



AUSTRALIAN COMPETITION  
& CONSUMER COMMISSION

# Guidelines on concerted practices

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## Purpose of these Guidelines

Subsection 45(1)(c) of the *Competition and Consumer Act 2010 (CCA)* provides that a person must not:

...engage with one or more persons in a concerted practice that has the purpose, or has or is likely to have the effect, of substantially lessening competition.

The ACCC is responsible for investigating and enforcing the competition provisions of the CCA, including s. 45(1)(c). This includes the power to bring court proceedings seeking to prove that the CCA has been contravened.

Businesses may also be subject to action by private parties for contraventions of s. 45(1)(c).

These Guidelines set out how the ACCC currently proposes to interpret s. 45(1)(c) and describes the general approach the ACCC will take in investigating alleged contraventions of s. 45(1)(c).

These Guidelines also include examples to illustrate the types of conduct that the ACCC considers are likely or unlikely to contravene s. 45(1)(c).

Australian courts are ultimately responsible for:

- interpreting the CCA
- determining if s. 45(1)(c) has been contravened
- determining what, if any, remedy should be imposed.

Decisions of the courts may be inconsistent with the ACCC's approach referred to in these Guidelines. If so, those decisions will be incorporated in revisions of these Guidelines as appropriate.

These Guidelines set out the ACCC's understanding of the law and are prepared for the general guidance of legal practitioners and business advisers. They are not a substitute for legal advice.

## 1. Introduction to concerted practices

- 1.1. Section 45 of the CCA prohibits contracts, arrangements, understandings or concerted practices that have the purpose, effect or likely effect of substantially lessening competition.
- 1.2. Over time Australian courts have held that an understanding requires a 'meeting of the minds' between two or more parties and the adoption (by at least one of them) of some commitment to act, or not to act, in a particular way. The concept of a 'concerted practice' is new to the CCA. It involves communication or cooperative behaviour that does not require all of the elements of an understanding but involves more than a person independently responding to market conditions.
- 1.3. The Explanatory Memorandum to the Bill which amended the CCA to introduce the concept of concerted practices to section 45, explains that a concerted practice is:

any form of cooperation between two or more firms (or people) or conduct that would be likely to establish such cooperation, where this conduct substitutes, or would be likely to substitute, cooperation in place of the uncertainty of competition.
- 1.4. Although the concept of a concerted practice is new to the CCA, jurisdictions including the European Union and United Kingdom have a long history of prohibiting concerted practices that have the object or effect of preventing, restricting or distorting competition. Other jurisdictions including Hong Kong and Singapore have followed a similar approach.
- 1.5. In the European Union and United Kingdom, a concerted practice may consist of a one-off event or a pattern of conduct, usually involving the disclosure of commercially sensitive information. Such information exchanges may occur directly, or through an intermediary such as a trade association, supplier or distributor. An anti-competitive concerted practice arises where parties substitute cooperation between them for the risks of competition. This is based on the idea that, in a competitive market, each economic operator must independently determine the practices it intends to adopt.<sup>1</sup>
- 1.6. Subsection 45(1)(c) of the CCA prohibits a corporation from engaging with one or more persons in a concerted practice that has the purpose, or has or is likely to have the effect, of substantially lessening competition.
- 1.7. This prohibition consists of the following elements:
  - a) parties
  - b) engaging in a concerted practice
  - c) purpose or effect
  - d) substantially lessening competition.

