



Australian
Competition &
Consumer
Commission

SMALL BUSINESS AND THE COMPETITION AND CONSUMER ACT



Your rights and responsibilities



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

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ISBN 978 1 921973 22 2

ACCC 09/12_603

www.accc.gov.au

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INTRODUCTION

The *Competition and Consumer Act 2010* (CCA) (formerly the *Trade Practices Act 1974*) is a national law that governs how all businesses in Australia must deal with their competitors, suppliers and customers. The law is designed to enable all businesses to compete on their merits in a fair and open market, while ensuring consumers are also treated fairly. Specific provisions relating to the treatment of consumers can be found in the Australian Consumer Law (ACL), which is contained in a schedule to the CCA.

This publication aims to help small businesses understand their rights and obligations under the CCA and the ACL. These include:

- **rights**—such as providing small businesses with the authority to bargain collectively in some circumstances, and protecting small companies from misleading and deceptive conduct and anti-competitive behaviour (such as price fixing and market sharing agreements)
- **obligations**—such as making it illegal for small businesses to mislead or deceive their customers or use unfair selling practices such as pressure tactics.

What the ACCC can do for your business

The Australian Competition and Consumer Commission (ACCC) is the national government agency which promotes compliance with the CCA and, where necessary, takes legal action against businesses that break the law.

The ACCC can:

- help you understand your business's rights and obligations under the CCA
- in certain circumstances, provide immunity for your business from legal action for conduct that may otherwise breach the CCA
- investigate alleged breaches of the CCA and take enforcement action for breaches of the CCA
- tell you about businesses that have breached the CCA and that the ACCC has taken action against
- refer you to other relevant agencies if your issue does not involve the CCA
- provide you with guidance about the CCA via the ACCC website, by phone, by email or through publications.

The ACCC cannot:

- provide you with legal advice, even on the CCA—you will need to see a lawyer
- provide advice on contractual matters or any other matters that fall outside the scope of the CCA, including those involving financial products or services
- comment on the reputation of a business, or whether purchasing a business or franchise is a good investment
- provide dispute resolution services (e.g. mediation) to businesses or consumers.

DEALING WITH YOUR CUSTOMERS

There are a number of rules which businesses must abide by when dealing with customers.

Consumer guarantees

Under the ACL, your business automatically provides your customers with a basic set of consumer guarantees when they purchase your goods or services. Consumer guarantees are intended to ensure your customers have rights if they buy a product that breaks easily, doesn't work or doesn't perform as generally expected.

The consumer guarantees cannot be excluded, modified or limited by contract.

If consumers have a problem with a good or service they have bought and believe that it does not meet one or more of the consumer guarantees, they are free to approach the seller, manufacturer or importer to obtain a remedy—and businesses cannot tell them otherwise.

The type of remedy will depend on the circumstances but may include a repair, replacement, refund or having the service performed again.

Consumer guarantees apply to all goods and services purchased by consumers.

A 'consumer' can be either a business or a person, provided:

- the goods or services cost up to \$40 000
- the goods or services cost more than \$40 000 and are normally used for personal, domestic or household purposes, or
- the good is a vehicle or trailer used mainly to transport goods.

However, if goods are purchased to be resold or transformed into a product that is to be sold by the customer, the consumer guarantees will not apply.

If your business has acquired goods or services as a 'consumer' under the ACL, then you are also protected by the consumer guarantees.

Selling goods to customers

Under the consumer guarantees, when goods are sold to customers:

- they must come with clear title and undisturbed possession and be free from any undisclosed securities
- they must be of acceptable quality
- they must be fit for any disclosed purpose
- they must match their description
- they must match the sample or demonstration model
- the supplier must honour any additional promises made about them.

Manufacturing goods

Under the consumer guarantees, the manufacturer or importer of the goods guarantees that:

- they will be of acceptable quality
- they will match their description
- any additional promises made about them will be honoured
- repairs or spare parts will be provided for a reasonable time.

Providing services to customers

Under the consumer guarantees, when a business provides services:

- it must provide the services with due care and skill
- the services must be fit for any disclosed purpose
- the services must be provided within a reasonable time of being purchased, if there is no agreed timeframe.

Failing to meet a guarantee

If a product or service fails to meet a guarantee, a customer has a right to obtain a remedy.

The type of remedy, and who must provide it, will depend on the extent of the problem.

If the problem with a *good* is **major**, the customer can demand a full refund or replacement. There is a major problem if the good:

- has a problem that would have stopped a reasonable person from purchasing the item if they had known about it
- is unsafe
- is significantly different from the sample or description
- is substantially unfit for its common purpose and can't be fixed easily within a reasonable time, or
- does not do what the business said it would or what was asked for, and can't be fixed easily.

