



*What Professionals Should Know
about the Trade Practices Act*

Address to Professions Australia
17 November 2008, Canberra
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Good afternoon. I am pleased to be with you today.

1. Introduction

1.1 What Is A Profession?

Each of you is a member of a profession.

So whether you're a dentist, accountant, pharmacist, engineer, veterinarian, surveyor or a nurse, what ties you together and distinguishes you as a professional is that you form part of:

"A disciplined group of individuals who adhere to ethical standards and...hold themselves out as, and are accepted by the public as possessing special knowledge and skills in a widely recognised body of learning...who are prepared to apply this knowledge and exercise these skills in the interest of others..."

– a definition developed by Professions Australia and also adopted by the ACCC.

Integral to any professional association, is a code of ethics - a body of rules which requires your conduct to go beyond the personal moral obligations of an individual. These expectations are recognised and enforced by the community as well as by your profession.

It is this element of self-regulation which forms one of the distinguishing characteristics of the professional sector as a whole. These obligations are primarily imposed privately, although sometimes with legislative support; and require a professional to comply in order to practice in their chosen field.

A breach of these regulations will often result in disciplinary action and for the most serious cases, expulsion from practicing in one's profession.

However these obligations and restrictions do not make any profession exempt from other obligations including those in the competition and consumer protection provisions of the *Trade Practices Act 1974*.

The ACCC will become involved where these private obligations and standards upheld by professional associations are used to directly or inadvertently lessen competition.

1.2 The Role of the Trade Practices Act

To help you understand how the TPA affects professions, today I'll outline some areas which I hope will be of great interest of you.

These include agreements made between professionals, advertising, co-location and price guidance.

Let me begin with by giving you an overview of the TPA and what as professionals you should look out for.

The purpose of the *Trade Practices Act* is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.

The TPA deals with almost all aspects of the marketplace: the relationships between suppliers, wholesalers, retailers, competitors and customers.

In broad terms the Act covers unfair market practices, industry codes, mergers and acquisitions of companies, product safety, product labelling, price monitoring, and the regulation of industries such as telecommunications, gas, electricity and airports.

All professionals became covered by competition laws following the Hilmer competition reforms and changes to the TPA in **1995**.

The Hilmer reforms were the result of an Independent Committee of Inquiry that was established by Prime Minister Paul Keating in 1992 after all Australian Governments agreed on the need for a national competition policy.

In February 1994, the Council of Australian Governments (COAG) agreed to enact legislation to achieve the universal application of competition law to all businesses throughout Australia. As a result, partnerships or sole practitioners and their associations became subject to the competition provisions of the TPA and the state competition codes.

In relation to consumer protection, **unincorporated practitioners are covered by State and Territory fair trading Acts** which substantially mirror the consumer protection provisions (Part V) of the TPA.

Professionals may also be liable as accessories or subject to the Act by virtue of the extended operation provisions of section 6.

It's important to note that the Act does not only impose obligations. It also protects professionals from anti-competitive conduct, and unfair trading practices, by suppliers, competing professionals and customers.

2. Issues Arising From Relationships Between One Practising Professional and Another

In relation to professions, it applies in their dealings with consumers and competitors. Professionals who conduct their business or practice through separate legal entities are considered competitors for the purpose of the TPA.

It is important that you are aware of the legal implications your business structure may have and there are a number of key TPA provisions that you should keep in mind in your dealings with competitors. These include a prohibition of the following types of agreements:

2.1 Agreements that have the purpose (or likely effect) of substantially lessening competition

These agreements may involve, for example, market sharing or a restriction of the supply of goods that have the purpose or effect of substantially lessening competition, in a market in which the businesses operate.

2.2 Agreements that contain an exclusionary provision

Also referred to as a 'primary boycott', these are agreements between competitors (including professionals) which prevent, restrict or limit dealings with a particular supplier, customer or a particular class of suppliers or customers.

2.3 Agreements that fix prices

These are agreements, arrangements or understandings between competing business entities (including professionals) that fix, control or maintain prices for goods or services. **This is an absolute prohibition** – which means it is not necessary to show that price fixing harms competition before it is found to breach the Act.

It is important to note that these provisions can be breached not only by the conduct of an individual professional, but by a corporation, industry association or representative body.

For example:

The ACCC recently expressed concerns over standards for accreditation of nuclear medicine practices by the Royal Australian College of Physicians (RACP) and the Royal Australian and New Zealand College of Radiologists (RANZCP).

In that case, Townsville Hospital approached the ACCC after two doctors providing nuclear medicine services remotely to the hospital were denied re credentialing because of the application of the standards.

The reason for this was that the standards had been drafted in such a way that they divided nuclear medicine practices into three categories, two of which were based on distance to the nearest fully staffed nuclear medicine practice.

It was alleged that because there was a fully staffed nuclear medicine practice within 200 kilometres of the hospital, the doctors could not provide their services remotely and so their application for re credentialing was denied. It was also alleged that the way the standards had been drafted

meant the doctors' established and fully supervised practice in Adelaide was also at risk of losing its credentialed status.

