumer goes to the supplier on their side of town. This is illegal.

### **Example**

The CEOs of two not-for-profit suppliers of disability supports each think that the needs of consumers with disability can best be served if they focus on supplying only one service each and don't duplicate the services they offer. They meet to discuss which services they will provide so that there is no duplication.

This is market sharing. It is illegal, even though the organisations are doing it to better service consumers with disability. In this scenario, the organisations could apply to the ACCC for authorisation of this conduct. Without authorisation being granted, it is illegal.

### **Curtailing supply**

It is illegal for competitors to agree on how much of a good or service will be offered for sale or to reduce the production of goods.

### **Association meetings**

Meetings between competitors on matters of common interest can be pro-competitive as well as beneficial for individual competitors, businesses and the public. For example, industry associations can provide useful education and information to members and consumers, and can represent the view of members to government. However, meetings must not be used to fix prices or for organising any other anti-competitive conduct such as market sharing arrangements.

For more information about the obligations of industry associations and professional bodies, refer to the publication *Industry associations, competition and consumers*, available at [www.accc.gov.au](http://www.accc.gov.au).

### **Misuse of market power**

Some businesses are so dominant in a particular market that they are able to insulate themselves from competition in a way that less dominant businesses cannot. Such businesses will have a substantial degree of market power. Where a business has this type of market power, certain forms of conduct are illegal.

A business with a substantial degree of power in a market is not allowed to use this power for the purpose of eliminating or substantially damaging a competitor, or to prevent a business from entering into a market. This behaviour is referred to as 'misuse of market power'. A business uses its substantial market power if it does something that would make no commercial sense for a business without market power to do. The possession of market power is not illegal, only its misuse.

A business may have a substantial degree of power in a market where:

- it is difficult for competitors to enter the market
- it can behave with little regard to what its competitors, suppliers or customers do
- it has large market share or financial strength.

### Case study

In 2008 the Full Federal Court found that Baxter Healthcare had engaged in misuse of market power. The Court found that Baxter, which was the sole Australian-based manufacturer of sterile fluids, had a substantial degree of power in the Australia-wide market for sterile fluids. The Court found that Baxter had taken advantage of its market power to structure the terms on which it offered to enter into contracts for the supply of these products to the state purchasing authorities in NSW, Queensland, South Australia, and Western Australia.

Baxter required the authorities to also purchase peritoneal dialysis fluids (PD fluids) (a market in which Baxter faced real competition from imports) if they wished to have the benefit of significantly lower prices.

The court found that Baxter's purpose in leveraging its market power in sterile fluids was to deter or prevent competitors from being competitive in the supply of PD fluids.

### Predatory pricing

Another form of prohibited anti-competitive conduct is predatory pricing. This occurs when businesses price their goods below cost for the purpose of eliminating or substantially damaging a competitor, preventing the entry of a competitor into a market or deterring or preventing a competitor from engaging in competitive conduct.

Simply pricing goods below cost is not automatically illegal. To determine whether the law has been broken other factors must be examined, such as how long the goods were sold at the below-cost price and how much market power the seller has.

### Example

A business is the sole supplier of disability aids in a regional town that forms its own geographic market. A new business enters that market to compete with the existing business. The existing business reduces the price of all of its products and sells them at a loss, so as to drive the new competitor out of business. This would be likely to be predatory pricing, a form of misuse of market power.

# Supply related issues

## When refusing to supply is allowed

In most cases, suppliers have the right to decide who they do business with. The supplier's decision may be swayed by factors such as the reliability of the customer, the cost of delivery, the agreed representation/presentation of goods and services, and the performance and maintenance of standards.

The CCA does not force a manufacturer or wholesaler to supply goods or services to small businesses, even when it has previously done so. If a refusal to supply is legitimate, the small business will have to renegotiate with that supplier or seek alternative suppliers.

## When refusing to supply is breaking the law

### Boycotts

The CCA makes it illegal for competitors to get together and agree not to acquire goods from a particular supplier or not to supply goods to a particular business or person. This applies to trade unions, professional associations and individual businesses.