If the problem with a good is minor, the customer can ask the supplier to fix the problem. The supplier can then choose to repair, replace or refund the good. Any repair must be carried out within a reasonable time.

If the problem with a *service* is **major**, the customer can choose to cancel the service contract with the supplier and get a refund, or keep the contract and get compensation for the difference between the service delivered and what they paid for. Major problems can occur if the service:

- has a problem that would have stopped a reasonable person from purchasing the service if they had known about it
- is substantially unfit for its common purpose and can't be fixed easily within a reasonable time

- does not meet the specific purpose the consumer asked for and can't be fixed easily within a reasonable time, or
- creates an unsafe situation.

If the problem with a service is minor, the customer cannot cancel the contract and demand a refund immediately. The customer must give the supplier a chance to fix the problem free of charge and within a reasonable time.

Example of a major problem

A customer buys an electric toothbrush which doesn't work when plugged in and switched on. The customer takes the item back to the store they bought it from and demands a refund, which is provided.

Reimbursement for consequential loss

If costs are incurred or losses suffered as a result of the failure of goods or services, the customer can also claim compensation from the seller or manufacturer (but not both), provided that the cost or the loss was a reasonably foreseeable consequence of the failure of the goods or services. The customer can also claim any costs for the return of the goods to either the supplier or the manufacturer.

Example of consequential loss

A customer buys a faulty tap which causes flooding and carpet damage. The customer may claim for compensation from either the tap seller or the tap manufacturer to replace the carpet.

Suppliers' rights against manufacturers

If goods are not of acceptable quality, do not match a description provided by the manufacturer or are not fit for a purpose made known to the manufacturer, and a supplier provides a remedy for those failures, the supplier can recover the costs incurred from the manufacturer. This also extends to consequential loss if the manufacturer would otherwise be liable.

Refusing to repair, replace or refund

Customers' rights are not limitless—the consumer guarantees only require a remedy if one of the guarantees has not been met. You are not legally required to provide a remedy if the customer:

- simply changes their mind, decides they do not like the purchase or decides they have no use for it
- discovers they can buy the goods or services at a cheaper price elsewhere
- damages the goods by using them in a way that is unreasonable or unintended.

Refunds and returns signs

Signs that state 'No refunds' are unlawful. The following signs are also unlawful:

- 'No refund on sale items'
- 'Exchange or credit note only for the return of sale items'.

However, signs that state 'No refunds will be given if you have simply changed your mind' are acceptable.

Sales practices

Proof of transactions and itemised bills

Businesses are required to provide a proof of transaction to customers for goods or services valued at \$75 or more. A proof of transaction may be a tax invoice, a cash register receipt, a credit card or debit card statement, a handwritten receipt, a lay-by agreement or a receipt number provided for a telephone or internet transaction.

For goods or services under \$75, the supplier is only required to provide proof of the transaction if the customer requests it. Similarly, a consumer has the right to request an itemised bill from the supplier of services. A request for an itemised bill must be made within 30 days of the date of supply or the date of receipt of the bill, and must be provided by the supplier within seven days of the request.

Unsolicited supply of goods and services

'Unsolicited supplies' are goods or services supplied to someone who has not agreed to buy or receive them. Under the ACL it is illegal to request payment for goods or services that the customer has not agreed to buy.

Example of unsolicited supply of goods and services

A consumer goes to a hairdresser for a haircut and blow dry and is quoted \$70. While washing her hair the hairdresser gives her a conditioning treatment which she did not ask for. She is later charged \$100 for the haircut—\$70 for the cut and blow dry, plus an extra \$30 for the conditioning treatment. The customer is not legally required to pay the additional \$30.

Anyone who receives unsolicited goods or services does not have to pay for those goods or services, or for any loss or damage arising from the supply of the service.

Referral selling

The ACL makes it illegal for a business to persuade a consumer to buy goods or services by promising benefits if they help the business supply goods or services to other customers.

It is not 'referral selling' for a supplier to promise a benefit for simply providing the names of consumers or helping the trader supply goods.

Example of referral selling

A sales assistant offers a consumer 10 free DVDs to go with their new plasma TV on the condition that they give the business the names of five of their friends and that these friends all buy plasma TVs from the business. This type of offer is illegal.

Pyramid schemes

Pyramid schemes make money by recruiting people rather than by selling actual products or services, even if the scheme includes the selling of a product. These schemes work by asking new participants to make a payment, known as a 'participant payment', in order to join. New members are promised payments for recruiting other investors or new participants.

It is illegal to participate in, or to persuade someone to participate in, a pyramid scheme.

