

The Australian Consumer Law

What does it mean for customs brokers and freight forwarders

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Topics

1. Anti-Competitive Behaviour
2. Misleading and Deceptive Conduct
3. Consumer Guarantees
4. Unfair Contract Terms

Anti-Competitive Behaviour



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Anti-competitive behaviour

There are a range of business practices, which limit or prevent competition, which are against the law. These are important when dealing with consumers, wholesalers, suppliers and other businesses. Anti-competitive practices include:

- Anti-competitive agreements
- Cartels
- Exclusive dealing
- Minimum resale prices
- Misuse of market power
- Predatory pricing
- Unconscionable conduct
- Refusal to supply products or services

Exclusive dealing

Exclusive dealing occurs when one person trading with another imposes restrictions on the other's freedom to choose with whom, in what, or where they deal.

There are two broad categories of exclusive dealing:

- third line forcing (prohibited outright) - occurs when a business will only supply, or give a particular price or discount, on the condition that the purchaser buys goods or services from a specified third party.
- other (only prohibited when substantially lessens competition).

Exclusive dealing – other

Exclusive dealing (other than third line forcing) involves a supplier refusing to supply goods or a service unless the purchaser agrees not to:

- buy goods of a particular kind or description from a competitor
- resupply goods of a particular kind or description acquired from a competitor
- resupply goods of a particular kind acquired from the company to a particular place or classes of places.

Only prohibited when the conduct has the effect of substantially lessening competition in the relevant market.

Resale price maintenance

Suppliers may not:

- put pressure on businesses to charge their recommended retail price or any other set price, for example by threatening to stop supplying to the reseller
- stop resellers from advertising, displaying or selling goods from the supplier below a specified price.

Example: a Customs Broker providing services and seeking to limit the price that the freight forwarder is able to charge

Misuse of market power

A business with substantial power in a market is not allowed to use this power for the purpose of eliminating or substantially damaging a competitor or prevent a business from entering into a market.'

Three critical questions:

1. Does the company have substantial market power?
2. Is it taking advantage of that power?
3. Is it using that power for a prohibited purpose (ie. eliminating or substantially damaging a competitor / preventing entry of market participant / deterring or preventing a person from engaging in competitive conduct in a market)?

Predatory pricing

One way in which a business may misuse its market power.

Occurs when a company with substantial market power or share of a market sets its prices at a sufficiently low level with the purpose of:

- eliminating or substantially damaging a competitor
- preventing the entry of a competitor into that or any other market
- deterring or preventing a competitor from engaging in competitive.

Designed to eliminate competition.

Refusal to supply products / services

Generally, businesses can decide with whom they wish to do business. However, there are a range of circumstances where refusal to supply is prohibited. This includes where a supplier is:

- misusing market power
- imposing minimum resale prices
- engaged in exclusive dealing
- acting unconscionably.

Unconscionable conduct

Unconscionable conduct is generally conduct which is so harsh it goes against good conscience. It must be more than simply unfair – it must be against conscience as judged against the norms of society. Relevant factors include:

- the relative bargaining strength of the parties
- conditions imposed on the weaker party not reasonably necessary to protect legitimate interests
- whether the weaker party understood documentation used
- use of undue influence, pressure or unfair tactics by the stronger party
- the willingness of the stronger party to negotiate
- whether the parties acted in good faith.

Cartels

A cartel is where businesses agree to act together instead of in competition with each other.

A cartel cannot:

- price fix – agree on a pricing structure
- share markets – divide a market
- rig bids – cartel participants communicate about bids / who will win and at what price
- control output or limit the goods and services available to buyers,

Can be local, national or international.

Cartels – ACCC v Flight Centre

ACCC v Flight Centre

- High Court held that Flight Centre competed to sell international airline tickets with the airlines for which Flight Centre was an agent.
- Flight Centre tried to persuade the airlines to raise the price of tickets sold directly to customers (so Flight Centre wasn't effectively “undercut” by the airlines).
- This amounted to seeking to fix prices with a competitor in an unlawful manner.

Need to carefully consider any distribution or agency arrangements, where the principal supplies the same goods as the agent.

