



Australian  
Competition &  
Consumer  
Commission

A GUIDE TO THE TRADE PRACTICES ACT  
FOR THE REAL ESTATE INDUSTRY

# Fair and square

MAY 2005



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### **Important notice**

This guideline is designed to give you basic information; it does not cover the whole of the Trade Practices Act and is not a substitute for professional advice.

Moreover, because it avoids legal language wherever possible, there may be generalisations about the application of the Act. Some of the provisions referred to have exceptions or important qualifications. In most cases the particular circumstances of the conduct need to be taken into account when determining how the Act applies to that conduct.

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## // Foreword

One of the priorities of the Australian Competition and Consumer Commission (ACCC) is helping small businesses understand the benefits and responsibilities associated with the *Trade Practices Act 1974*.

It is important for the entire community that businesses and consumers know their rights and responsibilities in the marketplace. Fair business practices ensure that genuine competition occurs, leading to greater trust by consumers and better relationships between consumers and business.

The ACCC has an important role in promoting fair trade to bring about greater competition and informed markets. It achieves this through education, information and, where necessary, enforcement action.

Real estate agents operate in a highly competitive marketplace. The Trade Practices Act encourages vigorous competition in all markets including the property market, but also protects consumers dealing with the real estate industry.

Industry participants must ensure they give prospective homeowners, vendors and tenants the full picture, enabling them to make informed decisions when buying, selling or leasing property.

Anti-competitive conduct is detrimental to the interests of both businesses and consumers and can give one business an unfair advantage over its competitors.

The Act prohibits all businesses, large or small, from engaging in misleading or deceptive conduct and anti-competitive behaviour such as price fixing, market sharing, exclusive dealing and third line forcing.

The Act has provisions covering unconscionable conduct, recognising that small businesses may be at a disadvantage when dealing with larger businesses. Real estate agencies operating within a franchise system are also protected under the Franchising Code of Conduct.

The ACCC encourages the real estate industry to think of the Act as an important management tool. Compliance with the Act is good business practice and can mean increased success and profitability.

Knowing their rights and obligations under the Act will help small businesses to be professional in their dealings with other businesses and avoid problems.

The ACCC cooperates with business associations and other small business advisers to disseminate information and obtain feedback. These networks also encourage the development of industry codes of conduct. Such codes can provide a framework in some sectors for pro-competitive and fair practices between larger enterprises and their small business suppliers and customers.

As part of the small business program, regional outreach managers in each state and territory provide support for, and promote understanding of the Act to, small business in rural and regional areas.

The ACCC Infocentre can also give advice on the Act and how it applies to small businesses. For further information on any of the topics covered in this publication, contact the Infocentre on 1300 302 502.

This guide has been written for owners, managers and advisers to the real estate industry and provides examples relevant to the industry. At the back of this guide is a list of other ACCC small business publications that may be helpful.



**John Martin**

*ACCC Small Business Commissioner*

# Introduction

All businesses involved in real estate should be fully informed about their rights and responsibilities under the Trade Practices Act. *Fair and square* has been written in consultation with the real estate sector for the real estate sector. The Act encourages a fair and competitive environment for efficient and innovative small businesses. It prohibits anti-competitive mergers, cartels, the misuse of market power, market sharing and price fixing, unconscionable conduct, and misleading and deceptive conduct. The mandatory Franchising Code of Conduct obtains its legal force through the Trade Practices Act. *Fair and square* is part of the ACCC's commitment to the development and sustainability of small business.



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# // Do's and don'ts—a summary

This summary of do's and don'ts for real estate agents is indexed to the main text. Page number references for more information on a topic appear in brackets after each entry.

## Don't mislead people by:

- > making statements that are untrue (p. 10—Playfair)
- > making predictions about trends in property values that you can't substantiate (p. 12—Predictions)
- > making unrealistic valuations or market appraisals (p. 12—Valuations and appraisals)
- > claiming non-existent sponsorship, approval or affiliation with another company (p. 13—Sponsorship claims)
- > offering gifts, prizes or items that you do not intend to supply (p. 14—Gifts and prizes)
- > offering gifts or items when their cost is disguised in the selling price (p. 14—Gifts and prizes)
- > advertising goods or services at a discount price, without intending to supply them at this price (p. 14—Bait advertising)
- > dummy bidding (p. 15—Dummy bidding)
- > offering goods or services that aren't available in reasonable quantities (p. 16—Availability of goods and services)
- > staying silent when you have a duty to disclose something (p. 16—Remaining silent).

### Don't act unconscionably. Avoid:

- > harassment and high-pressure sales techniques (p. 18—Undue harassment and coercion)
- > taking advantage of vulnerable or disadvantaged consumers (p. 23—Consumer transactions)
- > taking advantage of weaker businesses (p. 21—Business transactions).

### Remember that franchisees are protected and:

- > prospective franchisees must be given all the necessary information to help them make an informed decision, including a disclosure document about its commercial viability (p. 25—Disclosure requirements)
- > existing franchisees should be treated fairly as set out in the Franchising Code of Conduct (p. 25—Franchising Code of Conduct).

### Remember that fees are negotiable and:

- > real estate agents and their clients should be free to negotiate the types of listings, level of fees, etc. (p. 30—Listing)
- > unless authorised by the ACCC, forcing agents to multiple list could be contrary to the law (p. 30—Multiple listing).

### When selling land don't:

- > make false or misleading statements about the interest in the land (p. 34—Selling land), the characteristics of the land (p. 36—Characteristics of land), how the land can be used (p. 37—Use of land), or the existence of associated facilities (p. 38—Facilities)
- > make vague statements about the location of the land (p. 35—Location)
- > advertise or promote the land in any way that is misleading (p. 36—Advertising land).

### Take care when quoting prices. Always:

- > quote all mandatory price components including any GST (p. 39—Inclusive price, p. 40—Goods and services tax)
- > state the amount of the deposit and repayments if you are providing finance on terms (p. 39—Full cash price)
- > give a realistic average price of units or blocks (p. 40—Price range)
- > advertise finance only if reasonable precautions have been taken to ensure that it is actually available (p. 41—Finance).

## Don't agree with other agents to:

- > exclude or limit the dealings of one business with another (p. 7—Agreements)
- > fix or maintain fees for services (p. 7—Agreements)
- > recommend prices in a way that effectively fixes the price of goods or services (p. 7—Agreements).

## Attaching conditions to the supply of goods or services may contravene the Act if:

- > you supply goods or services subject to your client buying goods or services from a nominated third party (p. 8—Attaching conditions)
- > for example, you supply goods or services only if your client doesn't buy goods or services from your competitors, or upon other conditions that have the purpose or effect of substantially lessening competition (p. 8—Attaching conditions).

## The bottom line

- > An individual, another business, the ACCC or the minister can bring an action against you or your agency for breaching the Act (p. 43—Being taken to court).
- > For conduct prohibited under Part IV (restrictive trade practices) of the Act, you personally face a maximum penalty of \$500 000—and your company \$10 million—for each breach (p. 43—Fines).
- > For conduct prohibited under Part V (consumer protection) of the Act you personally face a maximum penalty of \$220 000—and your company \$1.1 million—for each breach (p. 44—Fines).
- > A person or a business can apply to the court for an injunction or damages if you or your agency has breached Part IV and V of the Act. (p. 44—Damages).
- > The court can order you to disclose information to the public or publish corrective advertising (p. 44—Injunctions and orders).
- > The court can order you to return property, refund money, perform a specific act or rescind a contract (p. 44—Ancillary orders).
- > If the ACCC brings an action against you it can also ask the court to make orders in favour of any named people who have suffered loss or damage (p. 45—Representative applications).

# 1 // The Act and the ACCC

## The Trade Practices Act

The Trade Practices Act is a Commonwealth law, which applies to most businesses in Australia.

The Act is divided into several parts. This publication deals with four parts that are particularly relevant to the real estate industry.

**Part IV**—covers anti-competitive practices that limit or stop competition. It fosters the competitive environment necessary to give consumers a choice in price, quality and service.

The following practices, which are prohibited if they are anti-competitive, specifically apply to real estate agencies:

- > contracts, arrangements or understandings (any that contain exclusionary provisions or fix prices are prohibited outright)
- > certain covenants
- > attaching conditions to the supply of goods or services.

**Part IVA**—prohibits unconscionable conduct in both consumer and commercial transactions, for example, enforcing harsh contractual conditions, which in good conscience shouldn't be enforced.

**Part IVB**—prohibits contraventions by corporations of industry codes of practice. Franchising is specifically defined as an industry for the purposes of Part IVB. Therefore, franchisors and franchisees are participants in the franchising industry, even if they also participate in another industry, such as real estate.