Unconscionable conduct

The ACL contains rules that prohibit unconscionable conduct in connection with the supply and acquisition of goods and services. Businesses are prohibited from acting in this manner against their customers and against other businesses. Conduct may be unconscionable if it is particularly harsh or oppressive, and more than just hard commercial bargaining. The law sets out a list of factors that courts may consider when deciding whether conduct is unconscionable, including the relative bargaining strength of the parties; whether the stronger party used undue influence, pressure or unfair tactics; and the extent to which the parties acted in good faith.

Refer to 'Unconscionable conduct by other businesses' on page 17 for a more detailed discussion of unconscionable conduct.

Harassment and coercion

The ACL makes it illegal to use physical force, coerce or unduly harass someone about the supply of, or payment for, goods or services.

Undue harassment means repetitive unnecessary or excessive contact or communication with a person, to the point where that person feels intimidated or demoralised.

Coercion involves force (actual or threatened) that restricts another person's choice or freedom to act. Unlike harassment, coercion does not have to involve repetitive behaviour.

Warranties against defects

Sometimes suppliers and manufacturers may choose to offer more generous warranties against something going wrong with a good, in addition to the consumer guarantees available under the ACL. These are often called ‘manufacturer’s warranties’. If suppliers and manufacturers choose to provide consumers with a document promising a warranty against defects, the document must comply with specific requirements. A warranty against defects is a claim or statement to a consumer that if the goods or services are defective the business will:

- repair or replace the goods (or part of them)
- resupply or fix a problem with services (or part of them), and/or
- provide compensation to a consumer.

A document promising a warranty against defects must be in writing and state:

- what the business giving the warranty must do if the goods are faulty or defective
- what the consumer must do to claim under the warranty (such as not misuse the goods)
- the contact details of the business providing the warranty
- the warranty period and the procedure for the consumer to claim the warranty
- whether the business or the consumer is responsible for any expenses associated with the warranty claim
- that the benefits provided by the warranty are in addition to the other rights and remedies available to consumers under the ACL.

The document evidencing a warranty against defects must also include the following text:

Our goods come with guarantees that cannot be excluded under the Australian Consumer Law. You are entitled to a replacement or refund for a major failure and compensation for any other reasonably foreseeable loss or damage. You are also entitled to have the goods repaired or replaced if the goods fail to be of acceptable quality and the failure does not amount to a major failure.

Repair notices

In a limited number of situations, the ACL requires that a repairer must provide a consumer with a repair notice before goods are accepted for repair. This includes:

- if the goods being repaired are capable of retaining user-generated data (such as files stored on a computer hard drive, telephone numbers stored on a mobile phone, or songs stored on a portable media player), the repairer must give the consumer a repair notice stating that the repair of goods may result in loss of the data
- if a repairer uses refurbished parts to fix defective goods or replaces defective goods with a refurbished version, the repairer must give the consumer a repair notice which includes mandatory text before accepting goods for repair.

Lay-by sales and direct selling

If you are in the business of offering lay-by agreements or you deal with customers through uninvited means, there are certain provisions in the ACL you should be aware of. More information on lay-by agreements and direct marketing and selling is available at www.accc.gov.au.

Product safety

Under the ACL, the relevant Commonwealth, state and territory ministers can regulate consumer goods and product-related services by issuing safety warning notices, banning products on a temporary or permanent basis, imposing mandatory safety standards or issuing a compulsory recall notice to suppliers.

Bans and product recalls

If any of your products are subject to a ban, you must not sell them. If a product or service presents a safety risk, it should be recalled. A product can be voluntarily recalled by a supplier (either independently or in consultation with a regulatory authority such as the ACCC) or a regulatory authority can mandate a compulsory recall.

Mandatory reporting and safety standards

If your product does not comply with all mandatory safety and information standards, you must not sell it. If you become aware of an incident where a person has suffered death, serious injury or illness that someone believes may have been caused by the use of a consumer good you supplied or serviced, you must notify the ACCC within two days of becoming aware.

For more information on product safety, banned products and recalls, visit www.productsafety.gov.au and www.recalls.gov.au.

Practical tips

To ensure you do not breach the ACL when dealing with your customers and other businesses:

Do:

- set up a system to handle complaints, to ensure that your business is able to comply with the ACL. This may mean delegating to one staff member responsibility for ensuring that:
 - » your business has an agreed complaints handling policy
 - » frontline staff are aware of the complaints handling policy and know who has the authority to settle complaints and what the process is
 - » customers know how to address any problems they may have with the product or service
 - » complaints are reviewed regularly to identify ongoing issues with products or services

- delegate to a staff member responsibility for overseeing your direct selling techniques, to ensure that your business activities comply with the ACL. You may also wish to join an industry association which advises its members on how to comply with direct selling laws
- contact the ACCC to make a complaint if your business becomes the victim of any conduct by other businesses in breach of these laws and you cannot get the dispute resolved.

