



GUIDE

Consult Australia Activities and Avoiding Anti-Competitive Behaviour

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This Guide, along with the Code of Ethics and the Code of Conduct sets out the behaviour expected of Consult Australia members and their representatives.

Consult Australia brings competitors together

Consult Australia members are businesses that provide consulting advisory, design, and engineering services and are part of the same industry. The opportunities Consult Australia provides (networking meetings, discussions, and events) bring competitors in the same industry together which has the potential to lead to anti-competitive behaviour and/or contravention of the Competition and Consumer Act 2010 (Cth).

Consult Australia requires members and their representatives to:

- meet the obligations of the Code of Ethics
- be familiar with this Guide
- behave in line with the Code of Conduct.



If you participate in Consult Australia activities, you must be familiar with this guide and avoid anti-competitive behaviour.

Avoiding anti-competitive behaviour does not prevent each Consult Australia's business members from independently taking a decision; on prices, to tender or not for different projects, service certain markets or clients etc.

Such decisions must be the choice of each member independently and separately.

This guide is non-exhaustive

More detailed information on anti-competitive behaviour is available from the Australian Competition and Consumer Commission's (ACCC) [website](#) including this [Cartels: What You Need to Know – A Guide For Business](#).

In complying with the Consult Australia Code of Ethics and having regard to anti-competitive behaviour as explored in this Guide, Consult Australia members must not:

- ✘ signal pricing intentions or enter into any discussions on actual prices or the underlying components which may be determinative of actual prices.
- ✘ enter a contract, arrangement or understanding that may restrict, prevent or limit the persons to whom products or services may be supplied or acquired.
- ✘ enter into agreements that substantially reduce competition in the market.
- ✘ exchange sensitive information which could give rise to trade practices issues, as well as issues in relation to privacy and confidentiality.
- ✘ act in a way that may contravene Consult Australia's Code of Conduct, when participating in Consult Australia meetings.

Consistent with the above, members should be wary of communications held or drafted without care and consideration. A poor choice of words can make a legal activity look suspicious.

Consult Australia, its members and member representatives should always be aware of their obligations to:

- Make individual and independent decisions regarding actions in the marketplace. Decisions should be commercial in nature having regard to an open and competitive market.
- Review any joint venture arrangements and check for a formal contract governing the arrangement.
- Consider what training/information to provide staff to make sure that they are aware of the requirements of the Competition and Consumer Act 2010 (Cth).
- Seek legal advice as necessary to assist in the identification of areas that may give rise to competition issues.

What is anti-competitive behaviour?

The Australian Competition and Consumer Commission (ACCC) notes the importance of competition between businesses to Australia's open market economy. The Competition and Consumer Act 2010 (Cth) (CCA) sets rules for business behaviour so that all businesses can compete on their merits.

It is important to know that anti-competitive behaviour can include:

- illegal behaviour such as cartel activity (fixing process, rigging bids, sharing markets or controlling output)
- potentially illegal behaviour that may damage competition such as cooperation among business, misuse of market power and exclusive dealing.

This guide covers a range of anti-competitive behaviour but is not comprehensive and every business must ensure its own compliance with the CCA.

Cartel activity

Under the CCA, a corporation must not make, or give effect to, a contract, arrangement or understanding that contains a cartel provision (this prohibition covers for example, an attempt to form a cartel, aiding and abetting and conspiring).

The CCA contemplates not only formal and written arrangements but also informal understandings. Liability under the CCA is 'strict', meaning that it does not require any intent or awareness of wrongdoing. Therefore, seemingly innocent discussions between Consult Australia members (who are competitors) could be found to contravene the CCA).

A cartel provision is one that relates to price-fixing, market sharing, controlling outputs and/or bid rigging.

Price fixing

Price fixing can happen when competitors agree on pricing instead of competing against each other. This can include arrangements that indirectly fixes, controls, or maintains the price of goods or services.

For more information see [ACCC, cartels price fixing](#) and subsection 45AD(2) of the CCA.

Consult Australia does not publish fee scales. A fee scale might indicate that Consult Australia and its members (competitors) have reached an understanding on the fees for consulting services, which is likely to have the effect of controlling or maintaining the price for those services.

