Important notice. This booklet is a guide only and should not be taken as legal advice. It is not possible here to explain many of the qualifications that apply to the provisions of the Trade Practices Act.

Contact your nearest ACCC office for more information. Addresses are at the back.
This guide

Businesses small and large often complain to the Australian Competition and Consumer Commission that manufacturers or distributors have refused to supply them with goods or services.

They believe that the *Trade Practices Act 1974* gives them an absolute right to be supplied, whatever the circumstances.

Manufacturers and distributors also ask about their obligations in relation to whom they have to supply, and when.

The answer is the same in both circumstances. **In general, businesses may decide for themselves with whom they wish to deal. No one has an absolute right to be supplied.**

There are a few circumstances only in which a refusal to deal is illegal under the Act. These are dealt with in the following pages.

What the Act says

The Trade Practices Act is fundamentally concerned with preventing anti-competitive conduct and providing appropriate safeguards for consumers.

Whether or not a refusal to deal is a breach of the Act often depends on the effect the refusal has or would have on competition in the market concerned.

There are situations where refusal to deal is prohibited outright, and others in which the prohibition is subject to a competition test.

Some conduct can also be exempted from legal proceedings by the processes of authorisation or notification.
When refusing to supply is legal

There may be sound commercial reasons—legal ones—why a customer is refused supply of goods or services.

For example, a wholesaler or manufacturer may find it too costly or inconvenient to sell to people who walk in off the street, or may dislike supplying outlets which are located too close to each other.

Perhaps the supplier believes that a reseller is a bad credit risk, does not promote the goods or services properly or lacks particular skills or expertise relevant to the business.

Or it may purely be a personality clash between the two parties that is causing the problem.

There are legitimate commercial reasons for refusal to supply. But suppliers should not attempt to use one of these as a front for illegal conduct.

Business owners who have been refused supply should look at all the circumstances leading up to the refusal.

Example

In a previous Federal Court action between a bank and a manufacturing company, the company allegedly took advantage of its market power by refusing to supply equipment until a debt had been paid. The court said there had to be a causal connection between the conduct and the market power in that the conduct was a use of that power.

In this case it was found that the purpose of the conduct was to collect a debt. The judge was satisfied that the refusal to supply was not linked with market power.
Conduct that may be a refusal to deal

Agreements (s. 45)

Agreements involving competitors that involve restricting the supply of goods are prohibited if they have the purpose or effect of substantially lessening competition in a market in which the businesses operate.

Examples

- In December 1995 the Federal Court imposed penalties totalling more than $20 million on three pre-mixed concrete suppliers and some executives after finding they had engaged in conduct that included market sharing.

- In 1994 three express freight companies were penalised a total exceeding $20 million. The companies had entered into and put into effect an anti-competitive arrangement or understanding that included reducing the soliciting of each other’s customers.
Boycotts

Primary boycotts: agreements that contain an exclusionary provision (s. 45 (2))

Agreements between two or more competitors to refuse to deal, or limit dealings with another supplier or particular customer, or a class of competitor or customer, are known as primary boycotts. They are illegal.

A manufacturer may regard a particular distributor as unsuitable (e.g. a poor credit risk or one who does not provide an adequate after-sales service) and refuse to supply its own products, but it cannot seek agreement from other manufacturers to cut off supplies to the distributor.

Neither can two or more competitors threaten or force another firm not to deal with a customer.

Secondary boycotts (ss. 45D–45EA)

Secondary boycotts are prohibited 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 action by two persons engaging in conduct that hinders or prevents a third person from supplying to, or acquiring goods or services from, a fourth person.

Specific provisions cover situations including:

- 45D—conduct causing substantial loss or damage to the fourth person’s business
- 45DA—conduct causing a substantial lessening of competition in any market in which the fourth person supplies or acquires goods or services
- 45DB—two persons hindering a third from engaging in trade or commerce involving the movement of goods in and out of Australia
• 45DC—when two or more members of an organisation engage in conduct with one another, the organisation is taken to be involved unless it can prove otherwise

• 45DD—permitted boycotts relating to employment, environmental protection or consumer protection matters

• 45E—contracts, arrangements or understandings that affect the supply or acquisition of goods or services between one person and another where there has been an obligation or established custom to supply or acquire

• 45EA—a provision giving effect to a contract, arrangement or understanding that contravenes s. 45E.