Do not:

- mislead consumers about their rights
- use physical force, coerce or harass customers in relation to the supply of, or payment for, goods or services
- act unconscionably when selling or supplying goods or services to customers or when dealing with other businesses.



ADVERTISING AND PROMOTING YOUR BUSINESS

Promotion is a useful tool to help build your business brand, attract new customers and build loyalty with existing customers. However it is important to ensure all your promotional statements are truthful and not misleading.

False or misleading behaviour or statements

It is illegal for a business to make statements to their customers that are not correct or are likely to create a false impression. This includes advertisements or statements in any media (print, radio, television or online) and any statement made by a person representing your business.

For example, a business must not make false claims about:

- the standard, quality, value or grade of goods or services
- the composition, style, model, previous history or use of goods
- the price of goods or services
- the age of the goods, for example whether the goods are new
- testimonials relating to the goods or services
- sponsorship, approval, performance characteristics, accessories, benefits and uses of goods or services
- the place of origin, for example where the goods were made or assembled
- a particular person agreeing to acquire goods or services
- a buyer's need for the goods or services
- any guarantee, warranty or condition pertaining to the goods or services.

It does not matter whether a false or misleading statement was intentional or not. A business that misleads its customers is breaking the law.

The only exception to this rule is 'puffery', or self-evident exaggeration such as 'whiter than white' or 'the best thing since sliced bread', where it is unlikely that any reasonable customer would take the claims seriously.

When providing information about your products or services, it is important to consider whether a statement made in your advertising or when dealing directly with your customers will create an incorrect impression in the mind of a customer. For example, a business is likely to break the law if it creates a misleading **overall impression** about the price, value or quality of the good or service. Failing to pass on relevant information may also be misleading if a customer has the wrong idea about your product or service and is relying on your advice.

Example of a misleading claim by a manufacturer

In 2010 a manufacturer of wristbands claimed in advertisements that their wristbands improved balance, strength and flexibility and worked positively with the body's natural energy field. The ACCC raised concerns that these claims were likely to mislead consumers into believing the wristbands had benefits they did not have. The manufacturer admitted that there was no credible scientific basis for the claims and that it had no reasonable grounds for making such claims. The company paid a refund to any customers who felt they had been misled.

Fine print qualifications

Businesses cannot rely on small print and disclaimers as an excuse for a misleading overall message. If your business needs to qualify its advertisements, make sure the qualifying statements are clear and prominent so that consumers know what the real offer is.

The fine print qualification cannot directly contradict prominent features of the advertisement (such as advertising a product as 'free' when the fine print indicates some payment must be made). It is the overall impression of the advertisement which is important.

Country of origin

It is illegal to make false and misleading claims about the country of origin of goods.

Claims about country of origin include:

- the name of a country or symbolism usually associated with a particular country displayed on goods or their packaging
- 'made in' or 'manufactured in' a specified country
- 'produce of', 'product of' or 'produced in' a specified country
- claims that goods or ingredients or components were 'grown in' a specified country.

Bait advertising

Bait advertising is the illegal practice of advertising low prices on goods that are not really available or are available only in very limited quantities.

You should only offer goods or services at a 'special price' if they are available in reasonable quantities for a reasonable period. State clearly if the good is in short supply or on sale for a limited time.

Offering rebates, gifts, prizes and other free items

When supplying or promoting goods or services, it is illegal to offer rebates, gifts, prizes or other free items without intending to provide them. It is also illegal to fail to provide them as promised. The rebate or gift must be provided within the specified time or, if no time was specified, within a reasonable time.

Price displays—multiple pricing

Sometimes a business may have two different prices on display for the one good.

A business that displays more than one price for the same good must either:

- sell the goods for the lowest 'displayed price', or
- withdraw the goods from sale until the price is corrected.

This includes discrepancies between prices displayed through labelling (a price label attached to the goods or anything connected or used with the goods), published online and published in catalogues or advertisements.

Example of multiple pricing

A consumer finds a dining table they like on the website of a furniture retailer. The table is priced on the website at \$350. The consumer visits the retailer showroom and finds the same dining table in-store marked at \$380. The retailer must either withdraw the dining table from sale until the price displays are corrected or allow the consumer to purchase the table at the \$350 advertised price.

Component pricing

When you present prices to your customers, you must state the total price. If you promote a price that is only part of the total price of goods or services, the total price must also be displayed (as a single figure) at least as prominently as the part price.

The total price must include any charge payable, along with the amount of any tax, duty, fee, levy or other additional charge (for example GST, import tax, agent fee or airport tax).

Example of component pricing

A ticket seller prices its tickets at \$40. However, the seller also imposes a booking fee of \$3 on all customers, whether they purchase over the phone, on the internet or in person. A purchase from the ticket seller also attracts a 10 per cent GST.