Misleading and Deceptive



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Misleading and Deceptive Conduct

Basic rule – A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive

There is no need to be intentionally misleading – you may believe the statement to be true

Many claims are based on services or goods not meeting an expected standard and refer to implied representations

Important – You generally cannot exclude liability for misleading and deceptive statements

Examples

- Incorrect advice as to the tariff classification of a good
- Incorrect advice as to the general duty rate
- Incorrect advice as to the application of a concession
- Incorrect advice as to the arrival date of a vessel
- Incorrect advice as to the customs value of the goods
- Incorrect advice as to whether dumping duties apply
- Incorrect advice as to cost of freight
- Incorrect advice as to whether goods are prohibited

Elements of a claim

- The misleading or deceptive statement was made
- The customer relied on the misleading or deceptive statement
- That reliance was reasonable
- The customer suffered loss in reliance on the statement

The giving of opinions

An opinion is not misleading and deceptive simply because it proves to be wrong

Example – an opinion as to whether a TCO applies

However, there are associated representations:

- There is a reasonable basis for the holding of the opinion
- The person giving the opinion held all of the information that they needed to form the opinion
- The opinion represents the application of due care and skill
- The opinion does not need to be qualified
- The opinion can be relied upon without further action being taken

Industry example - TCO

Predicting whether a TCO applies can be hard. Issues to consider if you are wrong.

- Did you qualify the opinion in any way
- Did you have all the product information you needed to provide the opinion
- Did you recommend obtaining a TA or a new TCO
- Was your opinion based on recent audits, TAs or Tribunal cases – reasonable basis

Given the current approach of the ABF, an incorrect unqualified opinion that a TCO applies is likely to expose the broker

However, it does not end there

- **Did the customer rely on the representation?**
 - How has the customer acted in the past when use of concessions has not been clear
 - Did the customer form their own view as to whether the TCO applied
 - Would the customer have used the TCO even if you qualified the statement
- **What loss was suffered**
 - Paying the correct duty is not a loss
 - Could an alternative TCO have been obtained
 - Could an FTA have been used instead
 - Would the client have increased their sale price
 - The client must take reasonable steps to mitigate their losses

Other industry examples

Secret commissions or mark ups

A port fee is \$100 and the forward adds 10% to account for its management of the fee – the invoice may be misleading if it states the port fee is \$110.

Representing that you are a customs broker

If you subcontract the customs clearance of goods you need to be careful how you represent your services – you should not give the impression that your business has a corporate brokers licence

Advertising of prices

Advertising a price for clearances that is subject to conditions but not setting out that conditions apply

Excluding liability

Very hard to exclude liability for misleading and deceptive conduct

Exclusions are generally taken to be against public policy

T&Cs often contain terms that a party has not relied on pre-contractual negotiations or representations – generally won't help with transactional representations

Possible exceptions:

- Large cap on liability
- Reasonable limit on time to bring claims

Not excluding the Act but agreeing to limits of liability

Individuals

Can employees be personally liable - YES

The individual's conduct must be in "trade or commerce"

Indemnity

If the misrepresentation was in performing the employer's instructions, the employee will generally have a right of indemnity against the employer

However, the indemnity will not extend to all wrong conduct of the employee – the worse the conduct the less likely there is a right of indemnity

Main risk is if the company has no assets

Vicarious liability

Company still liable – an employer will be liable for the wrongful acts of its employees if the conduct:

- is authorised by the employer (employee acting within the scope of their employment)
- results from the employer's inadequate supervision
- is ratified by the employer

Consumer guarantees



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What are consumer guarantees

Consumer guarantees are non-excludable rights implied by the ACL into many contracts

The guarantees applying to services are:

- the services are performed with due care and skill
- the services are fit for purpose; and
- the services will be supplied within a reasonable period

Were the services acquired by a “consumer”

The term “consumer” is defined in the legislation and **often includes business.**

2 tests relating to services – only one needs to be met

1. the amount payable for the services did not exceed \$40,000
2. the services are the kind ordinarily acquired for personal, domestic or household use or consumption

Unlikely that the second test will be met – it all comes down to the \$40,000 test

\$40,000 test

If the cost is less than \$40,000, the nature of the services or the person acquiring them is irrelevant – BHP will often be a “consumer”

Services provided over a period of time:

- is it an ongoing or fixed term contract
- is the price determined as a fixed price for a period or based on volume of services performed
- is the level of services known in advance with certainty

Expect most freight forwarding and customs clearance contacts to be assessed on a per transaction basis

What if the consumer guarantees apply

The consumer guarantees cannot be excluded – this means exclusions of liability in T&Cs are not very effective

“Due care and skill” effectively makes the service provider liable for negligence

Means that you need to have insurance to cover this potential liability.