The ACCC contacted RACP and RANZCP raising concerns that the accreditation procedures may have created artificial boundaries that protected service providers in geographical locations from competition. After some discussion, the accreditation standards were subsequently reviewed and amended by the RACP and RANZCP.

This example highlights two points. The first is that standards and processes can be affected by different factors over time. In this case, the standards had been developed at a time when internet and email were in their infancy and so the idea that a provider could examine records and slides from a site literally miles from that where the images were taken was not considered. As time and technology moved on, it was quite feasible for that to be done, but the structure of the standard did not allow it and created a barrier to competition.

Furthermore, this example shows the ACCC's willingness to work with organisations in order to achieve maximum levels of compliance with the TPA. It goes without saying that the ACCC would rather work cooperatively with professional associations to ensure relevant codes meet TPA compliance requirements rather than begin proceedings against such organisations.

2.4 Joint Practice or Co-location Agreements

These types of arrangements may offer consumers convenience and more affordable services through a reduction of overheads and shared running costs.

However, having a co-location agreement does not exempt you from the competition provisions of the TPA or allow you to fix prices or enter into anti-competitive arrangements.

For example:

The ACCC recently took action in the Federal Court against an orthodontist practice in Tasmania for price fixing and market sharing.

This arrangement was a result of the practice receiving incorrect legal advice and the ACCC did not seek pecuniary penalties. The Federal Court found in favour of the ACCC and did not impose penalties, but dealt with the matter by a series of injunctions preventing future conduct.

The orthodontists provided their services from shared premises in several cities and the majority of the illegal arrangements were written into the shared premises co-location agreement.

The orthodontists relied on an agreement drafted by a lawyer, and even when another orthodontist later joined the co-location agreement, he sought his own legal advice, and the lawyer in that instance also failed to identify the illegal clauses.

The judge found that the orthodontists, in various combinations, entered into a series of illegal anti-competitive arrangements to:

- *Fix the price of the orthodontic services they each provided to consumers*
- *Restrict their respective supply of orthodontic services to new patients when an orthodontist had more customers than the others*
- *Restrict the ability of the orthodontist to supply their respective services from separate premises or work with other orthodontists within 20 kilometres of the existing practices*
- *Stop another orthodontist from setting-up a competing practice in northern Tasmania.*

Although the orthodontists had relied upon poor legal advice from a number of law firms, they were still found to have engaged in anti-competitive conduct. This highlights the need for you, as professionals, to consider the application of the TPA when considering both your business structure and any agreement you may have with your competitors.

The TPA provides a process for obtaining protection from legal action for conduct that may otherwise breach the competition provisions of the TPA on the grounds there is a significant public benefit.

For example, the ACCC is currently assessing an application for authorisation by the Australian Dental Association Inc.

The application concerns two or more dentists who work in a shared practice making contracts or arrangements regarding fees and other dental services provided by the practice.

A draft determination has been released that proposes to authorise the dentists to agree on fees provided they:

- operate as a team
- share patient records
- share common facilities
- have a common trading name and
- common policies and procedures.

Similar arrangements for intra-practice price setting by GPs have also been authorised.

3. Your Dealings With Consumers

3.1 Implied Professional Standards Of Conduct

There is an **implied warranty** that your professional services will be carried out with due care and skill.

You are also not allowed to engage in conduct which may mislead or deceive consumers including the issue of informed financial consent.

3.2 Advertising

In terms of advertising, **restrictions as part of the self-regulation for professions may raise trade practices concerns** where they are overly prescriptive and subjective.

While aiming to protect consumers from misleading and deceptive advertising by unethical practitioners, restrictions often have the consequence of impeding competition and making consumers less informed in their decision-making.

This occurs where advertising criteria prevents information about professionals being distributed to consumers, and promotes anti-competitive conduct.

The ACCC will be particularly concerned where such restrictions are imposed in the guise of assisting consumers but are ultimately for the purpose of controlling competition.

Consumers need to be informed in their decision making in two ways: firstly, being able to obtain general information and a quote about the service offered; and secondly being able to compare this with other professionals for a similar service.

It is important to ensure that your advertising allows consumers to make this informed choice.

If you have any concerns you should contact the ACCC - we may be able to assist. The ACCC is constantly engaged in consultation with various professional associations and industry bodies to assist in ensuring that any imposed regulations comply with the TPA.

There are also several advertising techniques which you should also take particular care in using – so as to avoid potentially misleading consumers like the use of graphics, comparative pricing and price information.

Let me give you some examples -

Graphical or visual representations – often involving ‘before and after’ pictures, you must ensure that these representations are true, accurate and can be substantiated.

Comparative advertising – if you’re comparing your service to that offered by another professional (eg. price representations), you must ensure that

there is an accurate basis for comparison and that this will remain the case for the life of the promotion.

Price information – the provision of price information can be a difficult with respect to certain professional services (eg medical specialists or surgeons). You need to take care in providing quotes and ensure they are as comprehensive as possible.

4. The Role Of Professional Associations

4.1 Price Guidance

The **ACCC has taken a strong stance against 'recommended fee schedules'**, usually implemented by the circulation of a list of recommended fees under the auspices of a professional association.