This should be advertised as:

- \$47.30 (including 10% GST)
- $\$43 + \$4.30 \text{ GST} = \$47.30$, or
- $\$40 + \$3 \text{ booking fee} + \$4.30 \text{ GST} = \$47.30$.

Practical tips

When your business is presenting information about products or services to customers:

Do:

- give current, correct and relevant information
- ensure the overall impression is accurate, and avoid ambiguous statements
- back up claims with facts and documented evidence where appropriate
- note important limitations or exemptions
- correct any misunderstandings.

Do not:

- guess the facts
- omit relevant information
- use unnecessary jargon
- make promises you cannot keep, or make predictions without reasonable basis
- offer goods or services without a reasonable basis for believing you can deliver them.

Substantiation notices

The CCA gives the ACCC the power to issue substantiation notices requiring businesses to substantiate claims made about their goods or services. That is, the ACCC can send a written notice asking a business to provide credible evidence that supports specific claims made in its advertising, labelling or selling advice. The business has 21 days to respond.

Businesses that fail to comply can be fined (\$16 500 for a corporation and \$3300 for an individual) and can also be subject to court action.

WORKING WITH OTHER BUSINESSES IN THE SUPPLY CHAIN

It is important that you understand your rights and obligations when dealing with wholesalers, suppliers and other businesses which purchase your goods and services.

When refusing to supply is allowed

In most cases, suppliers have the right to decide who they do business with. The supplier's decision may be swayed by factors such as the reliability of the customer, the cost of delivery, the agreed representation/presentation of goods and services, and the performance and maintenance of standards.

The CCA does not force a manufacturer or wholesaler to supply goods or services to small businesses, even when it has previously done so. If a refusal to supply is legitimate, the small business will have to renegotiate terms with that supplier or seek alternative suppliers.

When refusing to supply is breaking the law

Under certain circumstances, if a wholesaler refuses to supply they are breaking the law. This may occur when a supplier is:

- misusing their market power
- involved in a boycott
- imposing minimum prices on retailers
- engaging in exclusive dealing
- placing certain limitations on resellers.

Misuse of market power

A supplier with a substantial degree of power in a market is not allowed to use this power for the purpose of eliminating or substantially damaging a competitor, or to prevent a business from entering into a market. This behaviour is referred to as 'misuse of market power'.

Example of misuse of market power

In 2010, after ACCC legal action, the court ordered Cabcharge to pay fines totalling \$14 million for refusing to allow competing suppliers of electronic payment processing services for taxis to process Cabcharge non-cash payment products.

Boycotts

The CCA makes it illegal for competitors to get together and agree not to acquire goods from a particular supplier or not to supply goods to a particular business or person. This applies to trade unions, professional associations and individual businesses.

Imposing minimum prices on retailers

Businesses have the right to set their own prices and discount their goods or services whenever they like. It is illegal for a supplier to attempt to set a minimum price by any means, including by formal agreement, by cutting off or threatening to cut off supply to a reseller (wholesale or retail) or by raising the supply price. This behaviour is referred to as 'resale price maintenance'.

Your supplier's recommended price lists

There is nothing wrong with using a supplier's recommended retail price (RRP) list as long as it is just that—recommended. The supplier is not allowed to force you to use the recommended price list. You are free to discount whenever you choose to.

However, it would be illegal for you and your competitors to agree to only charge the listed price or any other set price. This would amount to price fixing.

Are there any exceptions?

A supplier may withhold the supply of goods when a retailer has sold the goods at a price *below cost* for the purpose of attracting customers to the business—this is known as loss-leader selling.

In this instance, the retailer makes a loss on those goods but hopes to recoup this loss through the sale of other products. The supplier can refuse to supply unless the retailer's sale was a genuine clearance sale or took place with the consent of the supplier.

Also, agency agreements or other arrangements where ownership of the goods or services does not pass from the supplier to the retailer before resale are not prohibited under the CCA's resale price maintenance provisions.

Example of resale price maintenance

In 2010 the ACCC took legal action against a pram wholesaler for not allowing retailers to discount its Bertini brand baby prams. The wholesaler admitted it had told some retailers it would not supply them with Bertini products unless they agreed to sell them above a specified price. The wholesaler also admitted it had attempted to induce some retailers not to sell the prams below a certain price and had even entered into a formal agreement with one retailer.

The court ordered the wholesaler to pay fines totalling \$100 000, contribute \$25 000 to the ACCC's legal costs, write to the retailers informing them of the court case outcomes, and implement a fair trading compliance program.

Exclusive dealing

Exclusive dealing can occur when one business imposes restrictions on another business's freedom to choose who they deal with and on what terms. Exclusive dealing is prohibited under the CCA. Sometimes the conduct is prohibited outright; in other circumstances it is subject to a test of whether it has substantially lessened competition in a market.

