

EXPORT AGREEMENTS AND THE COMPETITION AND CONSUMER ACT

Guide to the export agreement exemption
in the Competition and Consumer Act



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

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Important notice

This publication has been updated to refer to the Competition and Consumer Act 2010 which replaces the Trade Practices Act 1974 on 1 January 2011. For more information on the Australian Consumer Law changes see www.consumerlaw.gov.au

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The Competition and Consumer Act

The objective of the Competition and Consumer Act 2010 (the Act) is to enhance the welfare of all Australians by promoting competition and fair trading and providing consumer protection.

The role of the ACCC and export agreements

The Australian Competition and Consumer Commission is the national agency responsible for administering the Act.

Among other functions, the ACCC is responsible for enforcing provisions of the Act prohibiting anti-competitive practices, unconscionable conduct and misleading and deceptive conduct.

However, the Act does allow some prohibitions to be exempted, including certain export agreements lodged with the ACCC.

Countries often exempt export agreements or export associations from competition regulation, and Australia is no exception. Some countries (including the United States and Australia) require disclosure of export arrangements. In the United States, for example, limited exemption from the US's anti-trust laws is available for export trade associations if the association registers its arrangements within a specified time frame.¹ Spill over effects from an export arrangement reducing competition in domestic markets are a concern, and therefore the exemption only relates to the export of goods and services.

The export agreement exemption protects businesses from certain breaches of the Act in Australian courts. It does not exempt Australian businesses from the competition laws in other countries. Businesses should seek their own legal advice about the implications of export arrangements in Australia and other jurisdictions.

Purpose of the guide

The purpose of this guide is to assist businesses that are considering obtaining an exemption from the Act for certain export arrangements.

It summarises information about lodging export agreements with the ACCC. However, it is not a substitute for legal advice.

The export agreement exemption

Section 51(2)(g) of the Act sets out the exemption for export agreements for breaches of most sections of Part IV of the Act (which contains prohibitions on anti-competitive practices). It states that regard shall not be had:

to any provision of a contract, arrangement or understanding, being a provision that relates exclusively to the export of goods from Australia, or to the supply of services outside Australia, if full and accurate particulars of the provision (not including particulars of prices for goods or services but including particulars of any method of fixing, controlling or maintaining such prices) were furnished to the ACCC before the expiration of 14 days after the date on which the contract or arrangement was made or the understanding was arrived at, or before 8 September 1976, whichever was the later.

¹ Section 65 of the Webb-Pomerene (Export Trade) Act 1918 (USA).

This means that export agreements are exempt from most of the anti-competitive conduct provisions of the Act if certain notification requirements are met.

Export agreements

What are they?

Export agreements are contracts, arrangements or understandings that relate exclusively to the export of goods from Australia or the supply of services outside of Australia.

Example:

A contract between Australian mining companies which sets out the quantity and price of natural resources sold to an overseas buyer for consumption or resale in an overseas market.

Example:

A memorandum of understanding between Australian producers to jointly market agricultural produce to overseas buyers for consumption or resale in an overseas market.

Agreements may contain provisions that relate to the export of goods from Australia and other provisions that relate to the supply of goods **within** Australia. Only those that relate to the export of goods and the supply of services outside Australia would be eligible for an exemption from certain sections of the Act. If, for example, a provision of an export agreement relates to supply or pricing in the domestic market in any way, it will not fall within the exemption.

Exemption from the competition provisions of the Competition and Consumer Act

Anti-competitive conduct

Anti-competitive practices prohibited by the Act include:

- cartel provisions, including price agreements between competitors
- agreements between competitors to refuse to deal, or limit dealings with another supplier or particular customer—sometimes called primary boycotts
- secondary boycotts if their purpose is to cause substantial loss or damage to a business, or a substantial lessening of competition in a market. They generally involve two people acting together to hinder or prevent a third person from supplying to, or buying goods from, a fourth person
- misuse of market power—a firm with substantial market power is acting unlawfully if it uses that power for the purpose of damaging a competitor or excluding other businesses from a market
- exclusive dealing—a person must not impose restrictions on others' freedom to choose with whom, or in what, they deal if it will result in a substantial lessening of competition

- third line forcing—a person must not supply another business or consumers on condition that the buyer also acquires another firm's product (e.g. a car dealer insisting that a consumer also acquire a particular source of finance or insurance)
- resale price maintenance—suppliers must not specify a minimum price below which goods or services may not be resold or advertised.