An outcome of the issuing of recommended fee scales by an association may be that the association expects many of its members, if not all, to follow the recommendation. In the ACCC's experience, recommended fee schedules significantly affect prices and reduce competition.

The ACCC understands that professionals may need help on how to set their own fees. It recommends that professional associations help their members to set their fees independently by publishing information and formulas that allow individual members to determine and set their own fee levels, in light of their own costs and expected level of profit from their individual practice or business.

In relation to fee arrangements, the ACCC has considered various applications for authorisation. In the case of fee scales, the ACCC denied authorisation of a fee scale proposed by the Royal Australian Institute of Architects (RAIA) in 2005. The ACCC rejected the application on the basis that the proposed scale was too broad and did not allow the ACCC to properly assess potential benefits and detriments.

In contrast, the ACCC recently granted authorisation to a fee cap for after hours medical services in the ACT, The ACCC considered that benefits such as providing patients with fee transparency and certainty for out-of-hours consultations outweighed the detriments from the imposition of a fee cap. Furthermore, doctors could still choose to set fees under the cap.

4.2 Industry Ethics Codes

As noted previously, integral to any professional association is a code of ethics. This element of self-regulation forms one of the distinguishing characteristics of the professional sector as a whole.

These obligations are primarily imposed privately, although sometimes with legislative support; and require a professional to comply in order to practice in their chosen field.

A breach of these regulations will often result in disciplinary action and for the most serious cases, expulsion from practicing in one's profession.

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4.3 Collective Bargaining

Let's discuss collective bargaining and the ACCC notification and authorisation of processes.

In some situations, businesses may achieve better outcomes if they collectively bargain rather than negotiate individually on commercial contracts. However collective bargaining may breach the TPA and parties wishing to engage in such a process, should consider lodging an authorisation application or notification with the ACCC.

A detailed guide on the two processes is available on the ACCC's website to assist businesses to decide which avenue best suits their circumstances.

Collective bargaining arrangements are assessed, and protection from legal action may be granted, when there is a net public benefit.

Each collective bargaining arrangement will be assessed on its merits and according to the nature and scope of the arrangements and the relevant market.

While it is up to the group to decide on the form of the collective arrangements, in the ACCC's experience the following features significantly increase the likelihood of a successful notification or application for authorisation:

- the process is voluntary for participants and the target
- it has the support of the target
- there is some limit on the size and scope of the group – for example limitation on the number of participants in the group, the geographic area over which they trade, or the number of targets with whom they can deal collectively are likely to reduce the level of anti-competitive detriment and

- there is an absence of a proposal to collectively boycott – which is where there is an agreement among the group to collectively withdraw goods or services.

For example:

The ACCC has recently issued a draft determination proposing to grant authorisations to the AMA to collectively negotiate with state and territory health departments the terms of contracts, including fees, for rural general practitioners providing services as visiting medical officers in public hospitals and health facilities in rural and remote areas of Australia (except in NSW).

The ACCC considers that the voluntary nature of the arrangements and the absence of collective boycott conduct limits the potential detriment arising from the conduct.

In August 2008 the ACCC granted authorisation to the AMA for similar collective bargaining negotiations to be conducted only in NSW.

The ACCC did not object to collective bargaining notification lodged by a group of anaesthetists who are members of the Wangaratta Anaesthetic Group, to collectively negotiate with HBA in relation to anaesthesia fees. The negotiations were considered to result in some public benefits including increased input into contracts and some efficiency savings. It was also considered that the voluntary nature of the collective negotiations would mitigate against any potential for anti-competitive impact.

In contrast, the ACCC revoked the AMA Victoria's proposal to collectively negotiate on behalf of 39 doctors the terms and conditions in relation to pricing, rostering, out of hours medical service and other conditions with Latrobe Regional Hospital.

The ACCC was concerned that the coverage and composition of the group would lead to potentially anti-competitive outcomes, in particular, a potential price rise as a result of the proposed arrangements may force the hospital to operate with fewer medical practitioners, or rationalise services.

The ACCC offers an invitation to professions to talk to us and find out more about how notification and authorisation in relation to the collective bargaining.

4.4 Specific Information For Professionals – New Material From ACCC

Furthermore, ACCC is currently developing guidance materials to better inform professionals of their rights and obligations under the TPA.

Of particular importance is the distinction drawn between legitimate collegiate behaviour and that which may raise competition concerns in relation to self-

imposed standards, and dealings between competitors in a particular profession.

The guidance will also examine the effect that this type of conduct may have on Australian consumers directly and on the relationship between professionals and consumers.

We are also developing a publication to highlight trade practices concerns that can arise out of the operation of industry associations more generally.

5. Conclusion

As I have outlined today, the *Trade Practices Act* touches upon many aspects in the working lives of professionals and professional associations.

My message today is if you have any doubts in relation to provisions in your codes of conduct or are considering setting up a joint practice, please carefully consider the *Trade Practices Act*.

This call is also relevant to collective bargaining arrangements.

The ACCC offers an open invitation for further discussion and clarification of any of the matters I have raised with you.

A good starting point for such information is by visiting our website – www.accc.gov.au.

Thank you.