**Part V**—contains provisions to protect consumers (and businesses in some circumstances) when they buy goods and services. It includes:

- > a very general prohibition of misleading or deceptive conduct
- > specific prohibitions of various types of false or misleading representations and unfair trading practices.

## Competition

The Australian Competition Tribunal has defined 'effective competition' as requiring:

... that prices should be flexible, reflecting the forces of demand and supply, and that there should be independent rivalry in all dimensions of the price-product-service-packages offered to consumers and customers. (Re Queensland Co-operative Milling Association Ltd; Re Defiance Holdings Ltd (1976) ALR 481 ATPR 40-012)

Evidence of competition is found in:

- > prices
- > service
- > value for money.

Some business practices such as price fixing, dividing up a particular market and preventing or discouraging potential competitors from entering the market, adversely affect competition. Others, such as refusal to supply, boycotts and misuse of market power, may actually force competitors out of the market.

## The Australian Competition and Consumer Commission

The ACCC is a Commonwealth statutory body, which administers and enforces the Trade Practices Act. It bases its compliance/enforcement strategy on education, negotiation and litigation. By selectively applying these corrective actions to a breach of the Act the ACCC can produce the best result in fair trading and competitive marketplace behaviour.

### Education

The ACCC produces a wide variety of publications for specific audiences including sellers, manufacturers, service providers and consumers.

It liaises with business and consumer organisations and initiates campaigns to resolve major problems and publicise issues of particular importance.

## Negotiation

Much of the ACCC's work involves education and persuasion in particular industries and with particular companies. This work is not always highly publicised or well-known outside the organisations directly affected. However, it often prevents potential breaches of the Act and modifies conduct.

The ACCC may also accept written undertakings from businesses that have breached the Act. Such undertakings can be enforced by the court if necessary.

## Litigation

The ACCC takes legal action when it believes this will produce the best result—for example, in terms of redress, deterrent effect or improved compliance with the Act.

## Exemptions

Authorisation by the ACCC allows some prohibited restrictive trade practices to be granted immunity from court action. Immunity can be granted in this way for:

- > anti-competitive agreements, for example, industry-wide standard forms
- > agreements where businesses collectively choose to limit or exclude dealing with others
- > mergers resulting in substantially less competition in a market.

However, authorisation will be granted only if the ACCC is satisfied that the practice or conduct produces a public benefit that outweighs its anti-competitive effect.

## 2 // Competition is the name of the game

### Agreements

Agents must not come to any sort of formal or informal arrangement, either as individuals or as a business, with another person or business if it will substantially lessen competition (unless authorised by the ACCC).

The phrase 'substantially lessen competition' is the key. In looking at the effect on competition it is not enough to show that one or two businesses have been hurt. The overall effect on the market, including the eventual effect of the agreement on consumers, has to be considered.

The ACCC can grant immunity from prosecution for conduct that would otherwise breach the Act—like an agreement that substantially lessens competition—if the public benefit outweighs any anti-competitive effect (see chapter 7). Agreements among agents must not:

- > **exclude or limit the dealings** of one business with another—for example a high fee charged for joining a real estate multiple listing bureau could be anti-competitive because it prevents newcomers gaining access to the bureau services
- > **fix or maintain prices** for goods or services—for example real estate agents must not make an agreement either among themselves or through a trade association on the fees to charge—this conduct is automatically deemed to substantially lessen competition, and is prohibited outright
- > **recommend prices** in a way that effectively fixes the price of goods or services—for example agents should not use collectively agreed forms that are pre-printed with a scale of fees unless the form also clearly states that fees are only recommended and are negotiable. Requiring businesses to resell goods or provide services at or above a certain price is known as 'resale price maintenance' and is also prohibited outright.

## Covenants

The term 'covenant' is primarily used to mean promises in conveyances or other instruments relating to real estate. However, in its broadest sense it can mean any contract.

Restrictive covenants that confer rights or benefits, or impose duties or obligations, on a corporation are unenforceable if they substantially lessen competition in a market in which the corporation operates.

This applies to real estate covenants and includes those:

- > concerned with assignment or sub-letting of a property
- > relating to the use of the leased land or adjoining land
- > restricting the people who can use the leased property
- > having the effect of restricting, controlling or maintaining prices.

It does not apply to certain 'purpose' clauses in contracts, for example, to use premises for residential purposes or not to use them for business purposes. Nor does it apply to a covenant imposed by a religious, charitable or benevolent institution or its trustee.

## Attaching conditions

You risk breaching the Act if you supply goods or services subject to restrictive conditions that may substantially lessen competition.

The Act prohibits this conduct, which is sometimes known as exclusive dealing, when:

- > goods or services are supplied on the condition that the buyer will not acquire other goods or services from a competitor
- > goods or services are supplied on the condition that they will not be resupplied to particular persons or in a particular place
- > goods or services are supplied on the condition that buyers acquire other goods or services from another specified supplier. At present it is not necessary to prove that this conduct, known as third line forcing, reduces competition—the conduct alone is enough to contravene the Act.

Notification to seek immunity for conduct described above is available from the ACCC. You can seek immunity from the ACCC by filing a notice with it. You can also apply to the ACCC for authorisation for any of this conduct including third line forcing (see chapter 7).

example

A building society offered prospective homebuyers a 'guaranteed low interest home loan' scheme. Under the scheme they could borrow a certain amount of money at a predictable rate of interest. Borrowers were required to save with the society a minimum amount of money each week, not to make any withdrawals 12 months before taking out the loan, and to purchase from a named company a \$50 000 renewable life insurance policy.

The building society admitted that the tied life insurance policy amounted to third line forcing in breach of s. 47(6) of the Trade Practices Act.

The building society, the insurance company and others associated with the scheme were fined a total of \$54 000.

An example of exclusive dealing in the real estate industry is a landlord making it a condition of a lease that tenants buy some or all of their trading stock from a separate company nominated by the landlord. It may also be exclusive dealing if a landlord takes into account the source of a tenant's trading stock when a lease is granted, renewed or terminated.

Sole agency agreements could be described as exclusive arrangements. In most cases, they are unlikely to have an anti-competitive effect and accordingly, are not prohibited by the Act.

## 3 // Play fair

### Don't mislead

You must not do or say anything that could mislead or deceive your clients or customers.

For example, if you decide to 'freshen up' a property by taking it off the market for a short time and readvertise it as a 'new' listing, you are likely to mislead buyers into thinking that the property is newly available when it has already been for sale.

Anybody who relies on what you say or do, or relies on your advertising—and loses money because they have been misled or deceived—can take you to court.

Furthermore, as the following examples show, your clients don't have to check that what you told them is right.

example

Mr and Mrs Hill bought a hotel from Tooth & Co Limited in 1991 for \$1 350 000 and at that time the average takings were represented at \$18 450 per week. Mr and Mrs Hill alleged that the information they were given was incorrect leading them to reasonably assume that average weekly takings of \$18 450 were current and sustainable. Mr and Mrs Hill were not able to keep up the payments on the loan they had taken out to buy the hotel and subsequently sold it for \$1 200 000 in 1994.

Mr and Mrs Hill took Tooth & Co Limited to court seeking damages for misleading and deceptive conduct.

The court accepted that Mr and Mrs Hill had been given incorrect information and, had they been given correct information, they would not have bought the hotel. They were awarded damages of \$400 000 plus costs.

*Dennis Ronald Hill & Anor v Tooth & Co Ltd & Ors (1998) ATPR 41-649*

example

Mr Nielsen bought a motel from Hempston Holdings Pty Ltd for \$345 000. The motel ran at a loss for about a year after which time Mr Nielsen took Hempston to court seeking damages for misleading or deceptive conduct. He alleged that the company had misled him, claiming an occupancy rate of 80 to 89 per cent when the true rate was 30 per cent.

Hempston argued that Mr Nielsen could have deduced the occupancy rate by inspecting the motel's books and seeking further information.

However, the court accepted that the company had given a false occupancy rate and the purchaser didn't have to pursue the matter and check out the figures. Mr Nielsen was awarded damages of \$160 000.

*Gordon Douglas Nielsen v Hempston Holdings Pty Ltd & Anor (1986)*  
ATPR 40-686

As the Hempston Holdings case shows, you can't assume that all the people you deal with are commercially competent.

Whether your conduct is misleading or deceptive depends on its likely effect on the type of person with whom you are dealing.

## Don't make false statements

The Trade Practices Act prohibits making false or misleading statements about goods or services. For example, you must not make statements that are not true about the quality or standard of goods supplied under a building contract or about the availability of finance, use of buildings or installation of facilities.