What can be exempted?

A provision of an export agreement will not breach the prohibitions on anti-competitive practices in the Act if certain notification requirements are met, with two exceptions—secondary boycotts and resale price maintenance conduct.

The exemption also does not provide immunity from other parts of the Act, for example, the prohibition on misleading and deceptive conduct in the Australian Consumer Law (Schedule 2 of the Competition and Consumer Act).

What do exporters need to do to take advantage of the exemption?

To obtain an exemption, section 51(2)(g) of the Act requires that:

- the provisions of the contract, arrangement or understanding relate exclusively to the export of goods from, or the supply of services outside Australia. A provision in the same agreement between the exporter and overseas buyer, that covers other aspects of export or supply (for example, a clause in the contract providing that the exporter will transport the goods from the point of manufacture to the point of departure in Australia) could be regarded by a court as being part of the export contract
- full and accurate details of the provisions be provided to the ACCC
- these details be submitted to the ACCC within 14 days of the contract, arrangement or understanding being made.

Providing details to the ACCC

Exporters must give details of export agreements to the ACCC by providing:

- a full copy of the export agreement
- a copy of the actual relevant provision(s) of the export agreement or
- details of the relevant provision(s) which may involve conduct prohibited by the Act.

There are no forms or fees for doing so. If an exporter gives the ACCC a complete copy of an export agreement, it should be accompanied by a covering letter which summarises the provisions being furnished for the export exemption.

The exporter should provide enough detail to demonstrate that the agreement relates to the export of goods or to the supply of services from Australia. Details of the substance of the provision should also be provided, including those which may involve conduct prohibited by the Act.

Details of the prices of goods and services are not required. However, details of any method of fixing, controlling or maintaining prices are required.

If the ACCC believes it has not received enough information, or it is not clear which provisions of an agreement have been provided for the purpose of an export agreement exemption, it may ask for clarification.

When lodging an export agreement, exporters should also indicate in the covering letter whether they need the ACCC to issue them with a certificate. The Act does not require the ACCC to issue a certificate, unless requested.²

The consequence of failing to submit particulars according to section 51(2)(g) is that the provisions may be considered in the context of an alleged contravention of the prohibitions in the Act on anti-competitive conduct.

Export agreement exemption certificates

Section 166 of the Act states:

- (1) where particulars of, or of a provision of, a contract, arrangement or understanding have been furnished to the ACCC for the purposes of section 51(2)(g), the ACCC shall, upon application by a party to the contract or to the arrangement or understanding, cause to be furnished to the party a certificate signed by a member of the ACCC specifying the particulars so furnished and the date on which the particulars were furnished;
- (2) a certificate shall be received in all courts as evidence that the particulars specified in the certificate were furnished to the ACCC on the date so specified; and
- (3) a person is not entitled to inspect any particulars of, or of a provision of, a contract, arrangement or understanding that have been furnished to the ACCC for the purposes of section 51(2)(g), but the ACCC may make those particulars available to the Minister or to an officer acting on behalf of, and with the authority of, the Minister or to a court.

² Section 166(1) of the Competition and Consumer Act 2010.

What does a certificate do?

A certificate may be provided to a court as evidence that the details of the export agreement, as specified in the certificate, were lodged with the ACCC on a certain date.

What doesn't a certificate do?

A certificate from the ACCC does not indicate that an agreement is exempt from the relevant prohibitions on anti-competitive conduct in the Act. The court is the ultimate arbiter as to whether an agreement is exempt. Exporters should seek their own legal advice to ensure that the notification requirements have been satisfied.

Procedures followed by the ACCC

If requested, the ACCC will provide a certificate signed by a commissioner. The purpose of this certificate is to specify what details were provided to the ACCC and the date they were provided.

As noted above, the certificate does not, itself, provide exemption from the anti-competitive conduct provisions of the Act. The exemption stems from the operation of section 51(2)(g) itself and as such the ACCC is not required to determine or advise exporters whether the notification requirements under section 51(2)(g) of the Act have been met. This is ultimately the court's decision.

However, in instances where the ACCC considers that the particulars of the export agreement may not be compliant with section 51(2)(g) it will note this in the covering letter to the notifying party when providing the certificate.

The ACCC endeavours in most cases to provide a certificate to the notifying party within one month of receipt.