These descriptions are not exhaustive explanations of the secondary boycott provisions. As with all the information in this booklet, readers should seek further advice if they think a situation may fit their own.
Misuse of market power (s. 46)

A firm with a substantial degree of power in a particular market (by market share or otherwise) cannot take advantage of that power for the purpose of damaging other businesses by refusing to deal or by offering to do business on such unrealistic terms that it is tantamount to refusal to deal.

However, this does not mean that the supplier has to supply everyone. The onus is on the customer to show that the supplier’s action was taken with the purpose of deterring or preventing the business or class of business from entering or competing in that market.

Successful court actions have been mounted for misuse of market power, both by the ACCC and private litigants.

Provisions against misuse of market power also extend to companies involved in trans-Tasman trade, whether based in Australia or New Zealand. Australian legal proceedings can take place in New Zealand and vice versa.
Exclusive dealing (s. 47)

Broadly speaking, exclusive dealing involves one person trading with another imposing restrictions on with whom, or in what, that person can deal. There are two types of exclusive dealing: full line forcing and third line forcing.

Full line forcing

If it would result in a substantial lessening of competition in the relevant market, a supplier could not refuse to supply goods or services because the intending purchaser will not agree to:

• refuse to buy, or limit the amount of goods or services it buys, from a competitor of the supplier
• refuse to resupply, or resupply to a limited extent, goods to particular persons or a particular class of person or in a particular place or places.

Small businesses often complain to the ACCC about what they see as the anti-competitive effect of restrictions that shopping centre leases place on their product ranges. However, it is unlikely that such restrictions would substantially lessen competition as the existence of the shopping centre is itself likely to increase the overall range of products available in competition with other shopping centres.

Third line forcing

Third line forcing is a specific form of exclusive dealing prohibited by the Act. It is not subject to the substantial lessening of competition test.

It involves either the supply of goods or services on condition that the purchaser buys goods or services from a particular third party, or a refusal to supply because the purchaser will not agree to that condition.
For example, it would be illegal for a finance company to make a loan conditional on the borrower buying cover from a specific insurance company.

Property lease agreements that have a similar effect are also prohibited.

Example
In June 1995 the ACCC succeeded in an action against a Sydney car dealer and its finance manager when the court found that the company had been offering special deals on the condition that buyers obtained finance through its preferred credit provider.

Bundling
It can be difficult to determine whether selling two distinct goods or services together as one (commonly known as bundling) contravenes the third line forcing provisions of the Act. It is, perhaps, best illustrated by a High Court example.

Example
A hotel in North Queensland ordered beer from a Brisbane brewery and it was delivered by a transport company nominated by the brewery. The brewery refused to supply the beer unless the hotel accepted it delivered to the door.

In other words, the brewery bundled the beer and delivery and supplied one product, delivered beer.
The brewery’s refusal to supply was challenged in the High Court with the court ruling in its favour. However, in its judgment the court said:

... to successfully determine whether conduct does fall within s. 47(6) or (7) will depend on making an accurate analysis of the arrangements which are in issue ...

Resale price maintenance (s. 48)

Resale price maintenance is illegal. Suppliers (including manufacturers and wholesalers) cannot specify to resellers a minimum price below which goods or services cannot be resold or advertised for resale.

A supplier may recommend an appropriate price but cannot force resellers—by refusing or threatening to refuse supply—to stop charging or advertising below that price or from advertising discounts.

Example

• The Federal Court imposed penalties totalling $3.5 million on a petrol company for its participation in Victorian price fixing and resale price arrangements. An employee was penalised a total of $100 000.

Buyers can commit an offence if they pressure suppliers not to supply a discounter—this can induce others to breach the law.

Constructive refusal

A constructive refusal is when a supplier offers to do business on such unrealistic terms that it is tantamount to a refusal to deal.
Loss leaders

Loss leader selling is selling particular goods or resupplying services below cost to promote business or to attract customers who are likely to buy other goods or services.

Suppliers are entitled to withhold goods from a person who has sold their goods in this way within the previous 12 months except for when:

• resellers engage in loss leader selling for a genuine seasonal or clearance sale (if the goods weren’t bought specifically for the purpose of loss leadering)
• the supplier consents to the sale.