## example

A property on which a hall was built was offered for sale by public auction. The vendor's agent described the property as ideally suited for offices, a restaurant, warehouse and display sales. Before the auction the agent read out the conditions of sale including a clause that the land was 'sold free from all encumbrances'.

Soon after the auction the Department of Lands told the purchasers, Mr and Mrs Ramage, that the land use for the property was restricted to the hall site but the restriction could be lifted by paying the equivalent of its unimproved market value to the Crown.

In an action for misleading or deceptive conduct under the Fair Trading Act (WA) in the Supreme Court of Western Australia, the Ramages were awarded damages, which included the cost of the land use variation, against the vendor and the agent totalling \$204 500. Mr and Mrs Ramage were also awarded court costs.

*Ramage & Anor v Sharp, Phillips & Jones as trustees of Geraldton Lodge No. 321 United Ancient Order Of Druids & Ors (1993) ATPR 41-242*

## Predictions

The Trade Practices Act prohibits representations being made about any future event without reasonable grounds. You should therefore be careful when predicting trends in property values or development prospects.

Past experience of a particular market can quite reasonably be used to predict its future performance. Such experience could be especially relevant in markets characterised by cyclical patterns.

On the other hand, some markets are so volatile that not even experts can make predictions with any confidence. If your clients require an estimate, you should at least make them aware of the unpredictability of the market and warn them to keep it in mind when evaluating your market forecast.

The Act places the onus on you. Unless a business can produce evidence to the contrary, the Act deems it not to have had reasonable grounds for making a prediction.

## Valuations and appraisals

You should also be careful that valuations and appraisals of land and buildings are not misleading. They must be realistic and based on a sound understanding of the market. For example, it is misleading to suggest a figure to a vendor that is unlikely to be realised if your purpose is just to get the property listed with your agency—that is, buying a listing.

It is now an offence under some state and territory fair trading legislation, for an agent to quote an estimate of the selling price that does not reflect its true estimate, for example, overstating a selling price to an owner. It may also be an offence to publish an advertisement or to make a statement in the course of marketing a property that falsely understates the estimated selling price to potential buyers.

## Sponsorship claims

It is an offence to claim that your agency has a sponsorship, approval or affiliation that does not exist. This practice is sometimes used to encourage sales, for example, claiming affiliation with a well-known and reputable company can inspire prospective clients' confidence in an agency. If you do this, you must be sure that the claimed sponsorship, approval or affiliation, and its benefits, does exist.

Some state and territory fair trading legislation requires that an agent's affiliation with another party, which results in a benefit (financial or otherwise) being paid to the agent, must be disclosed.

### example

Henry F Halloran was a Federation era real estate agent with a reputation for sound judgment, honesty and integrity. He died in 1953 and in 1984 his daughters sold their shares in the business to a company which registered a new company using Henry F Halloran's name.

Advertisements by the new company described Henry F Halloran as 'our founder' and implied it had been in the real estate business since the 1890s. One newspaper advertisement read:

For nearly 100 years our Estates have proven to be a sound form of investment. Like the purchasers of land at Seaforth (an estate developed by the original Henry F Halloran) in 1906 we are just as confident of the investment potential of today's offering.

An injunction was granted restraining the use of Henry F Halloran's name. Merely purchasing the business interests did not entitle the new company to rely on the reputation of its namesake.

*Warren Halloran v Henry F. Halloran & Co. Pty Limited and Ors (1985)*  
ATPR 40-501

## Gifts and prizes

Don't offer gifts or prizes unless you intend to supply them as offered. Some state and territory legislation prohibits the offering of gifts or prizes under particular circumstances. Check with your local fair trading office before offering a gift or prize.

Any offers you do make must clearly indicate what conditions or limitations apply, including any additional costs associated with the offer.

The cost of 'free' items should not be disguised in the selling price. This means, for example, that an offer of free landscaping should not increase the price of the property to more than it would be without the service.

Gifts or prizes actually given should not be materially different from those offered. For example, statements like 'prizes up to \$25 000 to be won' should be avoided when the prize is a ticket in an instant lottery or where a 'cash' prize is a credit on the purchase price of a block of land. Both these scenarios are likely to breach the Act.

## Bait advertising

Offering goods or services at a special price—the 'bait'— without intending to supply is prohibited.

The purpose of bait advertising is to get potential buyers in the door. They are then persuaded to buy more expensive goods or services in the absence of sufficient supplies of the advertised product or service.

East Coast Island Sales advertised, in glowing terms, land for sale on Russell Island in Queensland. Part of one advertisement read:

**BLUE RIBBON INVESTMENT SEASIDE COTTAGE \$9900.OWNER SACRIFICING PROPERTY DUE TO IMPENDING ASSETS TEST**

**FIRST TIME OFFERED** located on **BAYBREEZE ISLAND** in Brisbane's own sunny Moreton Bay. ... This outstanding cyclone proof dwelling consists of almost everything for a pleasant seaside holiday or semipermanent living, including concrete slab, plenty of furniture, beds, fridge, stove, generator, power, phone plus a host of other features, making it quite comfortable for the largest of happy families.

However, the evidence showed that the cottage didn't exist. There was only an unlined galvanised iron shed, which was uninhabitable. In the court's view, the purpose of the advertisement was simply to entice people to the island. Once there, their attention would be switched to other blocks.

Fines totalling \$210 000 were imposed on East Coast's corporate vehicle and owner. The judge said their advertising involved 'gross and blatant lies'. He pointed out that bait advertising was a type of fraud and people who pursue the advertised bargain are 'truly the victims of a gross, deliberate confidence trick'.

*Terence James Guthrie v Michael Robertson; Terence James Guthrie v Tarwarri No. 12 Pty Ltd (1986) ATPR 40-744*

## Auctions

Auctions are a well-established method for selling real estate. Legislation pertaining to this practice is state or territory-based and as such, there is no national code of practice. However, the misleading and deceptive provisions of the Trade Practices Act may still apply.

### Dummy bidding

Fictitious or false bids at an auction by attendees with no real intent to purchase the property are called dummy bids. These bids are placed in an attempt to artificially inflate the price of a property and may be intended to mislead or deceive potential buyers. In some states, local fair trading legislation has outlawed this practice.

For example, the New South Wales Office of Fair Trading has banned the practice and warns that agents or auctioneers involved in dummy bidding risk a fine of up to \$22 000. The property seller and/or a person making a dummy bid can also be fined up to \$22 000.

The ACCC generally regards dummy bidding as conduct that is likely to contravene the misleading and deceptive conduct provisions of the Act.

## Vendor bidding

Vendor bidding is a counter bid from the auctioneer to ensure a property reaches a price at which it can be sold. In most states and territories, fair trading legislation allows the vendor one bid. A vendor bid **must** be declared both before the auction commences, and when such a bid is made.

Only auctioneers or, in some cases, other identified and legally permitted persons may make vendor bids at auction on behalf of the vendor. A vendor bid made on behalf of the vendor by any person other than those identified is considered a dummy bid (see above).

Check your local fair trading legislation for the requirements in your area.

## Availability of goods and services

If you advertise a property at a certain price, it must be available at that price at the time the advertisement is published and for a reasonable period unless otherwise stated. What is **reasonable** will be determined by a number of factors, including the type of goods or services being offered, their price and the market in which they are sold.

If the quantity of goods or the time on offer is limited, say so. If you later realise that you may not be able to offer the goods for the period of time advertised, it is important to make potential customers aware of this.

## Remaining silent

For real estate agents silence can be dangerous. By remaining silent when you have a duty to disclose something of concern to a client or a potential buyer, you risk breaking the law. You should be open and frank with clients and customers.

A duty of disclosure can arise even when there is no particular relationship between the parties, such as trustee and beneficiary, or principal and agent.

example

Henjo Investments Pty Ltd owned The New York Deli, a licensed restaurant in Sydney. Henjo sold it to Collins Marrickville Pty Ltd knowing that there were stringent local council and liquor licensing restrictions on its seating capacity. Collins Marrickville bought The New York Deli unaware that Henjo was operating the restaurant outside the law. The seating limitations vitally affected the business, its goodwill, takings and profitability.

The Full Federal Court found the vendor's failure to disclose the legal seating capacity and licensing requirements was misleading and deceptive. The court was satisfied that the vendor had a duty to reveal the true position to the purchaser.

After taking into account other matters that contributed to the buyer's losses, the court ordered Henjo to pay Collins Marrickville \$817 200.

*Henjo Investments Pty Limited and Ors v Collins Marrickville Pty Limited (1988) ATPR 40-850*

Giving only half the story can also be misleading or deceptive, particularly when you are aware of relevant information that would be important to a potential client.