## 2. Parties

- 2.1. Two or more persons are required to engage in a concerted practice. Section 45 of the CCA only applies if one of the persons engaging in the concerted practice is a

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<sup>1</sup> *Suiker Unie v Commission* [1975] ECR 1663 at paragraph 173.

corporation. However, the Competition Code captures concerted practices that do not involve a corporation.<sup>2</sup>

- 2.2. At least two of the persons engaging in a concerted practice must be separate entities. Contracts, arrangements, understandings and concerted practices arising exclusively between a corporation and its related bodies corporate are excluded from s. 45.<sup>3</sup>
- 2.3. Parties to a concerted practice which has the purpose, effect or likely effect of substantially lessening competition will often be competitors or potential competitors. However, there is no requirement that persons engaging in a concerted practice are competitors or potential competitors in a relevant market. Depending on the nature of their involvement in a concerted practice, other parties such as suppliers, distributors, trade or professional associations and consultants may engage in a concerted practice.
- 2.4. Section 76 of the CCA provides that, depending on the circumstances, a person such as an individual employee or company office holder may also be found to be involved in a contravention of s. 45(1)(c). For example, if a corporation participates with several competitors in a concerted practice that contravenes s. 45(1)(c), a director of that corporation may contravene the CCA if that director was in any way directly or indirectly knowingly concerned in that corporation's contravention of s. 45(1)(c).

### 3. Engaging in a concerted practice

- 3.1. Under s. 45, engaging in a concerted practice, by itself, does not indicate whether that practice is anti-competitive. A concerted practice will only contravene s. 45 of the CCA if it has the purpose, or has or is likely to have the effect, of substantially lessening competition.
- 3.2. It is not possible to list all the circumstances in which a concerted practice may occur. However, a number of issues may be relevant in identifying a concerted practice.

#### **Cooperative versus independent behaviour**

- 3.3. A concerted practice may be thought of as any form of cooperation between two or more persons, or conduct that would be likely to establish such cooperation. As set out above, it captures cooperative behaviour or communication between separate entities which falls short of the commitment required by Australian courts to establish a contract, arrangement or understanding.
- 3.4. The degree of uniformity of purpose or action between two or more persons, while not determinative, is likely to be a factor in considering whether they are engaging in a concerted practice. However, parties do not need to act the same way or at the same time to engage in a concerted practice. Nor is it always necessary for a person to alter their behaviour in response to a communication in order to demonstrate that they are engaging in a concerted practice.
- 3.5. A concerted practice will often involve the exchange of strategic commercial information between independent firms. In some circumstances, this exchange can

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<sup>2</sup> Under the *Competition Code Agreement*, Australian States and Territories agreed to submit legislation extending the Schedule version of Part IV (including s. 45) of the CCA to each of those States and Territories.

<sup>3</sup> Subsection 45(8).

facilitate alignment of companies' competitive behaviour and soften competition between them. Competition may be softened through disclosing commercially sensitive information or by making such information available in a new way. For example, information may be made available more quickly, in a form which can be more readily processed, or in a manner which makes the information more reliable.

- 3.6. A concerted practice should be distinguished from parallel behaviour arising simply as a result of a person's independent response to market conditions. Parallel behaviour by competitors in the market, such as where their prices are similar or they make similar offers, is not by itself evidence that those competitors are engaged in a concerted practice. In a highly competitive market, competitors may independently respond almost immediately to each other's changes in pricing. For example, if one competitor lowers its price, others may respond immediately to avoid losing customers.
- 3.7. Prices moving in concert, however, may also be the result of a contract, arrangement, understanding or concerted practice. The ACCC will take into account all the relevant facts when considering whether parallel conduct is occurring as a result of:
- a) market forces; or
  - b) a contract, arrangement, understanding or concerted practice.

**Example 1**

Airline A runs a promotion offering discounts on flights to a number of popular holiday destinations. During the promotional period, it places restrictions on customers' ability to make changes to their bookings of these promotional fares.

Airlines B and C monitor Airline A's promotional offers in order to match Airline A's prices as part of their own campaigns. Several hours after Airline A announces its new promotional airfares, Airlines B and C reduce their fares on selected flights on the same route and place similar restrictions on customers' changes to their bookings.

Despite having similar discount offers and restrictions, this conduct is unlikely to amount to a concerted practice. Airlines B and C are independently responding to Airline A's publicly advertised pricing information without any cooperation occurring between the three airlines.