Learn from...Aussie Skips and Bingo Industries

It was alleged that in mid-2019, Aussie Skips and Bingo Industries agreed to increase and fix prices for the supply of skip bins and processing services for building and demolition waste in Sydney. For the collection of waste, the coordinated price increases saw Bingo increase prices by at least 25% and Aussie Skips increase by at least 20%. It was also alleged that the CEO/Managing Director of Bingo Industries later deleted text messages about the deal.

The ACCC investigated the case and referred the matter to the Commonwealth Director of Public Prosecutions which laid criminal charges. Both companies, as well as the CEOs of both companies pleaded guilty to cartel activity.

See: <https://www.accc.gov.au/media-release/aussie-skips-and-ceo-plead-guilty-to-alleged-waste-services-price-fixing-cartel>

Market sharing

Market sharing can happen when competitors agree to divide a market between themselves, so they don't have to compete. Examples can include when competitors:

- avoid producing each other's good or services
- serve different geographical areas
- divide contracts by value
- assign customers to each competitor with an understanding not to win each other's customers.

For more information see [ACCC, cartels market sharing](#) and subsection 45AD(3) of the CCA.

Learn from...K-Line, NYK and WWO

Three international shipping companies were convicted and fined a total of \$83.5m for cartel conduct including market sharing. K-Line, Nippon Yusen Kabushiki Kaisha (NYK) and Wallenius Wilhelmsen Ocean AS (WWO). The companies allocated major manufacturing customers between themselves including on certain shipping routes to Australia between June 2011 and July 2012. The court found that this cartel had the capacity to limit or distort the competitive setting of freight rates and was likely or at least had the potential to impact on the prices paid by Australian consumers.

See: <https://www.accc.gov.au/media-release/shipping-cartel-fines-now-total-835-million-after-wwo-conviction>

Controlling outputs

Controlling output can happen when competitors agree to limit the amount or type of goods and services available. For example, agreements to prevent, restrict or limit:

- the capacity, or likely capacity, of any or all of the parties to supply the services
- the supply, or likely supply, of goods or services to persons or classes of persons by any or all of the parties, or
- the acquisition, or likely acquisition, of goods or services from persons or classes of persons by any or all of the parties.

For more information see [ACCC, cartels controlling output](#) and paragraph 45D(3)(a) of the CCA.

Learn from...NQ Cranes

Overhead crane company NQ Cranes admitted contravening the CCA by entering into a cartel agreement with a competitor that allocated overhead crane service customers in parts of Queensland and the Newcastle region. The competitors signed a 'distributorship agreement' in August 2016 agreeing not to compete with each other but instead to focus on competing against other companies in the industry.

NQ Cranes was ordered to pay a \$1 million penalty in proceedings brought by the ACCC.

See: <https://www.accc.gov.au/media-release/nq-cranes-to-pay-1-million-for-cartel-agreement-with-competitor>

Bid rigging

Bid rigging (also called collusive tendering) can happen when suppliers discuss and agree among themselves who should win a tender, and at what price. For example:

- one or more of the parties bids but one or more other parties do not
- two or more of the parties bid but at least two of them do so on the basis that one of those bids is more likely to be successful than the others
- two or more of the parties bid and proceed with their bids, but at least two of them do so on the basis that one of those bids is more likely to be successful than the others
- two or more of the parties bid but a material component of at least one of those bids is worked out in accordance with the contract, arrangement or understanding with the other parties.

For more information see [ACCC, cartels bid rigging](#) and paragraph 45AD(3)(c) of the CCA.

Learn from...ARM Architecture

In April 2023 the Federal Court of Australia found ARM Architecture and its former Managing Director has attempted to rig bids for a tender relating to a \$250 million building project at Darwin's Charles Sturt University.

The Managing Director sent emails to eight other architecture firms in September 2020 asking those companies not to bid for the second phase of the project (as ARM Architecture was the successful tenderer for the first phase including principal design consultant services for the master plan, business case, concept plan and scheme design phase).

The Court ordered the company to pay a penalty of \$900,000 and the Managing Director to pay \$75,000 in addition to paying for part of the ACCC's costs. In addition, the company was ordered to conduct an education, training and compliance program relating to the CCA.

See: <https://www.accc.gov.au/media-release/arm-architecture-and-its-former-md-to-pay-penalties-for-attempted-rigging-of-university-tender>

Other prohibited activity

Section 45 of the CCA prohibits a corporation from making a contract or arrangement, or arriving at an understanding which has the purpose, or effect or likely effect, of substantially lessening competition in the relevant market.