Agents have to take responsibility for what they do and say. You cannot regard yourself solely as a channel for information between the seller and the buyer.

example

Paul Dewsnap wanted to sell a block of land in a hurry. He retained a real estate agent, Peter Evans Pty Ltd, and told it that the area of the land was one acre. Without making further inquiries, Peter Evans advertised the land as a 'one acre' block and successfully sold it.

However, the actual area of the land was about three-quarters of an acre.

The court found that the buyer was misled and deceived by the vendor and the real estate agent, who had failed to make proper inquiries of the vendor or check the vendor's estimate after seeing the land. The agent was ordered to pay 25 per cent of the \$9250 in damages awarded to the buyer and the vendor was ordered to pay the balance.

*Laurence Wilfred Johnson and Ninette Croy Johnson v Peter Evans Pty Ltd and Paul Vincent Dewsnap (1987) ATPR (Digest) 46-015*

## example

In August 1981 Sanrod Pty Ltd contracted to buy from Dainford Pty Ltd a unit on the first floor of a building to be constructed in Surfers Paradise. On completion, a canopy built over the driveway obstructed the promised uninterrupted view from the unit. Sanrod unsuccessfully tried to claim compensation from Dainford for the significant detrimental effect on the value, quality and enjoyment of the property. Sanrod then took Dainford to court alleging misrepresentation in breach of the Trade Practices Act.

The court accepted that initial discussion between the parties did not indicate that the view from the unit might be obstructed. The judge found that during negotiations a false impression had been created and the prospect of an uninterrupted view was one of the factors that had induced the applicants to sign the agreement. The court awarded Sanrod damages of \$50 000 and dismissed Dainford's cross claim for breach of contract.

Dainford then appealed against the decision on the grounds that Sanrod should have inspected the plans to confirm that the unit would have uninterrupted views as represented.

The Full Federal Court dismissed the appeal, saying that 'the purchaser's failure to make inquiries about the plans had not negated what had otherwise been misleading conduct'.

*Dainford Ltd v Sanrod Pty Ltd (1985) ATPR 40-513*

The ACCC's guide on *Advertising and selling* can be downloaded free from the ACCC website publications page at [www.accc.gov.au](http://www.accc.gov.au) or bought in hardcopy (\$10) by contacting the ACCC Infocentre on 1300 302 502.

## Undue harassment or coercion

The Act (s. 60) prohibits using physical force, undue harassment or coercion in supplying goods or services or when seeking payment for them. Sometimes, even overzealousness by a salesperson can be threatening to consumers, especially the elderly or people who do not speak or understand English well.

A business whose staff or agents are behaving in this way may also be breaching the Act.

Some examples of conduct that may be considered undue harassment or coercion are:

- > unreasonably frequent telephone calls and/or telephone calls late at night or early in the morning
- > contacts at the debtor's workplace in such a manner that the debtor's employment is threatened
- > deceptive tactics, including misrepresentations about the consequences of non-payment or about the debt recovery process
- > disclosure of loan information to third parties, such as work colleagues, neighbours and family members
- > threats to disclose information to employers, child welfare agencies, social security agencies and immigration agencies
- > use of abusive or threatening language.

Debts can be pursued with firmness, determination and civility without resorting to bullying, bluff, misrepresentation or stand-over tactics. It is important to note that s. 60 not only applies to debt collection agencies, but also to **any** company that supplies goods or services, or that pursues the debt for those goods or services.

example

Return Cash Mercantile Pty Ltd and its former agent, Ms McCaskey, while collecting debts from consumers, made an excessive number of telephone calls to debtors, and in those calls adopted a threatening, aggressive and abusive manner. Return Cash also misled debtors about debt recovery procedures and the consequences of non-payment of debts.

The court found that Return Cash and Ms McCaskey had engaged in undue harassment, coercion and misleading conduct while collecting debts from consumers.

*ACCC v McCaskey and Cash Return Mercantile Pty Ltd (2000) ATPR 41-780*

The ACCC's guide on *Debt collection and the Trade Practices Act* is available from the ACCC Infocentre on **1300 302 502** or by visiting the ACCC's website publications page at [www.accc.gov.au](http://www.accc.gov.au).

## 4 // Unconscionable conduct

The Act prohibits unconscionable conduct in both commercial dealings (ss. 51AA and 51AC) and in consumer transactions (s. 51AB).

The first, s. 51AA, is a broad prohibition. It states that 'a corporation must not, in trade or commerce, engage in conduct that is unconscionable within the meaning of the unwritten law' of the Australian states and territories—that is, the common law as it has evolved through decisions of the courts.

Section 51AA prohibits unconscionable conduct in situations where there is a disparity of bargaining power between parties to a business deal. It applies to all commercial situations, not just the buyer/seller relationship. Such inequalities have arisen in situations where:

- > the stronger party unfairly exploits the weaker party's disadvantage
- > the stronger party relies on their legal rights to take advantage of the weaker party in a way that is harsh or oppressive
- > the stronger party allows the weaker party to rely on an incorrect assumption, or fails to disclose an important fact
- > one party benefits unfairly from the deal
- > the weaker party relies on a misrepresentation by the stronger party
- > the weaker party is unable to understand the deal, due to lack of experience or professional advice.

The above list is not exhaustive and the application of s. 51AA continues to develop. Section 51AA does not apply to situations covered by s. 51AB (which applies to consumer transactions) or s. 51AC, and does not apply to financial services.

## Business transactions

Section 51AC builds on the concepts of unconscionability under s. 51AA.

It specifically prohibits one business dealing unconscionably with another when negotiating the purchase or sale of goods or services. The value of the transaction must be less than \$3 million, and the business subjected to the conduct must not be publicly listed (a publicly listed company has its shares listed on the stock market).

Although neither section defines unconscionable conduct, s. 51AC does provide a non-exhaustive list of factors, which the courts may use to establish unconscionable conduct. These include:

- > the relative bargaining strengths of the parties
- > whether, as a result of the stronger party's conduct, the other was required to meet conditions not reasonably necessary to protect the stronger party's legitimate interests
- > whether the weaker party could understand any documentation used
- > the use of undue influence, pressure or unfair tactics by the stronger party
- > how much the weaker party would have had to pay/charge, and under what circumstances, to buy/sell identical or equivalent goods or services from/to another supplier
- > the extent to which the stronger party's conduct was consistent with its conduct in similar transactions with other businesses
- > the requirements of any applicable industry code (or of any other code if the weaker party acted in the reasonable belief that the stronger party would comply with it)
- > the extent to which the stronger party unreasonably failed to disclose:
  - > any intended conduct that might affect the interests of the weaker party
  - > any risks to the weaker party arising from that conduct which the stronger party should have foreseen would not be apparent to the weaker party
- > the extent to which the stronger party was willing to negotiate with the weaker party the terms of any supply contract
- > the extent to which each party acted in good faith.

The following are examples of conduct that may be considered unconscionable:

- > applying pressure or using unfair tactics to induce a person to sign a contract
- > taking advantage of a client's poor education or language difficulties
- > placing onerous conditions on clients, for example, excessive penalties for late payment, or
- > requiring clients to sign blank contracts and filling them in with details which do not reflect pre-contractual negotiations.

Make sure that potential buyers fully understand the transaction and what they are signing. The content of documents, including the fine print, should be spelled out so they fully understand all the terms. Sales techniques should always avoid any form of unfair tactics.

example

In 1994 Avanti Investments leased land to farmers in South Australia. The lease agreements had no limitation on the water available from a bore on the land.

Subsequent agreements significantly reduced the amount of water available, despite representations by Avanti that the agreements were unchanged. Avanti sold a significant proportion of the water allocated to the bore, which resulted in the farmers incurring excess water charges.

Avanti then demanded payment from the farmers totalling more than \$67 000 for excess water use. The farmers lacked formal education, English language skills or commercial experience.

The Federal Court declared that Avanti had engaged in misleading and deceptive conduct, had made false representations in relation to land, and had engaged in unconscionable conduct within the meaning of s. 51AC.

The court granted injunctions restraining Avanti from demanding payment for excess water, and requiring them to indemnify the farmers for any excess water charges until the expiration of their lease. Avanti and its then director were also required to pay the ACCC's costs.

example

H F Stevenson (Australia) Pty Ltd entered into an 'exclusive sole agency' agreement with a real estate agent to sell its factory. Stevenson's business manager told the agent's representatives that she relied on their expertise and skill, and put faith and trust in them. When she asked if there were any onerous terms in the contract, the agent assured her there were not.

Almost three months after the sole agency agreement had expired the agent introduced an able buyer. Stevenson refused to sell.