Where you may breach the duty to exercise due care and skill:

- incorrect use of concessions
- incorrect classification
- not taking proper precautions to store goods

Limiting liability

Where services are provided to a business you are permitted to limit liability to resupplying the services again, or the cost of resupplying the services again

PROVIDED

it is fair and reasonable to rely on the exclusion

Example

Industry example

“...To the extent permitted by law, the liability of the Company for breach of an Australian Consumer Guarantee is limited to the payment of the cost of having the relevant Services supplied again”

In customs and logistics it will rarely be fair to limit liability in this way – most times it is of no value to have the service performed again

Example – Customs broker applied for TCO and negligently supplied the wrong wording

Good news for forwarders

Consumer guarantees do not apply to services supplied under a contract **for or in relation to** the transportation of goods for the purpose of a business, trade, profession or occupation carried on or engaged in by the perform for whom the goods were transported

This exclusion has been interpreted widely by the Courts. The existence of other services (such as warehousing) will not prevent the exclusion applying.

What is the primary service - is it the transport of goods

Contracts primarily for customs services will not enjoy the exclusions – even if there is incidental movement of goods.

Unfair contract terms



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Unfair contract terms - Refresh

- General position – unfair contract terms in template T&Cs with consumers and small business are void
- General exception for shipping contracts
- What will still be covered:
 - Transport by air and road
 - Storage
 - Customs clearance
 - Customs advisory services
- Small business – 20 employees or less
- Consumer – acquires services for personal, domestic or household use

What is an unfair term

A term is unfair if it:

- would cause a significant imbalance in the parties' rights and obligations arising under the contract
- is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term; and
- would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

ACCC guidance

- The ACCC examined standard form contracts in a number of industries and produced a report
- The report is guidance to businesses broadly as to the types of clauses that will cause concern
- The report marks the end of the ACCC's education phase and period for voluntary compliance
- The report shows that the ACCC will be strict on clauses that seek to limit rights of consumers.
- A clause must not go further than what is needed to protect the legitimate interest of the supplier

Terms that are of most concern

The right to unilaterally vary key aspects of the contract

- Concern - Vary product offering or price without notice
- Solution – Give customers notice and the right to terminate
- Note – it is reasonable for providers to allow a term to vary prices to reflect price increases from third party providers

Industry examples

Rights to change the route or manner or services without notice or without a legitimate need to do so.

A right to vary prices without being limited to unforeseen price increases by third parties.

Exclusions of liability

Limitation of liability

- Concern - Unreasonably limit the rights of the customer and/or seeking to exclude legislative guarantees
- Solution - Make the service provider liable for their negligence, wrongful acts and breach of contract

Industry example

“The Company will have no liability by virtue of the fact that there may be a change in the rates of duty ... or by virtue of the fact that a saving may have been effected in some other way had any act been performed at a different time”

The customs broker limits liability even where a change in duty was known to be occurring – such as commencement of an FTA or reduction in general rates

Terms that are of most concern

Rights to sell property

- Concern – Service providers are given wide rights to sell the customer's property
- Solution:
 - Ensure that the customer must be given notice before property is sold
 - Limit the costs that can be passed onto the customer to “reasonable costs”

Industry Example

Many clauses relating to uncollected goods and exercises of liens allow for the disposal or sale of goods without notice and do not limit recoverable costs to “reasonable” costs

Indemnities

Wide indemnities

- Concern – customers required to indemnify the service provider where the service provider had caused the loss
- Solutions – Exclude losses caused or contributed to by the service provider

Industry Example

“...the Customer must indemnify ... the Company ... from all costs and liabilities they incur in relation to their Reporting Obligations in respect of the Services or the Goods...”

The indemnity would cover situations where the customs broker's negligence has led to the need to report.

Indemnities

Industry example

“ The Customer agrees to indemnify the Company for ... any costs, charges of fees, including legal fees, incurred in obtaining any Customs Advices whether or not the Company directed or requested the Customer to obtain the Customs Advices”

There is no requirement that the customer request or consent to obtaining the Customs Advice or that the costs be reasonable.

Indemnities

Industry example

“The Customer undertakes to indemnify the Company in respect of any liability whatsoever and howsoever arising in connection with the provision of the Services and/or the Goods to any person (other than the Customer) who has or claims to have any interest in the Goods.”

The company has a legitimate interest in wanting to limit its claims to those from the customer – but it also requires the customer to indemnify the company for its negligence

Risk

- You cannot enforce your clauses
- You need a reasonable indemnity clause – if it is too wide you lose the entire clause
- The ACCC can take action where reliance on unfair terms is widespread
- Review your terms and conditions – what protection do you reasonably need

Key messages

- Before making any agreements with competitors seek advice from your lawyer
- “Handshake agreements” equally dangerous
- Any agreements with supplier regarding who they supply and at what price are dangerous
- If your advice is an opinion, always qualify it – in hindsight it rarely seems wise not to be cautious
- Assume you always have a duty to exercise due care and skill
- Review your terms and conditions – are any key terms void against small businesses

Questions



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