



ACCC Compliance – Do's & don'ts of Resale price maintenance

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Disclaimer

This information is only of a general nature, should not be applied to individual situations without obtaining further specialised legal advice. This information is focused on general issues and is not intended to be an exhaustive representation of the different legal issues that may arise in a particular instance. If you consider that you or your enterprise have a problem that this slide deck addresses, then you should promptly seek legal advice.

Today

1. What is resale price maintenance?
2. Why it is important?
3. What you can't do, can do and should do
4. Consequences if found in breach
5. Authorisation and Notification – relief from s 48 of the CCA
6. How to deal with suppliers who pressure you
7. Management action points

What is resale price maintenance?

- *Competition and Consumer Act 2010* (Cth)
- Form of price fixing
- Effect of reducing competition which
 - promotes inefficiency
 - increases what consumers pay
- Unlawful
- Involves a supplier stopping or attempting to stop an independent reseller from promoting/advertising or selling the supplier's good or service below a minimum price specified by the supplier
- Who is at risk?
 - the business
 - its officers – directors etc
 - its senior personnel

Why it is important

Very nasty potential penalties

- Companies – Hefty fines – the greater of
 - \$50 million
 - 3 x value of benefit obtained; or
 - If can't work that out, 30% of company's turnover
 - Can also be required to pay ACCC costs and much more
- Individuals
 - Fines of up to \$2.5 million
 - Can also be required to pay ACCC costs
 - Could be found to have aided and abetted and more

Can be sued for loss/damages caused by breach

More concerningly, ACCC can take action – much wider

ACCC has told LCA “We are watching....”

What is it? 6 types of conduct that amount to a breach

- Refusing to supply goods/services unless agree to minimum price
- Agreement that stipulates minimum prices/price controls
- Inducing or attempting to induce minimum price controls
- Withholding supply to reseller for non-compliance with minimum price
- Withholding supply to reseller because of a third party's actions (generally the reseller's customers)
- Using price statements & pricing practices to achieve any of the above

“Don’t do’s” or attempt to do

Do not

- Set or otherwise dictate, minimum prices
- Contract that the reseller must not discount by more than x%
- Send out price lists or advisory statements saying or implying reseller must sell at the price/s specified
- Prevent a reseller from setting their own price and offering discounts
- Make threats, veiled or otherwise, such as your rebate will be withdrawn unless...
- Make a reseller sell or advertise at or above a minimum price (For example, a statement: The resale price for these goods is \$x (but see below)
- Be “loose” with what you say during negotiations

“Don’t do’s” or attempt to do cont’d

- Offer discount or inducement if they sell at or above a minimum price
- Stop a reseller selling or advertising goods or services below a particular minimum price
- Refuse to supply resellers that sell below a minimum price
- Withhold supply because the reseller’s customer/s refuses, or is likely to refuse to resell the good/service at or above a minimum price set by you
- Withhold supply because reseller refuses to (or is likely to) sell the good/service at or above a minimum price set by you
- Get someone else to do the dirty work for you
- Punish resellers for selling below a minimum price. Eg:
 - take away a discount
 - send them a warning
 - supply on worse terms
- Attempt to do any of the above

What is permissible?

- Setting a maximum sale price
- Setting a recommended retail price or RRP – recommended wording: “The price set out or referred to herein is a recommended price only and there is no obligation to comply with the recommendation.”
- Withholding supply of goods/services to prevent, Loss leader selling – but only if strictly comply with Act’s qualifications
- Agents (true agency relationship) and related bodies corporate
- If have an ACCC Authorisation or have given Notification

Authorisation and notification – relief from s 48 CCA

- Can seek an Authorisation from ACCC or give ACCC a Notification
- The ACCC may **authorise** the conduct on public benefit grounds
 - applicant must discharge the onus of proof
- While the Authorisation is on foot, the authorised conduct will not contravene the Act
 - until and unless ACCC revokes the Authorisation, and
 - gives you notice of that
 - then, no more protection
- Notification – you may give ACCC a Notification of your conduct
 - you are taken not be acting unlawfully once 60 days after lodging passes
 - UNLESS
 - ACCC decides it is a breach and not in the public benefit, and
 - gives you notice
 - then no more protection

Consequences if you breach (in more detail)

- Injunctions – only ACCC can obtain
- Pecuniary penalties – only ACCC can seek
- Damages/compensation orders – ACCC and an applicant can seek
- Education, training & compliance programs
- Adverse publicity orders – leading to a damaged reputation
- Disqualification from managing a corporation
- Legal costs

Pecuniary penalties

Court can take into account

- Company size
- Degree of market power it has
 - market share, and
 - ease of entry into the market
- Deliberateness of the breach (*ie deliberate, covert or reckless worse than negligent or careless*)
- How long it went on for
- Whether they are a repeat offender
- Whether conduct was covert
- Corporate culture conducive to compliance – will look at
 - educational programs
 - disciplinary and other measures in response to an acknowledged contravention
- Whether happened despite the enterprise's compliance training
- Has company promptly co-operated with ACCC

2 examples – then and now

ACCC v IGC Dorel Pty Ltd [2010] FCA 1303

Pram manufacturer

- “We set the prices...you are not to discount. If ..[you do] we will send the trucks in and we’ll no longer be supplying you.”
- Company fined \$80K
- Director fined \$20k for aiding and abetting

2 examples – then and now cont'd

Australian Competition and Consumer Commission v Techtronic Industries Australia Pty Ltd [2023] FCA 1574

- Power tool supplier
 - 97 agreements with resellers over 5 years
 - clause prohibiting resale under set prices
 - 29 times gave warnings or withheld product to resellers selling under price
- Fined \$15 million
- Ordered to
 - put corrective notices on website
 - give resellers notice of breach and court order
 - pay ACCC costs (likely several 100K or more)
 - establish new education, training and compliance programs

Compliance plans

Compliance program: Courts consider for penalties whether you have

- a CCA/ACL compliance program, and
- a culture of CCA/ACL compliance

Policies and procedures: develop and document clear policies and procedures that

- address compliance risks, and
- ensure processes are put in place to minimise/eliminate those risks (includes whistleblower policy)

Education and training: have education and training materials

- to help staff understand their roles and responsibilities under the CCA/ACL
- external service providers can be a benefit

Monitoring and reviewing the plan: monitor/record the business' compliance and have an action plan to help for prompt corrective actions when needed

Compliance plans cont'd

Compliance officer: appoint an ACL compliance officer who

- is properly resourced
- reports, on a regular basis, directly to the chair of the board

Complaints handling: have a complaints handling system that can resolve consumer/reseller/supplier issues quickly and fairly

Disciplinary system: have a system for disciplining staff, including senior management, who engage in conduct that shows a wilful or reckless disregard for the CCA/ACL and the enterprise's CCA/ACL policies and procedures

How to deal with suppliers who pressure you

Explain why you can't do what they ask

- Would an advice from your lawyer warning you help?

What about an indemnity

- Might help monetarily BUT
- Might be unlawful and hence unenforceable
- Can't help reputational damage if found to have breached
- Can't stop you being banned from running a company

Risk Management – action points

- Do not impose, or attempt to impose a minimum price
- Get legal advice before you withhold supply – the loss leader exemption is problematic
- Have a legal review of your current reseller contracts, arrangements and understandings to check for problems
- Be careful what you say and do in meetings, negotiations, and email, texts etc with resellers
- Do not copy other people's T&Cs or rely on AI created documents
- Consider using the Notification process or seeking an Authorisation
- Develop and maintain a CCA/ACL compliance program

Questions?





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