Relying on a clause that created a general open agreement at the end of the sole agency and which entitled the agent to be paid commission if an able purchaser was introduced to the vendor at any time, the agent sued for its commission.

Dismissing the claim, the judge concluded that the clause was unconscionable both in terms of the sole agency agreement itself and the conditions it imposed on the vendor. He said that when Stevenson's business manager asked questions about the exclusive agreement and was assured there were no onerous terms in it, she 'was establishing a relationship between the parties which required utmost good faith, frankness and candour by all parties'.

*George T Collings (Aust) Pty Ltd v H F Stevenson (Aust) Pty Ltd (1991)*  
ATPR 41-104

## Consumer transactions

Section 51AB prohibits businesses acting unconscionably in their dealings with consumers. It sets out factors, similar to those in s. 51AC, that the court can consider when deciding if conduct is unconscionable.

Real estate agents and other associated industry participants must take extra care with vulnerable clients. They should make sure clients understand all documentation or terminology used, and advise them to get independent advice if there is anything they don't understand.

example

Doug Lee was uneducated, illiterate and totally inexperienced in business matters. He wanted to buy land to run horses, turkeys and a few poddy calves, and responded to an advertisement for an 'old farm' in the Queensland Darling Downs. The advertisement was placed in a Sydney newspaper by Xaton Pty Ltd.

A representative of Xaton, aware of Doug's disadvantaged circumstances, showed him photographs of rural land and told him it included the fences and dams that he required. The representative offered Doug the land at a reduced price if he bought it sight unseen. He agreed and bought it for \$29 000.

When Doug saw the property he found that it had no fences or dams and threatened to go to the media if he did not get his money back.

A second representative of Xaton told him he could not get his money back but offered him a 'clean swap' of his block for another in the same area. Doug was not told it cost \$8000 more and that in addition to the signing of the contract of sale he had also executed a deed of mortgage.

Because he failed to pay rates, the local council sold the replacement block and the net amount Doug received was \$18 400.

In this case, which was brought under the law of unconscionability as recognised by s. 51AA, the court found a case of misleading conduct and that relief should be granted on the ground of unconscionable conduct. The mortgage was declared void and Doug was awarded his costs plus \$45 180 against the vendor, Xaton and the Xaton representative who arranged the 'swap'.

*Douglas George v Lee Cafred Pty Ltd and Ors (1992) 14 ATPR 41-170*

For more information, see the ACCC's *Guide to unconscionable conduct* and *Fair game or fair go?* They can be downloaded from the ACCC's website or the guide is available in hard copy (\$10) from the ACCC Infocentre on **1300 302 502**.

# 5 // Franchising Code of Conduct

Many real estate agencies operate under a franchising agreement, whether this is expressly stated or not. The Franchising Code of Conduct, a mandatory code prescribed under the Trade Practices Act, was introduced on 1 July 1998.

The code recognises that a disparity in bargaining power between the franchisor and franchisee can give rise to opportunities for abuse. It contains clear provisions for up-front disclosure, sets conditions for franchise agreements that prohibit certain unfair practices, and establishes a framework for the quick and cost-effective resolution of disputes. It also clearly defines what arrangements will fall within the definition of a franchise.

## Disclosure requirements

Annexure 1 of the code outlines the information that a franchisor must provide to a franchisee before entering into an agreement.

A franchisor must give a franchisee a disclosure document at least 14 days before the franchisee enters into, renews, or extends the franchise agreement or pays a non-refundable deposit. The information should include details of the franchise territory including:

- > whether the franchise is for an exclusive or non-exclusive territory or limited to a particular site
- > whether the franchisor or its associates may establish other franchises or operate a business in the franchise territory that are substantially the same as the franchise
- > whether you may operate a business that is substantially the same as your franchise outside the franchised territory
- > whether the franchisor may change the territory.

Other issues that should be included (listed in annexure 1 of the code):

- > details of the franchisor, including the business experience of the people running the franchise
- > details of any criminal, trade practices and other litigation specified by the code
- > payments made to agents who recruited you
- > details of existing franchises and those terminated—not renewed, transferred or bought back—by the franchisor, in the last three years
- > details of any trade mark, patent, design or copyright significant to the franchise system
- > details of goods and services you acquire or provide, including restrictions and obligations on where you buy
- > the franchisor's policy on site selection and details on the history of the site
- > details on marketing and cooperative funds
- > details of money you are required to pay before you sign the franchise and when you are entitled to a refund
- > details of establishment costs and other payments
- > details of the financing arrangements
- > summary of conditions of the agreement that deal with both your obligations and those of the franchisor
- > summary of conditions of the agreement including the term of the agreement, variations, renewal and extension, termination, goodwill (if any), transfer, mediation, franchisor's right to inspect records and any restriction on your operations during and after the agreement
- > obligation to sign related agreements including leases, hire purchase, security, confidentiality, restrictions on business
- > information about the earnings of the franchisor
- > a statement about the franchisor's liquidity situation
- > provision for acknowledging your receipt of the disclosure document.

## Short-form disclosure

A franchisor proposing to enter, renew or extend a franchise with an annual turnover of less than \$50 000 may choose to provide short-form disclosure. This requires disclosure of only 11 classes of information (listed in annexure 2 of the code) in addition to details of the commercial viability of the franchise.

A franchisee may still request full disclosure under the requirements in annexure 1.

## Minimum business conduct standards

The code sets out key minimum business conduct standards, including:

- > a mandatory 7-day cooling off period for franchisees
- > a franchisor must provide a copy of a lease to a franchisee if the premises are leased from the franchisor or an associate
- > a prohibition on restricting association of franchisees
- > a prohibition on general releases of the franchisor from liability towards the franchisee
- > franchisors must provide audited annual financial statements of a marketing fund's receipts and expenses for the last financial year to the franchisee
- > ongoing disclosure by the franchisor to the franchisee of materially relevant facts
- > statutory provisions for transferring and terminating franchise agreements.

The courts will consider any failure to comply with the industry code when determining if conduct is unconscionable.

example

One case under s. 51AC dealt with a franchisor, Simply No Knead (SNK), and disputes that developed with some of its franchisees. SNK refused to consider complaints unless they were in writing and sent by mail and would not agree to joint meetings with the franchisees.

SNK also placed other conditions on the meetings that were found to be unreasonable, and threatened to withhold necessary business supplies unless certain conditions were complied with.

SNK withheld disclosure documents unless each franchisee gave written consent to renew the agreement. SNK also competed directly with the franchisees in a manner found to harm their businesses.

The court declared Simply No Knead had engaged in breaches of the Trade Practices Act and the Franchising Code of Conduct.

*ACCC v Simply No Knead (Franchising) Pty Ltd (2000) 41-790*

example

One factor the court will consider in looking at a matter under s. 51AC is failing to comply with a relevant industry code. Cheap as Chips, a chemical cleaning franchise, terminated a franchise without following the procedures in the Franchising Code of Conduct.

The court declared that the franchise's director attempted to contravene the code by trying to prevent a franchisee from associating with other franchisees for lawful purposes and was knowingly concerned in other contraventions.

Cheap as Chips was restrained from engaging in similar conduct and was ordered to provide franchisees with reasonable access to records, notify all current franchisees about the outcome of the proceedings, pay compensation, interest and the ACCC's legal costs, and to implement a trade practices compliance program.

## Resolution of disputes

Effective and low-cost dispute resolution is integral to managing disputes between franchisors and franchisees and preserving the relationship to the benefit of both parties. The code therefore sets out a mandatory process for resolving disputes, including mediation and complaints procedures. The Office of Mediation Adviser can help by appointing mediators to franchise disputes.

### example

A franchisee bought a franchise in December 1998 from Adelaide-based franchisor Mobile Computer Cleaning Pty Ltd. The company has franchises in three states and advertised them in the *Melbourne Age* newspaper.

A few weeks after the initial inquiry, the franchisee paid a non-refundable \$9950 for a franchise.

He subsequently complained to the ACCC that he had been induced to buy the franchise, which, if he had had proper disclosure according to the code, he may not have bought. The man got a refund because he had not received proper disclosure as set out in the Franchising Code of Conduct.

Failure to provide a disclosure document and a copy of the code at least 14 days before entering into a franchise agreement, or before accepting non-refundable money securing the proposed franchise agreement, breaches clause 10 of the Franchising Code of Conduct.

Section 51AD of the Trade Practices Act prohibits a corporation from contravening a mandatory code.

This matter was resolved through an undertaking to the ACCC.

For more franchising information see the ACCC's *Franchising compliance manual* or *The franchisee's guide*. Copies can be obtained from the ACCC Infocentre on **1300 302 502** or by visiting the ACCC's website publications page at [www.accc.gov.au](http://www.accc.gov.au).