Third line forcing

It is illegal for a business to only offer to supply a good or service on the condition that the customer also buy goods or services from another specified business. This behaviour is referred to as 'third line forcing'.

Examples of third line forcing

The ACCC has taken legal action to stop third line forcing against:

- a lender who, as a condition of loans, required borrowers to take out loan insurance with a specified insurance company
- a quarry company whose manager offered cartage work to people on condition that they bought a truck from a specified dealer, who in turn paid the manager a 'spotter's fee'.

Authorisation of anti-competitive conduct and collective bargaining

The CCA recognises that there may be circumstances where greater public benefit would result from allowing certain conduct that may restrict competition. The ACCC can allow businesses to engage in conduct that may otherwise breach the competition provisions of the CCA, through the authorisation or notification process. The ACCC will assess whether the conduct is likely to result in a public benefit that outweighs any resulting detriment, including from a lessening of competition.

For example, the CCA makes it illegal for businesses to get together and collectively negotiate terms and conditions with a supplier or customer, as this could involve agreements between competitors, often in relation to pricing. However when the outcome of collective negotiations is likely to result in a public benefit—such as through providing more efficient and effective negotiations, which can lead to lower prices or a greater variety of products—the ACCC may allow it.

The ACCC has allowed small business bargaining groups to form in diverse areas ranging from dairy farming and vegetable growing to concrete carting and hotels. For further information see *Authorisations and notifications—a summary* at www.accc.gov.au.

Other types of anti-competitive arrangements involving small businesses which have been allowed by the ACCC in the public interest include exclusive dealing arrangements and voluntary industry codes of conduct.

Unconscionable conduct by other businesses

The CCA protects small businesses from unconscionable conduct by other businesses. Conduct may be unconscionable if it is particularly harsh or oppressive and more than just hard commercial bargaining. It can occur between businesses or between businesses and consumers.

The law sets out a long list of factors that courts may consider when deciding whether conduct is unconscionable. These include:

- the relative bargaining strength of the parties
- whether any conditions were imposed on the weaker party that were not reasonably necessary to protect the legitimate interests of the stronger party
- whether the weaker party could understand the documentation used
- the use of undue influence, pressure or unfair tactics by the stronger party
- the requirements of applicable industry codes
- the willingness of the stronger party to negotiate
- the extent to which the parties acted in good faith.

Example of unconscionable conduct

In 2008 the ACCC took legal action against Dukemaster, the landlord of a shopping centre. The court found that Dukemaster had engaged in unconscionable conduct against small business owners who had no or little ability to speak or read English by:

- proposing a rental amount which it represented as being reasonable and below market value without any basis
- imposing, without justification or explanation, a very short timeframe for the tenants to respond to the proposal.

Settling a dispute with your supplier

If a dispute arises between you and your supplier:

- raise the matter quickly with the supplier
- make it clear what action you require to settle the dispute
- if that fails, check whether the supplier has a dispute resolution process and talk to its contact person
- if you are not confident about raising the matter with the other party directly, consider contacting your local Small Business Commissioner (if one exists in your state/territory) or asking your industry association for assistance
- if you still can't settle the dispute, suggest a mediation service to the other party (many Small Business Commissioners can help you access mediation services). Mediation is a relatively quick and cheap option that can help to keep relationships intact
- if you believe there has been a breach of the CCA, contact the ACCC and also consider seeking legal advice. Court action should be considered as a last resort.

Franchising

Most franchisees and franchisors are subject to the mandatory Franchising Code of Conduct. The code regulates the relationship between franchisors and franchisees, and entitles franchisees to specific information before they enter into a franchise agreement and during the life of their agreement. It also gives franchisees certain rights as their agreement comes to an end, and provides a cost-effective dispute resolution procedure. For further information visit www.accc.gov.au/franchising.

Practical tips

When dealing with your suppliers:

Do:

- set the terms and conditions of your agreements with suppliers and customers independently, while taking care that they comply with the CCA more broadly
- apply for authorisation under the CCA if you wish to negotiate collectively with a supplier or other businesses
- remember that you are free to set your own prices. Recommended retail prices from suppliers should be only used as a guide. If you receive a threat for setting different prices, report it to the ACCC.

Do not:

- enter into an agreement with your competitors for the purpose of preventing, restricting or limiting dealings with suppliers or customers—this is boycotting. You should not attempt to induce other businesses to do this.

COMPETING FAIRLY

This chapter outlines business behaviour that is illegal between competitors.

Price fixing

It is illegal for businesses to get together and agree to fix prices. Price fixing can have a detrimental effect on consumers and the economy. Not only can it increase prices along the entire supply chain; it can also stifle innovation, prevent small businesses from entering the market and lessen competition. The end result is higher prices and reduced choices of products and services for consumers.