Accepting payment without intending to supply (s. 58)

It is a breach of s. 58 of the Act to accept payment where there is no intention to supply.

Section 58 falls in Part V of the Act. It is not subject to the competition test and the penalties and remedies are those that apply to Part V.

Self help

If you think that any of the discussed situations fits yours, the first step should be to approach the supplier to discuss the reason for the refusal. Perhaps changes can be made which would satisfy the supplier’s requirements.

For example, some guarantee of a credit rating could be given or steps taken to improve store presentation.

Trade associations or industry bodies may be able to help by suggesting improvements to marketing strategies or acting as an arbitrator to settle disputes.
It may even be more practical for the reseller to shop around for another source of supply. An alternative supplier may be able to offer a better deal.

However, if these approaches are unsuccessful, and the refusal to deal falls into one of the illegal categories, then the business affected can take its own court action or complain to the ACCC.

What can the ACCC do?

If self help doesn’t solve the problem and you decide to make a complaint to the ACCC, it will need as much information and documentary evidence as possible to support an allegation that a supplier has contravened the Act.

When considering whether to take action, the ACCC must give prime importance to promoting competition in the particular market as a whole. It will look at all relevant information, including matters which may not be directly related to the complaint.

It will then decide whether to try to resolve the matter by talking to the supplier, accepting enforceable undertakings or by instituting proceedings in the Federal Court.

While the ACCC can get orders restoring supply or stopping the illegal conduct, it cannot always seek damages for the complainant.

If the ACCC successfully proves a breach of the Act the court may hand down penalties. Affected businesses can bring a ‘coat tails’ action in the court for damages.

If the ACCC institutes court proceedings, the complainant is likely to be required to give evidence.
Penalties and remedies

Various penalties and remedies are available in the Federal Court for breaches of the Act. Breaches of the restrictive trade practices provisions (aside from the boycott provisions) by companies may result in penalties of up to the greatest of:

• $10 million or
• where the value of the illegal benefit can be ascertained, three times the value of the illegal gain or
• where the value of the illegal benefit cannot be ascertained, 10 per cent of the turnover in the preceding 12 months.

Breaches of the boycott provisions may attract penalties of up to $750 000. Breaches by individuals of any of the anti-competitive conduct sections may result in penalties of up to $500 000.

In addition the court may impose other orders, such as:

• injunctions
• damages
• ancillary orders including specific performance, rescission and variation of contracts, damages, and provision of repairs and spare parts.

The ACCC has the power to seek monetary penalties, injunctions or divestiture. Individuals and corporations may, through private action, seek injunctions, damages and divestiture.
Authorisation and notification

Some anti-competitive conduct may be permitted if there are public benefits which offset the detriments.

Authorisation

The authorisation process within the Act provides for immunity from court action for some restrictive practices that could otherwise breach the Act, if they can be shown to have public benefit. Parties to the arrangement must apply to the ACCC. However, immunity does not operate until authorisation has been granted.

Authorisation is available for anti-competitive agreements, primary boycotts, secondary boycotts, exclusive dealing including third line forcing, and resale price maintenance. It is not available for misuse of market power.

Notification

An exclusive dealing arrangement, including third line forcing, can also gain immunity from court action if the supplier lodges notification of the arrangement with the ACCC.

This immunity operates from the date of lodgment. However, the ACCC can remove the immunity if it decides that benefit to the public does not outweigh any lessening of competition in the relevant market.

Similarly, the ACCC can allow certain small business collective bargaining arrangements. If the ACCC does not object within a certain timeframe, the arrangement is taken to be allowed.
For more information regarding collective bargaining, see the ACCC’s *Guide to collective bargaining notifications*. This publication is available from the ACCC Infocentre or the ACCC website.

**Competition test**

It is impossible in a publication of this size to give more than an indication of what factors are considered when the ACCC looks at the effect conduct has on competition in a market.

For those who are interested, ACCC publications such as its merger and misuse of market power guides give more detail.

However, the following gives an indication of how the ACCC assesses a situation.

Often, situations are not clear cut and depend on what effect the refusal to deal has, or would have, on competition in the market concerned.