### Imposing minimum prices on retailers

Businesses have the right to set their own prices and discount their goods or services whenever they like. It is illegal for a supplier to attempt to set a minimum price by any means, including by:

- formal agreement
- cutting off or threatening to cut off supply to a reseller (wholesale or retail), or
- raising the supply price.

This behaviour is referred to as 'resale price maintenance'.

### *Recommended price lists*

There is nothing wrong with using a supplier's recommended retail price (RRP) list as long as it is just that—recommended. The supplier is not allowed to force you to use the recommended price list. You are free to discount whenever you choose to.

However, it would be illegal for you and your competitors to agree to only charge the listed price or any other set price. This would amount to price fixing.

### *Exceptions*

A supplier may withhold the supply of goods when a retailer has sold the goods at a price *below cost* to attract customers to the business—this is known as loss-leader selling.

Also, agency agreements or other arrangements where ownership of the goods or services does not pass from the supplier to the retailer before resale are not prohibited under the CCA's resale price maintenance provisions.

Resale price maintenance may also be authorised by the ACCC provided the public benefit outweighs any detriment.

### Case study

In 2010 the ACCC took legal action in the Federal Court against a pram wholesaler for not allowing retailers to discount its Bertini brand baby prams. The wholesaler admitted it had told some retailers it would not supply them with Bertini products unless they agreed to sell them above a specified price. The wholesaler also admitted it had attempted to induce some retailers not to sell the prams below a certain price and had even entered into a formal agreement with one retailer. The Federal Court imposed a penalty of \$80 000 against the wholesale company and \$20 000 against its managing director.

### Misuse of market power

In some cases, if a business with a substantial degree of power in a market refuses to supply or deal with another business, it may be engaging in misuse of market power. For this to be the case, it would need an anti-competitive purpose and to be taking advantage of its market power. See the section on misuse of market power, above.

### Exclusive dealing

Exclusive dealing can occur when one business imposes restrictions on another business's freedom to choose who they deal with and on what terms. The CCA prohibits exclusive dealing. However sometimes the conduct is prohibited outright; in other circumstances it is subject to a test of whether it has substantially lessened competition in a market.

#### *Third line forcing*

It is illegal for a business to only offer to supply a good or service (to another business or a consumer) on the condition that the customer also buys goods or services from another specified business. This behaviour is referred to as 'third line forcing'.

### Example

A supplier of in-home care services to people with disability makes it a condition that it will only provide the services to its customers if the customer uses a specific type of bed that is only available from a single supplier. This is illegal.



# Authorisations, notifications and collective bargaining

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## **Authorisation or notification of anti-competitive conduct**

The CCA recognises that there may be circumstances where greater public benefit would result from allowing certain conduct or arrangements that may restrict competition. The ACCC can authorise businesses to engage in conduct that may otherwise breach the competition provisions of the CCA through the authorisation or notification process.

In considering authorisation applications or notifications the ACCC will assess whether the conduct or arrangement is likely to result in a public benefit that outweighs any resulting public detriment, including from a lessening of competition.

## **Collective bargaining**

The CCA makes it illegal for businesses to get together and collectively negotiate terms and conditions with a supplier or customer, as this could involve agreements between competitors, often in relation to pricing. However when the outcome of collective negotiations is likely to result in a public benefit—such as through providing more efficient and effective negotiations, which can lead to lower prices or a greater variety of products—the ACCC may allow it.

# Penalties for breaching the CCA or the ACL

The consequences of a court finding that you have breached the CCA or ACL may include significant penalties.

Penalties for breaches of the ACL or CCA include:

- **Financial penalties.** For breaches of the CCA the maximum penalty for corporations is the greatest of \$10 million, three times the value of any benefits obtained as a result of the conduct or 10 per cent of annual turnover in the preceding 12 months. For breaches of the ACL the maximum financial penalty for corporations is \$1.1 million for each contravention.
- **Imprisonment.** The CCA includes criminal provisions for cartel conduct. The maximum term of imprisonment for individuals who contravene the criminal cartel provisions is 10 years.
- **Community service orders.** A court may order that you undertake a service of benefit to the community that relates to the offending conduct.
- **Adverse publicity orders.** A court may order that you publish corrective advertising in relation to the offending conduct.
- **Disqualification from managing corporations.** In appropriate cases, a court may order that an individual involved in the contravening conduct be disqualified from managing corporations for a period of time.
- **Compensation orders and non-party consumer redress.** For breaches of the CCA or ACL, the ACCC may seek orders that specified persons who have suffered loss or damage as a result of the offending conduct be compensated. For breaches of the ACL, the responsible regulator may also seek remedies for a class of non-specified consumers that may have suffered loss or damage as a result of the contravening conduct (e.g. in matters where a large number of consumers have been misled and it is not possible to identify each one).

You may also incur significant legal costs defending any action brought by a responsible regulator and, if you are unsuccessful, you may be ordered by a court to pay a portion of the regulator's costs.

Any of the ACL regulators can take action for penalties where a business breaches the ACL. The ACCC is the only agency that can take action for penalties where businesses breach the competition laws in the CCA.

The responsible regulator usually issues a media release when a court case has started and concluded in court or settled without going to court. This informs the public about the responsible regulator's action and promotes compliance with the CCA or ACL.

The CCA and ACL also allow individual parties that have suffered loss resulting from a breach of the CCA or ACL to take their own private action to recover damages and seek injunctions or declarations.

# Further information and contacts

To help small business to understand the competition and consumer law, the Australian Competition and Consumer Commission operates an online education program.<sup>2</sup>

The various state and territory ACL regulators are listed at the end of this section, along with their contact details.

More detailed information is available on the different state and territory ACL regulators' websites and in the following publications:

*Avoiding unfair business practices—a guide for businesses and legal practitioners*

*Consumer Guarantees—a guide for businesses and legal practitioners*

*Unfair contract terms—a guide for business and legal practitioners*

*Consumer product safety—a guide for business and legal practitioners*

*Sales practices—a guide for business and legal practitioners*

*Small business and the Competition and Consumer Act*

*Advertising and selling guide*

*Consumer product safety online*

*Cartels: what you need to know—a guide for business*

*Product safety in Australia.*

These are available at [www.accc.gov.au/publications](http://www.accc.gov.au/publications).

## State and territory ACL regulators

### Australian Capital Territory

Access Canberra

Ph: 13 2281

[www.accesscanberra.act.gov.au](http://www.accesscanberra.act.gov.au)

### New South Wales

NSW Fair Trading

Ph: 13 3220

[www.fairtrading.nsw.gov.au](http://www.fairtrading.nsw.gov.au)

### Northern Territory

Consumer Affairs

Ph: 1800 019 319

[www.consumeraffairs.nt.gov.au](http://www.consumeraffairs.nt.gov.au)

### Queensland

Office of Fair Trading

Ph: 13 7468

[www.qld.gov.au/law/fair-trading](http://www.qld.gov.au/law/fair-trading)

### South Australia

Consumer and Business Services

Ph: 13 1882

[www.cbs.sa.gov.au](http://www.cbs.sa.gov.au)

### Tasmania

Tasmania Consumer, Building and Occupational Services

Ph: 1300 654 499

[www.cbos.tas.gov.au](http://www.cbos.tas.gov.au)

### Victoria

Consumer Affairs Victoria

Ph: 1300 558 181

[www.consumer.vic.gov.au](http://www.consumer.vic.gov.au)

### Western Australia

Department of Mines, Industry Regulation and Safety

Ph: 1300 304 054

[www.consumerprotection.wa.gov.au](http://www.consumerprotection.wa.gov.au)

## Australian Competition and Consumer Commission

Ph: 1300 302 502

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

<sup>2</sup> See <http://www.ccaeducationprograms.org>.

This guide was developed by:

- Access Canberra, Australian Capital Territory
- Australian Competition and Consumer Commission
- Australian Securities and Investments Commission
- Consumer Affairs Victoria
- Consumer and Business Services South Australia
- Consumer, Building and Occupational Services, Tasmania
- New South Wales Fair Trading
- Northern Territory Consumer Affairs
- Queensland Office of Fair Trading
- Western Australia Department of Mines, Industry Regulation and Safety

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