**Example 2**

Airlines A, B and C and various travel agents have access to a common online reservation system which lists the Airlines' available seats and airfares. Airline A begins releasing a class of fare, which is not yet available for purchase, which indicates the price at which it proposes to offer seats at a specific point in the future. Airlines B and C adopt the same practice.

This practice amounts to a disclosure of intended future prices by competing airlines. As customers and travel agents are unable to book these fares, it discloses sensitive commercial information and provides Airlines A, B and C with a platform to test and align their future prices.

This conduct is likely to amount to either an understanding or a concerted practice.

### **Nature of communication**

- 3.8. Communication between parties engaging in a concerted practice may occur in many ways. For example, a concerted practice may involve communications occurring:
- a) in public (including through public statements to the media) or in private
  - b) in formal or informal settings
  - c) with or without the involvement of agents or other intermediaries.
- 3.9. Most commonly, concerted practices will involve a pattern of cooperative behaviour or communications between two or more persons. However, depending on the circumstances, a concerted practice may arise from a single instance of information being provided by one person to one or more other persons.
- 3.10. It may not be necessary to identify specific communications to establish the existence of a concerted practice. For example, it may be possible to infer that a specific outcome or behaviour was only possible as a result of communications between parties (see paragraphs 8.7 to 8.9 below).

## **4. Purpose, effect or likely effect of substantially lessening competition**

- 4.1. Most contracts, arrangements, understandings and other cooperation between market participants benefit consumers and the Australian economy. Cooperation between businesses, either directly or through associations, can stimulate more efficient, cost-effective and innovative business practices. However, in limited cases such cooperation can undermine the competitive process and harm consumers.
- 4.2. Recognising this, Australia's competition law has always incorporated provisions prohibiting certain relationships between businesses. For example, s. 45 prohibits contracts, arrangements and understandings which have the purpose, or have or are likely to have the effect, of substantially lessening competition in a relevant market.
- 4.3. Like contracts, arrangements and understandings, a concerted practice will only be prohibited if it has the purpose, effect or likely effect of substantially lessening competition in a relevant market. This 'substantially lessening competition' test is a long standing test within Australia's competition laws.
- 4.4. There are two key elements to identifying whether a concerted practice is prohibited by s. 45:
- a) what market is impacted, or what markets are impacted, by the concerted practice;
  - b) whether the concerted practice has the purpose, effect or likely effect of substantially lessening competition in that market or those markets.

### **Competition in a market**

- 4.5. The assessment of whether a concerted practice substantially lessens competition must take place in any market in Australia:<sup>4</sup>

...in which:

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<sup>4</sup> s. 4E.

- a) a corporation [or person] that is a party to the practice; or
  - b) any body corporate related to such a corporation;
    - supplies or acquires, or is likely to supply or acquire, goods or services or would, but for the practice, supply or acquire or be likely to supply or acquire goods or services (s. 45(3)(b)).
- 4.6. A market is a product and geographic dimension and is ‘the field of actual and potential transactions between buyers and sellers among whom there can be strong substitution...if given a sufficient price incentive.’<sup>5</sup>
- 4.7. The ACCC’s starting point for assessing market definition is to identify:
- a) the good or service supplied or acquired by the relevant firm and its close substitutes (product market)
  - b) the geographic region in which the relevant firm supplies (or acquires) the good or service and close geographic substitutes (geographic market).
- 4.8. The ACCC also considers the functional dimension of the market (the different levels in the supply chain such as the production, wholesale or retail functional level) and the timeframe over which substitution possibilities should be assessed.
- 4.9. Although s. 4E refers to a ‘market in Australia’, the geographic market may contain goods and services from overseas. Section 4 makes it clear that competition includes competition from imported goods or from services rendered by persons not resident or not carrying on business in Australia.
- 4.10. Market definition is purposive. In *ACCC v Flight Centre* [2016], the High Court observed that:
- Identifying a market and defining its dimensions is ‘a focusing process’, requiring selection of ‘what emerges as the clearest picture of the relevant competitive process in the light of commercial reality and the purposes of the law’.<sup>6</sup>
- 4.11. This means that a market is not defined in isolation; the definition of a relevant market will be considered in the context of the particular concerted practice under investigation.
- 4.12. It is well recognised that market definition is not an exact science and that it is not possible or necessary to identify precise boundaries of a market to assess whether conduct substantially lessens competition.<sup>7</sup>

