



Exclusive dealing notification guidelines

November 2017

Australian Competition and Consumer Commission

23 Marcus Clarke Street, Canberra, Australian Capital Territory, 2601

© Commonwealth of Australia 2017

This work is copyright. In addition to any use permitted under the *Copyright Act 1968*, all material contained within this work is provided under a Creative Commons Attribution 3.0 Australia licence, with the exception of:

- the Commonwealth Coat of Arms
- the ACCC and AER logos

any illustration, diagram, photograph or graphic over which the Australian Competition and Consumer Commission does not hold copyright, but which may be part of or contained within this publication.

The details of the relevant licence conditions are available on the Creative Commons website, as is the full legal code for the CC BY 3.0 AU licence.

Requests and inquiries concerning reproduction and rights should be addressed to the Director, Content and Digital Services, ACCC, GPO Box 3131, Canberra ACT 2601, or publishing.unit@accg.gov.au.

www.accc.gov

1. Introduction

The *Competition and Consumer Act 2010*¹ (the Act) allows a business to obtain legal protection to engage in exclusive dealing conduct that might otherwise breach section 47 of the Act by:

- lodging an exclusive dealing notification, or
- obtaining authorisation for the conduct.

This guide provides information about the exclusive dealing notification process. The ACCC's [Guidelines for Authorisation of Conduct \(non-merger\)](#) contains details about the authorisation process.

2. Exclusive dealing

Broadly, exclusive dealing occurs when one person trading with another restricts the other's freedom to choose with whom, in what or where it deals.

Exclusive dealing is common in many business arrangements. Importantly, changes to the Act on 6 November 2017 mean that exclusive dealing is only a breach of the Act if the restriction is likely to have the purpose, effect or likely effect of substantially lessening competition.

Exclusive dealing under the Act can be divided into two broad categories:

- third line forcing and
- other forms of exclusive dealing.

Third line forcing

Third line forcing occurs when a supplier of goods or services imposes a condition requiring the buyer to also acquire goods or services from a particular, unrelated, third party, or refuses to supply because the buyer will not agree to that condition. The conditional supply may relate to the product itself or to the supply of the product at a particular price or discount.

Common business arrangements involving third line forcing include:

- a property developer offering blocks of land for sale on condition that purchasers use a nominated builder to construct their house
- a franchisor offering franchise services on condition that franchisees purchase goods and/or services from nominated suppliers
- a mobile phone retailer offering discounted handsets on condition that purchasers sign up to a data plan from a particular telecommunications service provider.

Prior to 6 November 2017, third line forcing was a per se breach of the Act, which meant that unless a notification or authorisation was in place, it was prohibited outright, regardless of whether it had an anti-competitive purpose or effect. For this reason, every year, the ACCC received hundreds of notifications to allow parties to engage in third line forcing. In most cases this conduct raised no competition concerns.

¹ Under section 93(1)(b) of the Act, a corporation or other person may lodge an exclusive dealing notification.

Under changes to the Act which took effect on 6 November 2017, third line forcing is treated the same way other forms of exclusive dealing: it will only breach the Act if it has the purpose, effect or likely effect of substantially lessening competition. Therefore from 6 November 2017, lodging a notification is only necessary if you are at risk of breaching this purpose or effect test. Most parties engaging in third line forcing will no longer need to lodge a notification.

Other forms of exclusive dealing

Other kinds of exclusive dealing include:

- the supply of goods or services, or the supply at a particular price or discount, on condition that:
 - the buyer will not acquire, or will limit the acquisition of, goods or services from a competitor of the supplier
 - the buyer will not re-supply, or will re-supply only to a limited extent, goods or services acquired from a competitor of the supplier, or
 - the buyer will not re-supply the goods or services to others, or will re-supply only to a limited extent, to particular persons, classes of persons or in particular places.
- refusing to supply goods or services, or to supply at a particular price or discount, because the buyer will not agree to any of these conditions.
- the acquisition of goods or services, or the acquisition at a particular price, on condition that the supplier will not supply the goods or services to others, or will do so only to a limited extent, or only to particular persons, classes of persons or in particular places
- refusing to acquire goods or services because the supplier will not agree to any of these conditions.

3. Exclusive dealing notifications

Lodgement

When to lodge a notification

A business may decide to lodge a notification where:

- it proposes to engage in conduct that may constitute exclusive dealing, and
- the conduct may have the purpose, effect or likely effect of substantially lessening competition.