Say, for example, a firm will supply a reseller only on condition that it does not also buy from a competitor or does not sell outside a certain territory.

Such arrangements are quite common and often have very little effect on the general level of competition, although they may adversely affect a particular business that is refused supply.

New entrants to markets sometimes enter into an exclusive dealing arrangement with a supplier or retailer to attract a dedicated and motivated distributor base. Such arrangements can be pro-competitive.
Assessing whether competition has been substantially lessened by a refusal to deal

It is not enough merely to show that an individual business has been damaged. The wider market for a particular product must be considered.

For example, take the case of a manufacturer or distributor who refuses to supply a reseller who won’t give an undertaking not to buy competing products.

Put simply, in that situation you would have to look at the overall market for the particular product (and its substitutes) and decide whether or not the refusal would severely restrict availability of that type of product to consumers.

When territorial restrictions have been imposed as a condition of supply, you need to assess whether consumers are severely restricted in their ability to buy a product or its substitutes within the territory.

As a general guide, the more unique or special the product, and the more powerful the supplier, the more likely it is that competition will be affected.

Factors that could affect competition

The courts consider a number of factors when determining the level of competition in a market. They include:

• the number, size and distribution of buyers and sellers, and especially the degree of market concentration

• the height of the barriers to entry, that is the ease of importing products and the ease with which new firms can enter and secure a place in a viable market

• the extent to which the products in the market can be characterised by extreme product differentiation and sales promotion
• the character and the extent of the vertical relationships between the customers and suppliers
• the nature of the stable, formal and fundamental arrangements between the firms which restrict their ability to function as independent entities.

How to define a market

In the Act, ‘market’ is defined as a market in Australia for goods or services that could be substituted by, or are competitive with, other goods or services.

Both demand- and supply-side substitution must be taken into account in determining the relevant market. Substitution possibilities must be considered in three dimensions:

• product (substitute or near substitute products)
• geographic (limits on degree to which customers will travel or products can be supplied over)
• functional (such as retail, wholesale and manufacturing).

Markets should also be considered within a timeframe—over a longer timeframe substitution possibilities will usually be expanded.

An alternative method for defining a market is to look at the nature and extent of competitive constraints on a particular firm from that firm’s point of view.
ACCC contacts

Infocentre 1300 302 502
Small business helpline 1300 302 021
Website www.accc.gov.au
For other business information go to www.business.gov.au.
Summary of amendments

- **Deputy chairperson, s. 10**—new s. 10(1B) requires that at least one of the ACCC’s deputy chairpersons has knowledge of, or experience in, small business matters.
- **Misuse of market power, s. 46**—the inclusion of new subsection 6A clarifies the meaning of ‘take advantage’ for the purpose of this section. Further, the role of recoupment in predatory pricing cases under s. 46(1) is clarified by inserting s. 46(1AAA). This subsection provides that, in proving such cases, it is not necessary to show that recoupment will be possible.
- **Unconscionable conduct, s. 51AC**—the monetary threshold applicable to unconscionable conduct cases under this section ($10 million) has been removed.
- **Jurisdictional issues, s. 86**—jurisdiction is given to the Federal Magistrates Court under s. 86(1A) to hear s. 46 matters and access to the Court under s. 86(1A) is extended to the ACCC.
- **ACCC’s information-gathering powers, s. 155**—new s. 155(4) provides that in matters where interim injunctions are sought by the ACCC, it may continue to use its s. 155 powers until pleadings are closed.

More information

More information about these changes is available on the Commonwealth of Australia Law website (www.comlaw.gov.au; refer to specific Act) or by contacting the ACCC Infocentre on 1300 302 502.

December 2008
IMPORTANT NOTICE

This publication is under review following recent amendments to the Trade Practices Act 1974 (the Act).

Amending legislation

Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009

This legislation amended the Act to introduce new cartel provisions and associated criminal penalties. The following forms of cartel conduct are prohibited by the new provisions:

- price fixing
- restricting outputs in production or supply chains
- allocating customers, suppliers or territories
- bid-rigging.

A civil prohibition will operate in relation to the same forms of cartel conduct.

Under the legislation it is a criminal offence for a corporation to make or to give effect to a contract, arrangement or understanding that contains a cartel provision. Any person knowingly concerned in the cartel conduct will also commit a criminal offence and be liable to imprisonment for up to 10 years.