### **Purpose, effect or likely effect**

- 4.13. ‘Purpose’ refers to an intention to achieve a particular result. This differs from a person’s motive, being why a particular result is desired.
- 4.14. Subsection 45(1)(c) refers to the purpose of the concerted practice, rather than the purpose of the parties engaging in the concerted practice. However, Australian case law on identifying ‘purpose’ under the repealed s. 45 of the CCA indicates that the relevant enquiry will be as to the subjective purpose of those engaging in the concerted practice.

<sup>5</sup> *Queensland Cooperative Milling (QCMA)* (1976) 8 ALR 481 at page 517.

<sup>6</sup> [2016] HCA49 at [69].

<sup>7</sup> For example, see Deane J in *Queensland Wire* at [196]; Allsop J in *ACCC v Liquorland* (2006) [2006] FCA 826 at [428–430]; Dowsett J in *ACCC v ANZ* (2015) 324 ALR 392 at [135].



- 4.15. Purpose can be established by direct evidence or by inference. The purpose specified in s. 45(1)(c) need not be the only purpose of a concerted practice; but it needs to be a substantial purpose.
- 4.16. 'Effect' refers to the direct consequence of the concerted practice. This is determined objectively by examining the actual impact on the competitive process within the relevant market.
- 4.17. 'Likely effect' refers to the likely consequences of a firm's conduct. It requires an assessment of the potential impact on the competitive process. 'Likely' means that there is a real chance or a possibility that is not remote.
- 4.18. When assessing effect or likely effect on competition, the ACCC will usually undertake a 'with or without test'. This compares the likely state of competition 'with' the conduct, to the likely state of competition 'without' the conduct, to determine whether a lessening of competition occurred as a result of the firm's conduct.

### **Substantially lessening competition**

- 4.19. There is no legislative definition of 'substantially lessen competition'. In essence, it is where a practice interferes with the competitive process in a meaningful way by deterring, hindering or preventing competition.
- 4.20. 'Substantially' in the context of section 45 has been defined in case law as meaningful or relevant to the competitive process. It is a relative concept and does not require an impact on the whole market. In *Rural Press v ACCC* (2003), the majority of the High Court of Australia assessed 'substantially' in section 45 by asking:

...whether the effect of the arrangement was substantial in the sense of being meaningful or relevant to the competitive process, and whether the purpose of the arrangement was to achieve an effect of that kind.<sup>8</sup>

- 4.21. In *Universal Music v ACCC* (2003), the Full Court observed:

... The lessening of competition must be adjudged to be of such seriousness as to adversely affect competition in the market place, particularly with consumers in mind. It must be 'meaningful or relevant to the competitive process': *Stirling Harbour Services Pty Ltd v Bunbury Port Authority* [2000] FCA 38 at para 114.<sup>9</sup>

- 4.22. Competition is not a static situation but a process expressed in the form of rivalrous behaviour. It is assessed by looking at both market structure and strategic behaviour. When assessing whether a concerted practice substantially lessens competition, the focus is on the practice's impact on the competitive process.
- 4.23. 'Lessening competition' means that the process of rivalry is diminished or lessened, or the competitive process is compromised or impacted, and also extends to 'preventing or hindering competition'.<sup>10</sup>

<sup>8</sup> (2003) 216 CLR 53 at [41].

<sup>9</sup> (2003) 131 FCR 529 at [242]. 3.23. See also *Australian Competition and Consumer Commission v Cement Australia Pty Ltd* (2013) 310 ALR 165 at [329].

<sup>10</sup> s. 4G.