The ACCC can provide information about the legal test, but it is up to the business to assess its own risk and whether it needs to lodge a notification.

How to lodge a notification

The ACCC encourages businesses to contact it before they lodge a notification for proposed exclusive dealing conduct. These discussions enable businesses to outline their proposal to the ACCC to ensure they provide all relevant information and documents as part of the notification.

A notification can only be lodged by business that is engaging in, or is proposing to engage in, exclusive dealing conduct.

To lodge a notification, the individual or business must:

- provide the information required by the notification form, which is available on the ACCC website (<https://www.accc.gov.au/business/applying-for-exemptions/fees-forms>), and
- pay the lodgement fee, which is \$2500 per notification unless a concessional fee applies.
 - A concessional fee of \$500 may apply where additional notifications are lodged within 14 days of the first notification and relate to conduct in the same, or closely related, markets as the first notification.
 - See the ACCC's website at www.accc.gov.au/lodgementfees for details on how to pay the lodgement fee.

The ACCC prefers notifications to be lodged by email to the General Manager, Competition Exemptions, Mergers, Exemptions and Digital, ACCC at exemptions@acc.gov.au, but they can also be lodged by mail or in person at an ACCC office (see www.accc.gov.au/contactus).

Once the notification is assessed as validly lodged, it will be placed on the ACCC public register.

Information required

The information the ACCC requires to assess a notification will vary depending on the nature and complexity of the proposed conduct and the market(s) involved. The ACCC can assess your notification more efficiently and effectively if you provide comprehensive information and evidence.

As part of the notification it is important that you:

- describe the proposed conduct in a sufficiently precise manner such that the ACCC can consult with interested parties and assess the notification
- outline the areas of competition (relevant markets) likely to be affected by the proposed conduct
- describe the likely public benefits from the proposed conduct
- describe the likely public detriments, including any likely detrimental effect on competition
- provide any other information that is relevant to the ACCC's assessment.

The ACCC will give more weight to claims that are supported by relevant evidence.

The ACCC may seek further information from the notifying business or consult with interested parties. The ACCC generally prefers to obtain its information cooperatively but may exercise its compulsory information gathering powers under s 155 of the Act where appropriate.²

Amending or withdrawing a notification

A notification cannot be amended after it is lodged.

A notification can be withdrawn by the notifying business by writing to the ACCC at any time. If a notification is withdrawn, it will remain on the ACCC's public register in the 'withdrawn notifications' section.

² Section 155(1)

Where a notification has been withdrawn, the notifying business is unable to lodge a notification in relation to the same conduct or for conduct to like effect.³ Businesses are encouraged to contact the ACCC before lodging further notifications.

Commencement of legal protection

The protection from legal action provided by a notification automatically commences on the day the notification is validly lodged with the ACCC. The protection will continue unless or until the notification is revoked or withdrawn.

While the notification is in force, the business is able to engage in the exclusive dealing conduct as described in the notification without the risk of breaching the exclusive dealing provisions of the Act.

4. ACCC assessment

Legal test

The ACCC will assess an exclusive dealing notification by applying the test in s 93(3) of the Act. The test requires that in order for the ACCC to revoke a notification it must be satisfied that the notified conduct:

- has the purpose, effect or likely effect of substantially lessening competition, and
- in all the circumstances, will not result in likely public benefit which would outweigh the likely public detriment.

Substantial lessening of competition

There is no definition in the Act of ‘substantially lessen competition’. The ACCC generally takes it to mean where the competitive process has been damaged in a meaningful way, usually by deterring, hindering or preventing competition.

‘Substantially’ refers to the competitive process and it is interpreted as a relative concept and does not require an impact on the whole market.

‘Lessening competition’ means that the field of rivalry is diminished or lessened, or the competitive process is compromised or impacted, and extends to ‘preventing or hindering competition’. The effect is a weakening of competitive constraints or reduced incentives to engage in competitive rivalry.

The precise threshold between a lessening of competition and a substantial lessening of competition is a matter of judgement and will depend on the facts. Generally, the ACCC takes the view that a lessening of competition is substantial if the proposed conduct for which authorisation is sought confers an increase in market power that is significant and sustained.

Public benefits and public detriments

If the ACCC considers that notified conduct may have the purpose, effect or likely effect of substantially lessen competition, the ACCC will then go on to assess the likely public benefits and detriments resulting from the conduct.