Price fixing agreements do not have to be in writing. For example, they can be oral agreements made over a drink at the pub, or at an association meeting. You don't even have to formally agree with your competitors to fix prices for your conduct to be illegal. It is enough that there is an understanding between businesses, regardless of how long the agreement lasts or how effective it is. The only exception to this is where conduct is specifically authorised by the ACCC—see 'Authorisation of anti-competitive conduct and collective bargaining' on page 16 of this guide.

Market sharing

Dividing a market up with your competitors and agreeing to only do business in specific market segments, known as 'market sharing', is illegal—no matter how you do it. Again, the only exception to this is where conduct is specifically authorised by the ACCC—see 'Authorisation of anti-competitive conduct and collective bargaining' on page 16 of this guide.

Association meetings

Meetings between competitors on matters of common interest can be pro-competitive as well as beneficial for individual competitors, businesses and the public. For example, industry associations can provide useful education and information to members and consumers, and can represent the view of members to government. However, meetings must not be used to fix prices or for organising any other anti-competitive conduct such as market sharing arrangements.

For more information about the obligations of industry associations and professional bodies, refer to *Industry associations, competition and consumers*, available at www.accc.gov.au.

Predatory pricing

Another form of prohibited anti-competitive conduct is predatory pricing. This occurs when businesses price their goods below cost for the purpose of eliminating or substantially damaging a competitor.

Simply pricing goods below cost is not automatically illegal. To determine whether the law has been broken other factors must be examined, such as how long the goods were sold at the below-cost price and how much market power the seller has.

Practical tips

When dealing with your competitors:

Do not:

- make any agreements with your competitors about pricing
- use association meetings to make anti-competitive agreements.



ACCC COMPLAINTS HANDLING

How to make a complaint or inquiry

To make a complaint or inquiry contact the **ACCC small business helpline** on 1300 302 021.

It is not a function of the ACCC to provide legal advice. While the ACCC can explain your general rights and obligations under the CCA and how the ACCC is likely to view particular business practices, the ACCC can't give you legal advice in the same way your solicitor can.

If you are making a complaint about another business, ACCC staff may ask you to provide evidence in the form of business records such as invoices and letters that are relevant to your complaint.

If the CCA does not apply to your problem, ACCC staff will suggest the appropriate government agency for you to contact or suggest other options.

How the ACCC investigates complaints

The ACCC listens to anyone who offers information about possible breaches of the CCA. As well as telling the ACCC about what has been going on, complainants often give documents as evidence. The evidence the ACCC will need depends on the type of conduct it is investigating. During an investigation it may interview competitors and consumers as well as the management and staff of the business being complained about.

In most cases the ACCC tells the business concerned that it is being investigated.

After hearing the other side of the story the ACCC may conclude that the law has not been broken. However, if the ACCC concludes that the law has been broken, this will be explained to the business concerned.

Businesses under investigation are free to seek their own legal advice at any time.

When the law is broken

When the ACCC believes a business has broken the law it can take legal action.

In making a decision about whether to go to court, the ACCC will take into account several factors in accordance with the ACCC's *Compliance and enforcement policy*, including:

- blatant disregard of the law
- significant public interest or concern
- educative or deterrent effect
- new market issues
- the need to clarify the reach of the CCA.

The ACCC can also settle the matter without going to court in some circumstances. Such circumstances may include issuing infringement notices (that is, issuing the business with a fine), administrative resolutions (that is, obtaining a signed agreement from the business

agreeing to stop the conduct and compensate those who may have suffered from it) or court enforceable undertakings (that is, obtaining a signed agreement from the business that is on the public record and can, if broken, lead to the court making further orders).

The ACCC is more likely to settle without going to court if the business concerned:

- cooperates by compensating people who have been affected by the illegal conduct
- undertakes to change its management practices and improve staff training to ensure there are no further breaches of the law.

For more information about how the ACCC approaches enforcement of the CCA, refer to the *Compliance and enforcement policy*, available at www.accc.gov.au/cepolicy.

The ACCC is not the only party that can institute court proceedings for breaches of the CCA. Your competitors, your customers and you may have the right to pursue private action.

Penalties for breaching the CCA

The consequences of breaching the CCA include penalties, adverse publicity and loss of reputation.

Breaching the CCA may result in the court:

- imposing significant penalties for breaches of the consumer protection or anti-competitive conduct provisions
- making declarations that a business has contravened the CCA
- making injunctions restraining current or future conduct, or requiring certain action to be taken
- requiring businesses to publish notices about their conduct and corrective advertising, and to disclose relevant information to others (for example to customers)
- allowing damages to be recovered by consumers and businesses affected by the conduct
- requiring businesses to provide compensation for consumers or businesses harmed by the conduct.