## 5. Anti-competitive concerted practices

- 5.1. It is not possible to provide a comprehensive list of concerted practices that may have the purpose, effect or likely effect of substantially lessening competition. However, a business is particularly at risk of engaging in a concerted practice with the purpose, effect or likely effect of substantially lessening competition if it replaces or reduces competitive, independent decision making by cooperating with its competitors regarding decisions such as:
- how the business determines the price of its products
  - where the business sells its products
  - to whom the business sells its products
  - whether the business bids for a tender and/or the terms of a tender; or
  - the quantity of the product the business offers or produces.
- 5.2. To assist advisers and businesses to identify potentially high risk behaviour, the following examples outline some of the circumstances where anti-competitive concerted practices may arise.

### Example 3

For the last 18 months the CEO of T1 has been on the board of a charity with the CFO of a close competitor, T2. The charity's board meets once a quarter and the CEO and CFO regularly talk after the meeting.

In several of these conversations, the CEO of T1 complained to the CFO of T2 how the rising cost of key inputs was 'putting pressure on margins', and how he expected this would result in a price increase of T1's services in the coming weeks. T1's subsequent actions were generally consistent with these discussions. On the latest occasion, the CEO of T1 was specific about an upcoming price increase of 6 per cent across a range of its services on 1 December.

During each of these discussions, the CFO of T2 made a variety of sympathetic comments about rising costs affecting the whole sector, but did not divulge any specific information about how these increases impacted either T2's costs or plans. However, the CFO did share the comments of the CEO of T1 with other senior executives at T2.

T2's senior executives considered the information flow was useful. For example, in relation to the latest information about the proposed 1 December price increase, T2 had intended to increase the price of its services by either 4 per cent or 5 per cent on 20 November. After some internal discussion, T2 executives decided that T1's disclosure gave them additional comfort that they could increase T2's prices by 5 per cent without losing customers to T1. On 1 December, T1 increased its prices by 6 per cent across the board.

#### *Assessment*

If the conduct does not reach the level of an understanding, the ACCC considers that T1 and T2 are likely to have engaged in a concerted practice that has the purpose, effect or likely effect of substantially lessening competition. Although

there was no agreement between the parties obliging T2 to change the way it acted in response to T1, the risks of competition were reduced by the conduct of the disclosing party.

- 5.3. Industry and professional associations provide a valuable service to their members and can assist the productivity of industries through research, advocacy and development of best practices. However, as a place where competing firms may meet, associations have always had to take care that they do not facilitate anti-competitive arrangements between their members. Associations and their members must take care when exchanging commercially sensitive information.

#### **Example 4**

An association of manufacturers and suppliers of a fast moving consumer good (the FMCGA) represents all major, and the majority of minor, producers of this consumer good in Australia. The FMCGA has been in place for over 50 years and takes pride in representing the interests of its industry. To assist with 'advocacy and industry planning' the FMCGA produces quarterly reports outlining trends in its industry.

To prepare these reports, each quarter the FMCGA sends its members a voluntary survey to complete. The survey requests detailed, commercially sensitive data from members about their sales, input costs and future price intentions. Although the members are under no obligation to do so, most members see benefits in the report and seek to provide accurate data to the FMCGA. The FMCGA ensures the responses are not circulated among competing members or their staff and aggregates and anonymises the confidential information before releasing this information in its quarterly report. Among other information about the historical performance of the sector, each FMCGA quarterly report includes a 'price forecast' which provides an aggregated chart setting out its members' future pricing intentions by product category.

FMCGA members find these quarterly reports useful in a number of respects. In relation to the price forecasts specifically, many say that the reports are the most reliable means of ensuring that their future pricing intentions are not 'out of step with the market'.

#### *Assessment*

The majority of the FMCGA's conduct represents good practice, minimising the risk of commercially sensitive data being shared among competitors. By aggregating and anonymising the confidential information it receives, the FMCGA greatly reduces the risk of the historical information exchanged hindering competition.