³ Section 93(10)

The Act does not define what constitutes a public benefit or public detriment and the ACCC adopts a broad approach on a case by case basis. Common public benefits from exclusive dealing conduct may include:

- more efficient business operations
- improved product quality
- the promotion of competition.

Public detriments from exclusive dealing conduct are not limited to those that relate to a lessening of competition, although in many cases these will be the only identifiable detriments.

Steps in the process

Upon a notification being lodged, the ACCC will assess the notification and decide either to:

- **take no further action** at the current time, which allows the legal protection provided by the notification to commence or continue unless and until the ACCC decides to revoke the notification, or
- **take steps to remove the protection** from legal action by revoking the notification.

No further action

If the ACCC is satisfied that the proposed conduct is not likely to substantially lessen competition, or, if it does, the proposed conduct is likely to result in a net public benefit, the ACCC may decide to take no further action at that time. The ACCC will advise the notifying business and any interested parties of its decision and update the public register.

The ACCC may revisit this assessment at any time and take steps to remove the protection provided by the notification. Triggers for review might include complaints from those affected by the conduct, a change in market conditions or new information coming to light.

Revoking a notification

When the ACCC considers that the test to revoke a notification is met, the ACCC may issue a written notice objecting to the notification. Before the ACCC does so, it must:

- issue a draft notice outlining the reasons why the ACCC proposes to revoke the notification
- seek submissions from the notifying business and interested parties in response to the draft notice
- hold a conference, if requested.

Draft notice to revoke

Before removing the legal protection provided by a notification, the ACCC must issue a draft notice outlining the reasons why the ACCC proposes to revoke the notification.

The draft notice will be sent to the notifying business and placed on the public register to allow for public consultation.

The ACCC will seek submissions on the draft notice from the notifying business and from interested parties.

Opportunity for a conference

When the ACCC issues a draft notice objecting to a notification, it will provide the notifying business and interested parties with an opportunity to request that a conference be held. Conferences of this kind are chaired by an ACCC commissioner and provide the notifying business and interested parties with an opportunity to make oral submissions relating to the draft notice and the notification.

Any conference request must be made in writing within 14 days from the date nominated by the ACCC. If a conference is requested, it must be held no later than 30 days after the expiration of the 14 day period.⁴

The ACCC will prepare a record of the main points raised during the conference. Copies of this record and all written submissions will be placed on the public register.

Final decision

If the ACCC decides to issue a final notice to revoke a notification, the legal protection provided by the notification will cease on the 31st day after the notice is given or on any later date specified in writing by the ACCC.⁵

The ACCC will place a copy of the final notice on the public register and will provide it to the notifying business and interested parties.

When a notification is revoked, the notifying business cannot lodge a further notification in relation to the same conduct or for conduct to like effect. Businesses are encouraged to contact the ACCC before lodging further notifications.

Alternatively, the ACCC may decide not to revoke the notification. If this is the case, the legal protection provided by the notification will continue.

Tribunal review of the ACCC's decision

The giving of a final notice revoking a notification by the ACCC is subject to review by the Australian Competition Tribunal.⁶ A person seeking review must lodge an application for review with the Tribunal within 21 days of the date of the notice.

If an application to the Tribunal is lodged, the legal protection continues unless and until the Tribunal makes a decision affirming the giving of the final notice.

The Act does not provide for review by the Tribunal of an ACCC decision to allow a notification to continue.

5. Public register

Under the Act the ACCC must maintain a public register containing documents provided in relation to a notification.

The public register enables the notification process to be as open and transparent as possible. This allows the claims made by the notifying business about the impact of the proposed conduct to be tested and gives interested parties the opportunity to put their views.

The public register is available on the ACCC's website (<http://acc.gov.au/PublicRegister>).

4 Section 93A(5)

5 Section 93(7C)

6 Section 101A

6. Contacts and further information

The ACCC is available to discuss the notification or authorisation process with parties before they lodge a notification or apply for authorisation. We can provide guidance on the type of information that is likely to be relevant to the ACCC's assessment and we can provide comments on a draft notification before it is lodged.

Related publications

[Guidelines for excluding information from the public register for authorisation, merger clearance and notification processes](#)

[Guidelines for Authorisation of Conduct \(non-merger\)](#)

ACCC contacts

Competition Exemptions – exemptions@acc.gov.au

Infocentre 1300 302 502

Website www.acc.gov.au