## 6 // Agency services

### Listing

Whether a property is listed as exclusive, sole or open is negotiable between an agent and its client. An agent may make recommendations but the client has the right to accept or reject them.

Agents and clients benefit from using listing forms clearly written in plain English while retaining their legal effect.

To avoid misleading clients, agents should make clear, preferably on their listing forms:

- > the level of fees
- > the period of agreement
- > the extent to which the client is liable for advertising
- > the right of clients to retain the option to sell a property themselves without paying the agent commission
- > other expenses.

Remember, too, that none of these matters should be the subject of an agreement or understanding between agents.

### Multiple listing

An obligation imposed on agents to multiple list new listings may be contrary to the Trade Practices Act unless specifically authorised by the ACCC. Depending on the range and level of alternative services open to the client—for example, other forms of listing or agents outside the listing service—the client may have little choice but to accept multiple listing on the terms offered by the agent.

This type of conduct may be unlawful, particularly in places where the listing service has a substantial market share. Listing services and agents should take legal advice before entering into a compulsory listing arrangement with fellow agents.

As membership of a multiple listing service can be a valuable marketing tool, it should be open to all licensed agents who meet membership requirements—and those requirements must not be anti-competitive. This means new entrants and existing members who may want to change their approach to selling can still compete.

The joining fee should reflect the initial costs in enrolling a new member plus a contribution toward the cost of establishing and running the service. If membership is refused or if a member is disciplined, for example, fined, suspended or expelled, they should have a right of appeal to an independent arbitrator. Membership applications should be decided within a reasonable, specified time.

## 7 // Immunity from the Act

The Trade Practices Act recognises that sometimes there may be arrangements that benefit the community but which also might breach the Act.

Consequently, the Act contains what are known as the 'authorisation' and 'notification' processes. These allow people who wish to participate in arrangements which benefit the community to obtain immunity from legal action for breaching provisions of the Act prohibiting anti-competitive conduct (see chapter 2).

For most of the anti-competitive provisions, authorisation is available in certain circumstances for arrangements that might otherwise be in breach of those provisions. At present notification is available only for exclusive dealing (see chapter 2).

Parties must apply to the ACCC to obtain an authorisation or notification, but the processes for each are different.

When a person or business seeks immunity from the Act by applying for authorisation, the immunity only begins after the ACCC issues a decision to grant authorisation. The ACCC will grant authorisation if it is satisfied that the public benefit from the arrangement is greater than the public detriment flowing from any restriction on competition in the arrangement. The ACCC conducts a comprehensive public consultation process before making a decision.

In contrast, when a person seeks immunity by applying for notification, immunity commences automatically once the ACCC receives the notification (except for third line forcing, where immunity commences after 14 days. However, the ACCC may revoke a notification (that is immunity) if it considers that the public benefit from the arrangement does not outweigh the public detriment. Again, the ACCC conducts a comprehensive public consultation process before revoking a notification.

In the past, various real estate industry associations have sought authorisation for, among other things, their codes of conduct and standard form contracts used by real estate agents.

example

In December 2001 the ACCC granted authorisation for five years, subject to several conditions, to the Articles, Codes of Practice, Multiple Listing Service By-Laws and certain standard agreements of the Real Estate Institute of Western Australia (REIWA).

The ACCC considered that public benefit flowed from, among other things, requirements that REIWA members adhere to professional standards of behaviour and obtain professional indemnity insurance; the operation of REIWA's dispute resolution processes and Multi Listing Service; and its standard contract documentation. However, the ACCC considered that some restrictions in the documents were excessive, including certain standard contract terms. Also, REIWA's reporting arrangements were not sufficiently transparent and its appeals process was not sufficiently independent. The ACCC imposed several conditions on the authorisation to remedy these concerns.

The notification process may be more relevant for individual real estate agents. For example, agents offering a fee discount on their services if sellers buy some other good or service (e.g. advertising with a particular publication) would constitute exclusive dealing. Before doing something like this, agents should obtain legal advice on whether what they are thinking of doing would breach the Act and whether they might need to lodge a notification with the ACCC.

### *Further information*

A leaflet, *Authorisations and notifications*, is available from the ACCC which explains the procedures. They can be obtained from the ACCC Infocentre on 1300 302 502 or from the ACCC's website publications page at [www.accc.gov.au](http://www.accc.gov.au).

# 8 // Land

## Selling land

The prohibitions that apply to the sale of goods and services also apply to the sale of land or to its promotion.

As with goods and services, when selling land you must not:

- > represent that it has a sponsorship, approval or affiliation it does not have
- > offer gifts, prizes or other free items with the intention of not providing them or not providing them as offered—additional laws in some state and territory legislation prohibits the offering of gifts or prizes under particular circumstances, or
- > use physical force or undue harassment or coercion.

In addition, you must not make false or misleading representations about:

- > the nature of the interest in the land—any advertising, promotional material or sales talk should say whether buyers can secure exclusive title or, for example, a tenancy in common or a shareholding in a corporation which owns the land
- > the price payable for the land
- > the characteristics of the land
- > the use to which the land can be put or may lawfully be put, or
- > the existence or availability of facilities associated with the land.

These prohibitions not only apply to sales or transfers but could also apply to false or misleading representations when attempting to sell or rent land.

Because land legally includes what is fixed to it, the prohibitions also apply to buildings and fixtures already erected.

You must be able to demonstrate that any predictions you make about future buildings are reasonable.

## Interest in land

An interest in land includes:

- > a property interest, for example, fee simple, life estate or easement
- > rights in the nature of a licence, for example, a right to enter and use land without trespassing.

## Location

Vague statements about the location of land are likely to be misleading under the Act. Only use factual information about the location of land or property.

For example:

- > '40 km to city centre' is preferable to 'commuting distance to city'
- > 'primary/secondary schools 5 km', is preferable to 'within walking distance of schools'.

example

Beneficial Finance Ltd, through its agent, promoted residential blocks of land in the foothills of the Mount Lofty Ranges in South Australia.

To preserve the semi-rural appearance of the hills, which were visible from the city of Adelaide, an area known as the Hills Face Zone had strict limitations on building and development. This was widely known and it was generally believed that the area was unlikely to be heavily developed.

Beneficial Finance's brochure featured a plan of a development showing some of the blocks abutting the Hills Face Zone but it incorrectly showed the position of the zone itself.

Beneficial Finance was found to have falsely represented the location of the land it was promoting. The company's agent pleaded guilty to a similar charge. Beneficial Finance was fined \$5000 and the agent \$2000. The trial judge found the defendants equally culpable but imposed fines, which took account of their relative sizes.

*Videon v Beneficial Finance Corp. & Ors (1981) ATPR 40-246*

## Advertising land

When you advertise or promote real estate, imagination or ‘puff’—self evident exaggerations and opinions—are not likely to contravene the Trade Practices Act. Puffery is distinguished from other representations in that it is almost certain not to be taken as a serious or accurate assertion, or as an assertion that is capable of objective proof.

But the message itself, no matter how you decide to convey it to consumers, must not be misleading. For example, if you categorically state that a view ‘can never be built out’ you must be able to substantiate that claim.

## Characteristics of land

Representations about the characteristics of land include:

- > suitability for particular types of rural production
- > suitability for residential development
- > profitability of a business associated with the land
- > drainage, water supply and topographical features
- > previous use of the land
- > ability to be subdivided
- > area dimensions of the land or of buildings
- > physical condition or state of repair of buildings or other improvements.

Because any one of these characteristics could be especially important to a potential buyer, you must take care when making any such representations about the land.

## example

An agent issued a brochure lauding the features of a building that it was selling on behalf of its client. One feature, according to the brochure, was the potential to strata title the property. What the brochure failed to mention was that a survey report available to the agent had shown that the building encroached beyond its title boundaries, making strata title conversion very difficult.

Benlist Pty Ltd initially bought the building to convert it to a hotel but later decided to strata title it instead. When Benlist learned of the strata titling problem it sued the vendor and the agent for damages.

Though the buyer's interest in the property was not primarily for its strata title conversion potential, the judge held that the representation was misleading as to 'the use to which the land is capable of being put or may lawfully be put'.

The judge subsequently ordered the agent and the vendor to pay the purchaser damages of \$1.5 million plus interest.

*Benlist Pty Limited v Olivetti Australia Pty Limited and Chesterton International (NSW) Pty Limited (1990) ATPR 41-043*

## Use of land

Representations about potential or permitted use of land or buildings must acknowledge any legal restrictions affecting the property. These include town and country planning requirements, restrictive covenants, easements and other orders such as injunctions.