However, the exchange and publication of future price intentions by product category risks hindering competition even though that data is aggregated and anonymised. By disclosing and increasing the reliability of information regarding future pricing in the market, the report is restricting a key competitive uncertainty, being each member's competitors' future pricing strategy, that would otherwise be inherent in that market.

The ACCC considers that by publishing future price intentions through these quarterly reports, the FMCGA and its members are likely to be engaging in an agreement or concerted practice that has the purpose, effect or likely effect of substantially lessening competition.

- 5.4. It may be apparent from the nature of certain concerted practices, and the resulting conduct of those engaging in the concerted practice, that the practice has the purpose of substantially lessening competition. For example, the ACCC will be likely to conclude that a concerted practice has the **purpose** of harming competition where competitively sensitive information, such as a corporation's planned future pricing or output or capacity, is exchanged between competitors in circumstances where:
- a) the information is given with the expectation or intention that the recipient will act on the information when determining its conduct in the market; and
  - b) the recipient acts or intends to act on the sensitive information.

#### **Example 5**

At an industry event, Bank A discloses, to its main competitors, its intention to increase its home loan interest rates by 25 basis points. This disclosure is made prior to Bank A's disclosure to the market.

Bank A's competitors do not provide pricing information in return. However, they each circulate Bank A's pricing information internally. Bank A's competitors know that there will be less competitive pressure on their loan product pricing. They do not seek to undercut Bank A but rather move their rates broadly in line with Bank A. Bank A notes the reaction of its competitors and this practice continues over time.

#### *Assessment*

If it does not reach the level of an understanding, the ACCC considers that the conduct of Bank A and its competitors is likely to amount to a concerted practice that has the purpose (and may also have the effect or likely effect) of substantially lessening competition.

The practice has replaced the uncertainties of competition on interest rates between the banks with predictable, 'follow the leader' pricing.

#### **Example 6**

A number of petrol retailers notify each other of their future pricing intentions. Retailers find such information assists them and start making business decisions in expectation of calls from their competitor. No attempt is made to reject the calls. Moreover, the retailers go to considerable lengths to ensure that their conversations occur in secret and begin to refer to each other by code names.

While they have not committed to do so, and although there are some occasions when the prices are not followed, the practice continues and the petrol retailers regularly follow the price changes foreshadowed by each other.

#### *Assessment*

If the conduct does not reach the level of an understanding, the ACCC considers it is likely that the retailers are engaging in a concerted practice that has the purpose (and may also have the effect or likely effect) of substantially lessening competition. The disclosures result in the pricing uncertainties present in raising or lowering prices in a competitive market being substituted by a degree of cooperation.

## 6. Exceptions

- 6.1. Section 51 of the CCA lists a number of circumstances where a person who engages in a concerted practice will not contravene s. 45(1)(c). The following table summarises the exceptions set out in s. 51:

Provision	Summary of exception
s. 51(1) to (1C)	Conduct authorised by an Act or regulations made under an Act, provided that the authorising provision expressly refers to the Competition and Consumer Act. In the case of conduct authorised by regulations made under an Act, conduct occurring more than two years after the regulations came into operation cannot rely on the exception.
s. 51(2)(a)	Concerted practices relating to remuneration, conditions of employment, working hours or working conditions of employees.
s. 51(2)(c)	Concerted practices relating to standards prepared or approved by Standards Australia.
s. 51(2)(d)	Certain internal arrangements related to partnerships.
s. 51(2)(g) and s. 51(2AA)	Concerted practices relating exclusively to the export of goods and/or the supply of services outside Australia, providing appropriate notice of that concerted practice is provided to the ACCC.
s. 51(2A)	Consumer actions undertaken other than in trade or commerce (e.g. consumer boycotts).
s. 51(3)	Imposing or giving effect to certain narrow technical provisions relating to intellectual property.

- 6.2. A number of these exceptions only apply in very specific circumstances. If you intend to rely on a s. 51 exception to engage in a practice that may otherwise contravene s. 45, you should seek independent legal advice.
- 6.3. Section 45 provides that if a contract, arrangement or understanding falls under s. 47 (exclusive dealing) or s. 48 (resale price maintenance), it cannot also contravene s. 45.