Other prohibited activity also includes:

- **Imposing minimum resale prices:** suppliers are prohibited from setting minimum prices for the resale of products or services.
- **Collective bargaining:** businesses that want to join together to negotiate with a supplier or customer through collective bargaining first need permission (see exemptions below).
- **Misuse of market power:** businesses must not misuse their market power to stop other businesses competing on their merits.
- **Exclusive dealing:** businesses must not restrict how customers or suppliers do business in a way that substantially lessens competition.

Exemptions

There are legitimate exemptions to the CCA provisions, including related bodies corporate and joint ventures.

Related bodies corporate

Contracts, arrangements or understanding between related bodies corporate are exempt from prohibitions on cartel provisions (see section 45AN of the CCA) and anti-competitive agreements (see subsection 45(8) of the CCA).

Joint ventures

Joint ventures are exempt from prohibitions on cartel provisions in limited circumstances.

Section 45AO of the CCA provides the exemption from the offence provisions and section 45AP of the CCA provides the exemption from the civil penalty provisions.

The exemptions for joint ventures are drafted narrowly, the following element must be established:

1. The cartel provision is:
 - for the purposes of a joint venture, and
 - reasonably necessary for undertaking the joint venture.
2. The joint venture is for:
 - production of goods
 - supply of goods or services, or
 - acquisition of goods or services.
3. The joint venture is not carried on for the purpose of substantially lessening competition.
4. In the case where the joint venture is carried on jointly by two or more persons, whether or not in partnership – the joint venture is carried on jointly by the parties to the contract, arrangement or understanding.

5. In a case where the joint venture is carried on by a body corporate – the joint venture is carried on by a body corporate formed by the parties to the contract, arrangement or understanding for the purpose of enabling those parties to carry on the production of goods, supply of goods or services or acquisition of goods services jointly by means of:

- their joint control
- their ownership of shares in the capital, or
- that body corporate.

Penalties

Depending on the conduct, breaches of the CCA discussed above can expose Consult Australia and its members to criminal sanctions, pecuniary penalties, damages actions brought by third parties, injunctions, declarations, and other orders. For more information see: <https://www.accc.gov.au/business/compliance-and-enforcement>

Penalties for cartel provision breaches

For an individual, for criminal offences:

- prison sentences of up to ten years
- fines of up to \$550,000 per offence (2,000 penalty units) for conduct on or after 1 January 2023.

The maximum pecuniary penalty for civil contraventions of the cartel prohibitions by an individual is \$2.5 million.

For a corporation, a fine not exceeding the greater of:

- \$50 million
- if the Court can determine the 'reasonably attributable' benefit obtains, three times that value
- if the Court cannot determine the benefit, 30% of the corporation's adjusted turnover during the breach turnover period for the offence.

See section 45AF and 45AG of the CCA.

Penalties for other breaches

Civil penalties apply to breaches of the provisions under Part IV of the CCA, such as misuse of market power, exclusive dealing, imposing minimum resale prices, and anti-competitive mergers.

For an individual, the penalty can be up to \$2.5 million

For a corporation, the penalty can be the greatest of:

- \$50 million
- if the Court can determine the 'reasonably attributable' benefit obtains, three times that value
- if the Court cannot determine the benefit, 30% of the corporation's adjusted turnover during the breach turnover period for the offence.

Companies cannot indemnify officers

Companies are not able to indemnify current or former officers for liability for breaches of the competition provisions of the CCA (see subsections 77A and 77B of the CCA). This means that company officers who are ordered to pay a penalty under relevant provisions of the CCA will not be able to have the penalty, or any costs incurred in defending the proceedings, paid by the company for which they work.

A court can, if it deems it justified, disqualify a person from managing a corporation if the person has contravened, or attempted to contravene, or has been involved in a contravention of relevant provisions of the CCA.

Powers of the ACCC to enter premises

The ACCC can search premises, seize documents, and conduct raids. The ACCC must obtain the consent of the occupier to enter the premises, or a warrant from a magistrate before carrying out the search and seizure.

This guide provides a summary only of the subject matter covered, without the assumption of duty of care by Consult Australia. The summary should not be relied on as a substitute for legal or other professional advice.