The per se prohibition on price fixing contained in ss. 45 and 45A of the Act has been repealed and replaced by the new cartel provisions.

The legislation exempts certain joint ventures from the criminal offence and civil prohibition.

Also included in the legislation are provisions that:

- enhance the ACCC’s capacity to conduct search warrants
- set out a new regime to enhance confidentiality of cartel information provided to the ACCC
- enable telephone interception to be used for investigation of the cartel offence.

More information

More information about these changes is available on the ACCC website (accc.gov.au) or by contacting the ACCC Infocentre on 1300 302 502.
important notice

Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009

The Parliament of Australia has passed the Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009 (the Act), which amended the Trade Practices Act 1974 (TPA) to provide criminal penalties for cartel conduct.

The main provisions of the Act commence on 24 July 2009. The Act contains criminal penalties for proscribed forms of cartel conduct. A civil prohibition will operate in relation to the same forms of cartel conduct.

Also included in the Act are provisions that:
- enhance the ACCC’s capacity to conduct search warrants
- enhance confidentiality of information provided to the ACCC in relation to cartel conduct
- enable telephone interception to be used for investigation of the cartel offence.

The mechanics—how the Act does it

The Act provides for a civil cartel prohibition and a criminal cartel offence. Both are centred upon the existence of a cartel provision within a contract, arrangement or understanding (CAU).

The definition of ‘cartel provision’ includes four varieties of cartel conduct:
- price fixing
- output restrictions
- allocating customers, suppliers or territories
- bid-rigging.

The definition of cartel provision also requires that at least two of the parties to the agreement as to price, output restrictions etc. be persons who are, or are likely to be, in competition with each other.

As did s. 45A of the TPA (now repealed), the cartel provision addresses price-fixing agreements on a ‘purpose’ or ‘effect’ basis. It remains the case that the prohibition on cartel conduct in the form of output restrictions, allocation of customers and bid-rigging is based on purpose.

A company will have contravened the civil prohibition if it makes a CAU containing a cartel provision with its competitor or if it gives effect to the cartel provision.

The element that distinguishes the cartel offence from the civil prohibition in the Act is the need to establish certain fault elements under the Criminal Code Act 1995. An overview of the application of those fault elements is provided below:

Making a CAU containing a cartel provision

It will be necessary to establish that an individual or corporation intended to enter into a CAU and that they knew or believed the CAU contained a cartel provision.

Giving effect to a cartel provision

It will be necessary to establish that an individual or corporation knew or believed a CAU contained a cartel provision and that they intended to give effect to that cartel provision.

What will stay in the TPA and what will go?

The per se prohibition on price fixing contained in ss. 45 and 45A of the TPA has been repealed and replaced by the new cartel provisions. Conduct that was captured by s. 45A will be captured by the new provisions.

Section 45 of the TPA otherwise remains and will continue to prohibit a CAU that contains an exclusionary provision or provisions that have the purpose, effect or likely effect of substantially lessening competition. The prohibition of exclusionary provisions by ss. 45 and 4D is retained as a backstop for the new cartel provisions, primarily because the new cartel provisions do not capture the same breadth of conduct as s. 4D.

With the repeal of s. 45A, the joint venture defence for price fixing, s. 76D, is also repealed. A new joint venture exception has been introduced for the cartel offence and civil prohibition.

How liability will be determined

The cartel offence

The prosecution will need to prove the charge beyond reasonable doubt and a unanimous jury verdict is required.

The civil prohibition

The prosecution will need to establish the contravention on the balance of probabilities.

Accessorial liability, attribution of liability

A new head of accessorial liability will be created: ‘attempts to contravene’ (paragraph 79(1)(aa)).

The TPA will continue to permit the state of mind and/or conduct of a director, employee or agent to be attributed to that person’s employer via s. 84.

The penalties

Individuals

For individuals, the cartel offence is punishable by imprisonment of up to 10 years and/or fines of up to $220 000 per contravention.

Under the civil prohibition, individuals may be liable to a pecuniary penalty of up to $500 000 per contravention.