## 7. Authorisation

- 7.1. Authorisation provides protection against legal action for future conduct that might breach the competition provisions of the CCA, including s. 45. Parties can apply to the ACCC for authorisation where they believe there is some risk that the conduct they propose to engage in would or may breach s. 45(1)(c) and they want the certainty provided by an authorisation before undertaking the activity.
- 7.2. In general, the ACCC may grant an authorisation if it is satisfied that the proposed concerted practice either:
  - a) is not likely to substantially lessen competition; or
  - b) the likely public benefit resulting from the conduct outweighs the likely public detriment.
- 7.3. Authorisation is a formal and public process. The application and supporting submission will be available on the ACCC's public register and provided to interested parties for their comment or response. Applicants and interested parties providing documents and submissions to the ACCC may request that confidential information be excluded from the public register. All public responses are made available on the public register. The ACCC's draft and final determination, including the reasons for the decision, are also publicly available.
- 7.4. The ACCC must issue its final determination either granting or dismissing an application within six months of receiving a valid application, unless extended with agreement by the applicant. The ACCC may consider non-contentious applications under a streamlined process.
- 7.5. The ACCC cannot retrospectively grant authorisation for conduct that has already occurred. Parties are encouraged to contact the ACCC if they have any concerns about future or ongoing conduct.
- 7.6. Further detailed information on the authorisation process is available in the ACCC's authorisation guidelines at [www.accc.gov.au](http://www.accc.gov.au).

## 8. ACCC investigation and enforcement

- 8.1. In deciding whether to take enforcement action, the ACCC focuses on the extent to which matters will, or have the potential to, harm the competitive process or result in widespread consumer detriment. The ACCC cannot pursue all the complaints it receives and will direct its resources to matters that provide the greatest overall benefit for competition and consumers.
- 8.2. To assist with this determination, the ACCC publishes an annual Compliance and Enforcement Policy which sets out the priorities for the following year. A copy of the Policy can be found at [www.accc.gov.au](http://www.accc.gov.au).
- 8.3. In relation to allegedly anti-competitive concerted practices, the following issues may impact the likelihood of the ACCC taking enforcement action.

**Concerted practices considered as part of broader ACCC investigations, including into cartel conduct**

- 8.4. It may not always be clear whether two or more persons have entered into a contract, arrangement or reached an understanding or have engaged in a concerted practice. As such, when investigating potentially anti-competitive behaviour, the ACCC may simultaneously investigate whether parties have entered into a contract, arrangement or understanding or engaged in a concerted practice.
- 8.5. Where competitors enter a contract, arrangement or understanding to fix prices, share markets, rig bids or control or limit output the businesses, officers, agents and employees involved in that conduct risk engaging in cartel conduct, which is a criminal offence.

**Evidence beyond independent behaviour**

- 8.6. As set out at paragraph 3.6 above, parallel behaviour by competitors in a market is not by itself evidence that those competitors are involved in a concerted practice. In a competitive or oligopolistic market, competitors may respond almost immediately to each other's changes in pricing.
- 8.7. The ACCC is conscious of the need to distinguish strategic responses to competitive conditions from anti-competitive concerted practices. Without additional evidence of communication between competitors, or economic evidence suggesting that particular parallel behaviour may be arising from an agreement or concerted practice, the ACCC is unlikely to investigate allegations of parallel behaviour.

**Example 7**

A newspaper article appears in a number of syndicated newspapers suggesting that three supermarket chains are fixing the price of bananas.

The article bases this price fixing allegation on the fact that the price of bananas in these supermarkets is regularly the same. The article includes a table showing how the price of bananas in each supermarket has moved both up and down more or less in tandem over the last month.

These similarities in the price of bananas could readily be explained by each supermarket responding independently to other supermarkets changing their price. Absent something more, this information is unlikely to be sufficient to warrant the ACCC investigating whether the supermarkets are engaging in price fixing or a concerted practice.