Statements about the permitted use of land under anticipated regulation should not mislead potential purchasers into thinking that the regulation has already been enacted.

example

Geculo Pty Ltd and its agent, Brian Pryor, televised an advertisement for land near Newcastle, New South Wales.

Various pictures of the land showed several houses apparently on the estate. The words 'watch it grow' appeared twice during the advertisement. The audio part of the advertisement described the location and price of the land and also said:

*No deposit, only \$40 a week to approved clients. Come and see this weekend. A wonderful place to live.*

The land in question, subject to a County District Planning Scheme Ordinance, was zoned 'non-urban A'. Under the ordinance no houses or flats could be erected on the land unless at the discretion of the council.

Proceedings were instituted on the grounds that the building restrictions imposed by the ordinance made the advertisement misleading.

The judge said that the wording of the advertisement led people to the conclusion that houses could be built on the land and that the area was 'a wonderful place to live'. Because the land was subject to the ordinance and because of the building restrictions, he considered the statement concerning the use to which the land could lawfully be put was misleading.

*Edward Alfred Pryor v Brian Alexander Given (1980) 30 ALR 189*

## Facilities

Facilities associated with land have been defined by the court as:

*... a feature or circumstance which facilitates or renders easier or more enjoyable a person's occupation, whether as owner of a dwelling house or otherwise, of a piece of land. The availability of electricity, gas or sewerage are more obvious examples of facilities.*

Claims that services such as sewerage, gas, electricity will be connected to land should be made only after the relevant authority has approved the connection and funds are available to connect it. For example, it would be misleading to describe land as sewered if the sewerage system was only in the planning stage.

You should not mislead people about the progress of proposed facilities such as shopping centres, sports grounds or golf courses. Facilities pictured in advertisements or signs should actually exist. Otherwise, reference to how far they have progressed should be spelt out.

# 9 // Money matters

## Prices

You must not mislead your clients about your fees and disbursements.

### Inclusive price

You should give your clients full price information when quoting prices and ensure that all mandatory components of the final price are quoted so that prospective buyers can easily ascertain the final purchase price. Otherwise you risk misleading them about what they are actually getting for their money.

For example, if you advertise a project home featuring a garage, pergola and fireplace in a sales brochure for \$145 000, you must either:

- > include all these features for the \$145 000 or
- > clearly state in your brochure and any other media used including promotional signs on the display site, which features are not included in the sale price and will involve extra costs. For example, 'Home \$145 000. Extra garage, fireplace and pergola package \$15 000.

### Full cash price

When you advertise deposits or terms for buying land, you must also specify the full cash price.

If you are providing finance on terms, you must also specify the deposit and repayments—along with the total cost.

Full cash price includes all the individual agent's own charges. Some advertisements risk breaching the Act, for example:

- > '\$200 deposit secures your home'
- > 'Buy your home for \$40 a month'.

Preferably, say something like '\$15 000 deposit secures this house and land package—total price \$95 000'.

## Goods and services tax

To avoid engaging in misleading or deceptive conduct, businesses must ensure that the GST is included in advertised/quoted prices for goods and services or that the amount is sufficiently specified. Consumers are entitled to know the final selling price of goods or services before making a purchase.

Businesses also need to make sure they do not engage in any misleading or deceptive conduct when quoting prices to their business customers. This view is based on court judgments relating to s. 52 of the Act that prohibits misleading and deceptive conduct generally, s. 53(e) that prohibits false or misleading representations in relation to price, and s. 53C and s. 53(e) that both prevent misrepresentations and require the specification of the cash price for goods or services where a representation has been made concerning part-price. There are also criminal provisions for specific misrepresentations under ss. 75AZC and 75AZF.

For more information on GST pricing issues, contact the ACCC Infocentre on **1300 302 502** or visit the ACCC website on [www.accc.gov.au](http://www.accc.gov.au).

## Price range

Your clients might also be misled about the average price of units or blocks if more than one is on offer. For example, most consumers would interpret the statement '45 blocks from \$10 000' to mean that there was a range of prices for the blocks and that some would be priced at or around \$10 000. However, if there were only one at that price and the next was considerably more expensive, such a statement would probably be misleading.

There is nothing wrong in expressing prices in general terms such as 'from \$20 000 to \$28 000'. However, it would be better also to state the approximate price of most blocks and to update your advertising as sales occur. It would obviously be misleading to continue with the original advertisement once the cheaper blocks were sold.

## Negotiating fees

Fees are negotiable. It is not unethical to negotiate fees. Remember that agency fees in some states are maximum scale fees only. You can decide whether or not to negotiate with your client the fee to be paid up to the maximum.

Forms with the scale of fees already printed on them should make it clear to the client that fees are negotiable. Omitting such a statement may disadvantage some clients.

To suggest to your client that it is compulsory to charge the maximum scale fee may be misleading conduct in breach of the Trade Practices Act or state and territory fair trading laws.

As with other agreements, competing agents must not come to an understanding among themselves on the fees they will charge or advertise.

In multiple listing arrangements the parties need to agree at the outset on how the two agents involved will divide the available fees. Again, how this is split can be negotiated between the parties concerned.

## Finance

Finance should be advertised only if you have taken reasonable precautions to make sure it is actually available.

Statements such as 'low interest finance readily available' might be misleading if lower income earners do not qualify for it and those who do respond to the advertisement are 'sold up' to higher interest finance.

Qualifiers like 'to approved purchaser only' can be added to inform buyers that finance is not available to everyone. To ensure that the qualifier is effective, it should be displayed prominently on your advertising material.

example

Pioneer Homes Pty Ltd advertised a house, land, carpets, paving and fencing package for \$37 600. Its advertisement stated in large and prominent print that the package could be purchased for \$100 deposit, with repayments as low as \$45 per week. In very small print it stated that bridging finance was available for only 12 months.

The ACCC alleged that the advertisements were misleading because they implied that the houses could be bought on very favourable terms, whereas after 12 months the buyer would have to refinance the loan at higher rates.

When the case went to the Full Federal Court on appeal, the main issue considered was what a competent reader, of the type to whom the advertisement was directed, would reasonably understand from the advertisement. The court decided that the reader was unlikely to be familiar with conveyancing practice or with analysing business documents and would believe that the houses could be obtained on favourable terms.

The company was found guilty and fined a total of \$47 000.

*Craig Jackson Henderson v Pioneer Homes Pty Ltd and Pioneer Agencies Pty Ltd (1980) ATPR 40-159*

# 10 // The bottom line

## Being taken to court

Anyone—an individual, another business, the ACCC or the minister—can bring an action in the Federal Court against you or your agency for breaching Part IV, Part IVA or Part V of the Trade Practices Act. Individuals can also bring actions under state fair trading laws in any state or territory court that has the jurisdiction to hear the matter.

Remember: If you are convicted of a criminal offence, you may be at risk of losing your real estate licence.

## Fines

The ACCC can bring a civil action against you directly or ask the Director of Public Prosecutions to pursue a criminal prosecution against you. It can also ask the court to impose monetary penalties, that is, fines.

For conduct prohibited under Part IV of the Act, such as:

- > entering agreements or understandings that substantially lessen competition
- > attaching conditions that substantially lessen competition in the supply of goods or services

the maximum penalty for each breach is \$10 million for a company and \$500 000 for an individual.

For conduct prohibited under Part V of the Act such as:

- > making false or misleading representations
- > making false or misleading representations about land
- > not stating the full cash price
- > offering gifts or prizes that you don't intend to supply as offered
- > bait advertising
- > unduly harassing or coercing clients

the maximum penalty for each breach under the criminal provisions in Part VC is \$1.1 million for a company and \$220 000 for an individual.

Under the Act offenders cannot be fined for:

- > unconscionable conduct
- > the general prohibition of misleading or deceptive conduct in s. 52.

However, the Act does provide for other remedies for those who have been harmed by unconscionable conduct or misleading or deceptive conduct.

## Damages

A person or business that has suffered any loss or damage because your agency has breached the anti-competitive, unconscionable conduct or consumer protection provisions of the Act may apply to the court for an award of damages.

## Injunctions and orders

Anyone who takes you to court may ask for an injunction to stop you from doing something or to make you do something.

The ACCC can apply to the court to order you to disclose information to the public or to publish corrective advertising.

## Ancillary orders

The court can also make ancillary orders including:

- > return of property
- > refund of money
- > specific performance
- > rescission of contract.

Anyone who suffers loss or damage as a result of your conduct, whether or not they were a party to the original court action, can apply for one of these orders.

example

A major real estate agent advertised for sale a 3-bedroom house which boasted a 'superb 2-bedroom home on rear of block'. While the smaller house was in fact being used as a residence, council regulations prohibited more than one dwelling on the lot.