Confidentiality and export agreements

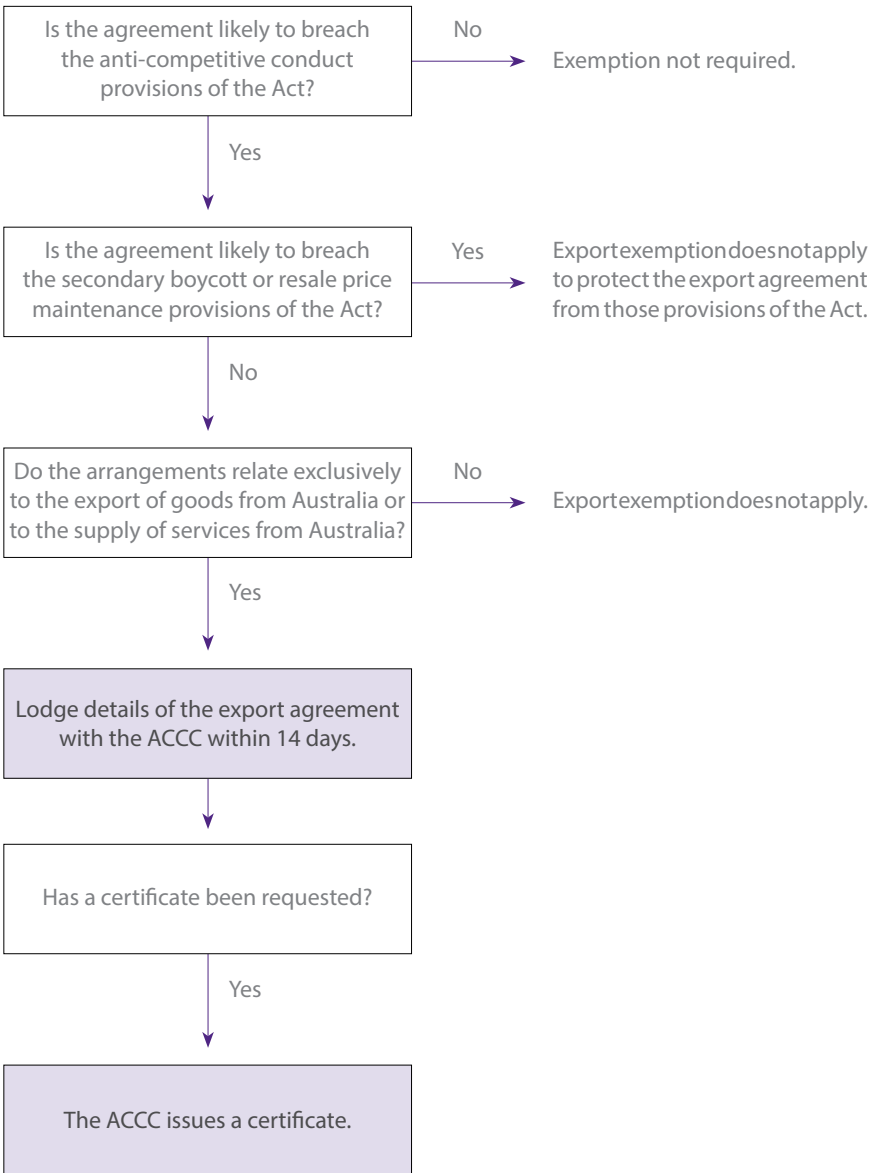
Confidentiality of agreements

Details of export agreements that have been lodged with the ACCC are not available for public inspection.

The ACCC cannot disclose information contained in a certificate that it has issued to an exporter, if it contains the details of the export agreement.

However, the ACCC may make those details available to a court or to the minister (or an officer acting on behalf of the minister).

Overview



How to contact us

Export agreements should be submitted to:

General Manager, Competition Exemptions
Australian Competition and Consumer Commission G
PO Box 3131 CANBERRA ACT 2601

Email: exemptions@accc.gov.au

The ACCC cannot give legal advice. However, it can give you information on the issues discussed in this guide. For more information about lodging export agreements contact:

Competition Exemptions
Australian Competition and Consumer Commission
GPO Box 3131
CANBERRA ACT 2601

Tel: (02) 6243 1368

ACCC contacts

Infocentre: 1300 302 502

Website: www.accc.gov.au

For all other business information go to www.business.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

Addresses

ACT (national office)

23 Marcus Clarke Street
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Darwin NT 0801
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