To commence a detailed investigation, the ACCC would generally require more evidence such as:

- a reasonable suspicion that there was prior direct or indirect communication between two or more supermarkets of the price changes; or
- other information suggesting that prices are moving out of line with what would be expected as a rational, competitive response to changes in the cost of bananas or other market circumstances.



**Information recipient's response to the receipt of information**

- 8.8. As set out above, the ACCC considers that in some circumstances an anti-competitive concerted practice may arise from a single instance of information being provided by one person to one or more other persons. Moreover, if a firm continues to receive commercially sensitive information from competitors, over time it will become increasingly difficult for that receiving firm to act in a manner which does not take its competitors' information into account. In such cases, regardless of that recipient's purpose, the information exchange may have the effect or likely effect of substantially lessening competition.
- 8.9. To ensure there is no risk that a person becomes involved in a concerted practice, where a person unexpectedly receives sensitive information from a competitor, that person should take immediate steps to make it clear that they do not wish to receive or act upon the information. For example, the information recipient may immediately reply that it did not wish to receive that information and that it will in no way follow or take it into account in their future actions. The information recipient should then act to give effect to this intention. The information recipient may also notify the ACCC of the conduct.

**Example 8**

The officers and employees of several competing heating appliance retailers and installers, including T1 and T2, meet at a large hotel in Sydney. Apart from an amusing keynote from a sporting celebrity, the morning's discussions are dominated by falling margins blamed on heavy discounting in the industry.

At a lunch in a private room of a nearby restaurant, the owner and director of T1 is frustrated by what he sees as the association 'trying to talk around the elephant in the room'. He says that it is 'high time sanity prevailed in the industry'. He points out that the industry only used to discount to move old stock and keep the installers busy at the end of winter—but now everyone in the industry offers discounts all year round. If this continues, he says, it will drive everyone out of business. He says the industry should focus on quality, not price, and that he has no intention of discounting his stock or installation prices this winter. He asserts that having sat through that morning's meeting, everyone around the table would be mad if they didn't follow his lead.

The CEO of T2 stands up. She says that she utterly rejects any suggestion that T2 stop discounting during winter and that T2 will not be party to any such discussions with T1—or any of the others in the room. The CEO of T2 leaves the room and T2 continues to offer discounts on appliances and installation during winter.

The ACCC considers the CEO's express rejection of T1's suggestion persuasively demonstrates that T2 is not party to a contract, arrangement, understanding or concerted practice arising from the statement of the CEO of T1.

- 8.10. An attempt to engage or induce others to engage in a concerted practice that has the purpose, effect or likely effect of substantially lessening competition may contravene the CCA (s. 76(1)).



## 9. Sanctions

- 9.1. If a court determines that a person has contravened, attempted to contravene or has been involved (as set out in s. 76 of the CCA) in a contravention of s. 45(1)(c), the court may impose orders including but not limited to:
- a) requiring that person to pay a civil pecuniary penalty
  - b) requiring that person to pay damages
  - c) preventing that person from engaging in certain conduct
  - d) declaring that person has contravened the CCA
  - e) in the case of individuals, disqualifying a person from managing a corporation.
- 9.2. The maximum penalty payable by a body corporate for each act or omission is the greatest of:
- i) \$10,000,000
  - ii) if the Court can determine the value of the benefit that the body corporate, and any body corporate related to the body corporate, have obtained directly or indirectly and that is reasonably attributable to the act or omission—3 times the value of that benefit
  - iii) if the Court cannot determine the value of that benefit—10% of the annual turnover of the body corporate during the period (the turnover period ) of 12 months ending at the end of the month in which the act or omission occurred.<sup>11</sup>
- 9.3. Any other person, including individuals, is liable to pay a maximum penalty for each act or omission not exceeding \$500,000.<sup>12</sup>

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<sup>11</sup> s. 76(1A)(b).

<sup>12</sup> s. 76(1B)(b).