Legal costs can be much higher than any penalties imposed on a business for breaching the CCA. Also, under the Australian legal system the unsuccessful party usually has to pay most of the winner's legal costs as well as its own.

The ACCC usually issues a media release when the proceedings of a court case have started and concluded in court or settled without going to court. This is done to inform the public about the ACCC action and promote compliance with the CCA.

ACCC INFORMATION

To find out more about any of the topics outlined in this publication you can contact the ACCC using the following channels:

ACCC website: www.accc.gov.au

ACCC small business helpline: 1300 302 021

Callers who are deaf or have a hearing or speech impairment can contact the ACCC through the National Relay Service (www.relayservice.com.au).

TTY or modem users: phone 13 3677 and ask for 1300 302 021.

Voice-only (speak and listen) users: phone 1300 555 727 and ask for 1300 302 021.

For information in languages other than English, phone 13 1450 and ask for 1300 302 021.

ACCC small business publications: The ACCC produces a range of guidance materials to help you understand your rights and obligations under the CCA. These materials are available at www.accc.gov.au/publications. Many are also available in hard copy.

ACCC Small Business Information Network (SBIN): The ACCC provides a subscriber only information service to small businesses via an email newsletter. If you would like to subscribe to the ACCC SBIN newsletter visit www.accc.gov.au.

ACCC Education & Engagement Managers

The ACCC has a team of Education & Engagement Managers who educate the small business sector across the country about its rights and obligations under the CCA. To get in touch with your local ACCC Education & Engagement Manager contact the ACCC small business helpline.

RELEVANT GOVERNMENT AGENCIES AND RESOURCES

There are a number of government agencies and resources that can assist you or provide important information that affects the running of your business.

www.business.gov.au

This website is an Australian Government initiative designed to offer you simple and convenient access to all the government information, forms and services relevant to business. It also provides information about planning, starting and growing your business.

Small Business Support Line

This was established by the Australian Government to provide initial advice and referral services on matters such as obtaining finance, promotion and marketing, and hardship counselling. To access the support line, phone 1800 777 275 or visit www.business.gov.au to use live chat.

State/territory offices

Australian Capital Territory

ACT Office of Regulatory Services
www.ors.act.gov.au/community/fair_trading
Telephone (02) 6207 3000

New South Wales

Office of the Small Business Commissioner, NSW
www.smallbusiness.nsw.gov.au
Telephone 1300 795 534

NSW Fair Trading
www.fairtrading.nsw.gov.au
Telephone 13 3220

Northern Territory

Consumer Affairs NT
www.consumeraffairs.nt.gov.au
Telephone 1800 019 319

Queensland

Queensland Office of Fair Trading
www.fairtrading.qld.gov.au
Telephone 13 7468

South Australia

Office of the South Australian Small Business Commissioner
www.sasbc.sa.gov.au
Telephone 1800 072 722

Consumer and Business Services
www.ocba.sa.gov.au
Telephone 13 1882

Tasmania

Consumer Affairs and Fair Trading TAS
www.consumer.tas.gov.au
Telephone 1300 654 499

Victoria

Office of the Victorian Small Business Commissioner
www.sbc.vic.gov.au
Telephone 13 2215

Consumer Affairs Victoria
www.consumer.vic.gov.au
Telephone 1300 558 181

Western Australia

Consumer Protection WA
www.docep.wa.gov.au/ConsumerProtection
Telephone 1300 304 054

Small Business Development Corporation
(including Small Business Commissioner)
www.smallbusiness.wa.gov.au
Telephone 13 1249

Other government agencies

Australian Securities and Investments Commission

The Australian Securities and Investments Commission (ASIC) is Australia's corporate, markets and financial services regulator. It is the regulator of consumer credit in Australia and is also responsible for business name registrations. For further information contact ASIC on 1300 300 630 or visit www.asic.gov.au.

Department of Industry, Innovation, Science, Research and Tertiary Education

The Department of Industry, Innovation, Science, Research and Tertiary Education (DIISRTE) assists small business with small business policy issues within government. For further information contact DIISRTE on (02) 6213 6000 or visit www.innovation.gov.au.

Australian Taxation Office

The Australian Taxation Office (ATO) manages and shapes tax, excise and superannuation systems that fund services. For information about taxation matters relating to your business, contact the ATO on 13 2866 or visit www.ato.gov.au/businesses.

IP Australia

IP Australia administers Australia's intellectual property (IP) rights system, specifically patents, trademarks, designs and plant breeder's rights. For further information contact IP Australia on 1300 651 010 or visit www.ipaustralia.gov.au.



www.accc.gov.au