Corporations

For corporations, the fine or pecuniary penalty for each contravention of the cartel offence or civil prohibition (whichever applies) will not exceed the greater of:
- $10 000 000
- three times the total value of the benefits obtained by one or more persons reasonably attributable to the commission of the offence/act or omission in contravention of the civil prohibition
- where those benefits cannot be fully determined, 10 per cent of the corporate group’s annual turnover in the 12-month period when the offence/contravention occurred.

Other forms of relief relating to the cartel offence and civil prohibition include injunctions, orders disqualifying a person from managing corporations and community service orders.
Other new provisions

Investigative powers that can only be used criminally
Telephone interception and surveillance device warrants can be sought for investigation of the cartel offence and accessorial liability in relation to that offence.

Investigative powers that can be used both civilly and criminally
Other investigative powers for cartel conduct, such as TPA search warrants and s. 155 notices, can be used for both civil and criminal investigations.

Search warrants
The ACCC’s ability to conduct search warrants has been enhanced by the Act, particularly in relation to seizure of electronic information. Other amendments include:

- capacity to seize material relating to obstruction during a search warrant
- permitting Australian Federal Police assistance to the ACCC in the execution of search warrants
- allowing temporary exit of premises being searched and resumption of the search
- extending the period of time a seized article may be retained from 60 to 120 days
- the ability for a magistrate in any state or territory to issue a warrant that can be exercised across Australia.

Section 155
A change in the wording of s. 155 means that documents produced to the ACCC by an individual under paragraph 155(1)(b) can be used against that individual in criminal proceedings. If the material already exists, it can be used against the individual in criminal proceedings. A corporation has no right against self-incrimination.

Protected cartel information
A new regime has been created to enhance confidentiality of cartel information provided to the ACCC. It is based on the concept of protected cartel information—that is, information given in confidence to the ACCC about a potential breach of the cartel offence or civil prohibition.

In certain circumstances the ACCC will be able to disclose protected cartel information and the court will also be able to compel the ACCC to provide such information. The test used by the ACCC and the court will be the same. The regime provides for restrictions upon use of the information in secondary proceedings.

Exceptions to the new cartel regime
Certain exceptions exist to the new cartel regime. Broadly, they relate to:

- conduct subject to a collective bargaining notice
- conduct subject to authorisation
- joint ventures
- agreements between related bodies corporate
- collective acquisition of goods or services
- ‘anti-overlap’ provisions.

Collective bargaining notices
Section 44ZZRL provides that if you have a collective bargaining notice in place, businesses will be exempt from the cartel offence and civil prohibition insofar as the conduct is in relation to:

- price fixing
- restricting outputs
- allocating customers, suppliers or territories
- but not bid-rigging.

Authorisation
Authorisation is available for conduct in relation to:

- price fixing
- restricting outputs
- allocating customers, suppliers or territories
- bid-rigging if the public benefit from the conduct would outweigh any public detriment.

Joint ventures
An exception to the cartel offence and civil prohibition has been created for joint ventures. The party claiming the joint venture exception will need to ensure that the portion of their agreement that would otherwise attract attention as a cartel provision is contained in a contract. The party will also need to ensure that:

- the cartel provision is for the purposes of a joint venture
- the joint venture is for joint production or supply.

The joint venture exception extends to a situation where a person has an arrangement or understanding, but intended it to be, and reasonably believed it was, a contract.

Agreements between related bodies corporate
Much like the existing exception in subs. 45(8), s. 44ZZRN ensures that agreements solely between related bodies corporate will not fall within the cartel offence or civil prohibition.

Collective acquisition of goods or services
Much like the existing exception in subs. 45A(4), s. 44ZZRV ensures that there is an exception to the cartel offence and civil prohibition (for price fixing) for the collective acquisition of goods or services and/or the joint advertising of the price for the re-supply of the collectively acquired goods or services.

Anti-overlap provisions
Much like the existing ‘anti-overlap’ provisions in subs. 45(5) to (7), the new provisions governing cartel conduct will not apply to conduct captured by ss. 45B (covenants), 48 (resale price maintenance), 47 (exclusive dealing), 49 (dual-listed companies) and 50 (acquisition of shares or assets).

More information
More information about these changes is available on the ACCC website (accc.gov.au) or by contacting the ACCC Infocentre on 1300 302 502.