The property was sold at auction. On discovering the agent's misrepresentation, the buyer refused to complete the purchase. The property was eventually resold but, in the interim, the vendors had incurred additional cost in a stay of execution against their mortgagee and in meeting interest payments on the mortgage.

The vendors, Vincenzo and Diego Latella, sued the real estate agent for damages to recover the costs they had incurred. They alleged the agent's conduct had contravened s. 53A of the Act by placing the advertisement misrepresenting the lawful uses of the property.

The court found that the agent had made the misrepresentation and ordered the agent to pay a proportion of the damages sought by Vincenzo and Diego plus the cost of the action.

*Vincenzo Latella and Diego Latella v L.J. Hooker Limited (1985) ATPR 40-555*

## Representative applications

When the ACCC successfully brings an action for penalty or injunction under the unfair trading provisions of the Act, it may ask the court to make ancillary orders in favour of people who have suffered loss or damage.

## Enforceable undertakings

In some instances, rather than take legal action over a contravention of the Act, the ACCC may decide to settle the matter administratively by accepting formal undertakings from the company or the person in breach.

If any of the undertakings are breached, the ACCC may apply to the court for an order directing compliance. A person who breaches a court order is in contempt of court and may be imprisoned.

The ACCC may also ask the court for other orders, such as compensating a third party for loss or damage.

## Defences and exceptions

It is a defence in criminal prosecutions under Part VC if you can establish:

- > the contravention was due to reasonable mistake
- > your agency reasonably relied on information supplied by another person other than one of your employees or agents
- > the reason for the alleged contravention was the action or failure of another person (other than an employee or agent), an accident or some other cause beyond your control, and you took reasonable care and precautions to avoid the contravention.

Note: these defences cannot be pleaded in any civil action under the Act.

# Summary of relevant provisions of the Trade Practices Act

## Part IV—anti-competitive practices

Part IV of the Trade Practices Act prohibits anti-competitive practices including:

- > anti-competitive agreements and exclusionary provisions, including primary and secondary boycotts (ss. 45, 45D)
- > exclusive dealing, including third line forcing (s. 47).

### Anti-competitive agreements

Section 45 prohibits agreements between businesses—for example, market sharing—which have the purpose or effect of substantially lessening competition in a market in which those businesses operate.

Prohibited outright are:

- > **Agreements that contain an exclusionary provision** (s. 45(2)). Sometimes called a primary boycott, these are agreements between competing companies which exclude or limit dealings with a particular supplier or customer, or a particular class of supplier or customer.
- > **Agreements that fix prices** (s. 45A). This includes agreements which purport to recommend prices but which in reality fix prices by agreement. Genuine recommended price agreements are excluded from this prohibition.

**Secondary boycotts** are prohibited by s. 45D if they substantially lessen competition. These involve action by two or more people, which hinders or prevents a third person from:

- > supplying goods or services to a business
- > acquiring goods or services from a business
- > engaging in interstate or overseas trade or commerce.

### Exclusive dealing

Section 47 prohibits exclusive dealing, which has the purpose or effect of substantially lessening competition in a market. Generally, exclusive dealing involves one corporation, which trades with another, imposing restrictions on the other's freedom to choose with whom, or in what, it deals.

It is prohibited to supply goods or services on condition that the buyer:

- > will not acquire, or will limit the acquisition of, goods or services from a competitor of the supplier (s. 47(2)(d))
- > will not resupply, or will resupply only to a limited extent, goods to particular persons or a particular class of persons or in a particular place or places (s. 47(2)(f)).

A supplier may not refuse to supply goods or services because the intending buyer will not comply with these conditions (s. 47(3)).

It is likewise prohibited for a buyer to impose such conditions on a supplier (s. 47(4)).

### Third line forcing

One form of exclusive dealing prohibited outright at present is third line forcing which involves supplying goods or services on condition that the buyer acquire them from a particular third party—or a refusal to supply because the buyer will not agree to that condition. Property lease provisions to similar effect are also prohibited (ss. 47(6), (7), (8)(c), 9(d)).

## Part IVA—unconscionable conduct

The Act prohibits unconscionable conduct in both commercial dealings (ss. 51AA and 51AC) and in consumer transactions (s. 51AB).

### Commercial dealings

Under s. 51AA a corporation must not, in trade or commerce, engage in conduct that is unconscionable within the meaning of the unwritten law of the Australian states and territories. This means the general non-statutory or common law as it has evolved through decisions of the courts. 'Unconscionability' is accordingly not defined in the Act.

Section 51AA does not apply to situations covered by ss. 51AB or 51AC.

### Small business

Section 51AC specifically prohibits one business dealing unconscionably with another in the supply or acquisition of goods or services. The provision does not apply to conduct before 1 July 1998, to transactions greater than \$3 million, or to transactions in which the business subject to the conduct (target business) is a listed public company.

Although the Act does not define 'unconscionable conduct', s. 51AC does include a non-exhaustive list of factors which may be taken into account by the court. These are:

- > the relative bargaining strengths of the parties
- > whether, as a result of the stronger party's conduct, the other was required to meet conditions not reasonably necessary to protect the stronger party's legitimate interests
- > whether the target business could understand any documentation used
- > the use of any undue influence, pressure or unfair tactics by the stronger party
- > how much the target business would have had to pay/charge, and under what circumstances, to buy/sell identical or equivalent goods or services from/to another supplier
- > the terms and circumstances in which the weaker party could have engaged in a similar transaction with another party
- > the extent to which the stronger party's conduct was consistent with its conduct in similar transactions with other businesses
- > the requirements of any applicable industry code (or of any other code if the target business acted in the reasonable belief that the stronger party would comply with it)

- > the extent to which the stronger party unreasonably failed to disclose:
  - > any intended conduct that might affect the interests of the target business
  - > any risks to the target business arising from that conduct which the stronger party should have foreseen would not be apparent to the target business
- > the extent to which the stronger business was willing to negotiate with the target business the terms of any supply contract
- > the extent to which each party acted in good faith.

## Consumer transactions

Section 51AB prohibits unconscionable conduct by corporations when they supply goods or services that are ordinarily bought by consumers for their personal, domestic or household use but not for resupply or use in trade or commerce. In such a transaction the stronger party may not take advantage by behaving in an unfair or unreasonable manner.

Section 51AB also contains a non-exhaustive list of factors, which may be taken into account by the court. These are:

- > the relative bargaining strengths of the parties
- > whether the consumer understood any documentation used
- > the use of undue influence or pressure, or unfair tactics
- > the imposition of conditions not reasonably necessary to protect the supplier's legitimate interests
- > how much the consumer would have had to pay, and under what circumstances, to buy equivalent goods or services from another supplier.

Remedies for unconscionable conduct include damages, monetary compensation, refund or rescission, variation or specific performance of a contract.

## Part IVB—industry codes

Section 51AD prohibits contraventions by corporations of applicable industry codes of practice. An applicable code is one which is mandatory for an industry or a voluntary industry code that binds the corporation.

Such codes must be declared, either as mandatory or voluntary, by regulations under s. 51AE. For voluntary codes the regulations may specify the method by which a corporation agrees to be bound and by which it ceases to be bound.

## Franchising

Franchising is defined as an industry for the purposes of part IVB. Therefore franchisors and franchisees are declared to be participants in the franchising industry, even if they also participate in another industry.

The Act provides penalties and remedies if an applicable industry code is contravened. These include injunctions to prevent the prohibited conduct continuing or being repeated, or to require that some action be taken, such as corrective advertising, damages, specific performance and rescission and variation of contracts.

## Part V—consumer protection

Part V of the Act protects consumers and businesses that qualify as consumers.

### Misleading or deceptive conduct

Section 52 prohibits conduct by business which is misleading or deceptive, or which is likely to mislead or deceive. Whether or not conduct is held to be misleading or deceptive will depend on the circumstances.

Generally, sellers must tell the truth or refrain from giving an untruthful impression. Failure to disclose information may breach the Act. The duty to disclose can arise even when there is no particular relationship between the parties—such as trustee and beneficiary or principal and agent.

Only civil proceedings can be brought for a breach of s. 52.

### False representations about land

Sections 53A and 75AZD prohibit a business from making false or misleading representations or engaging in misleading or deceptive conduct in relation to the sale of land, for example, about sponsorship or price.

### Other false or misleading representations

Sections 53 and 75AZC prohibit false claims about other matters, including:

- > the sponsorship, approval, performance characteristics, accessories, uses or benefits of goods or services (ss. 53(c) and 75AZC(1)(e))
- > the sponsorship, approval or affiliation of a corporation (ss. 53(d) and 75AZC(1)(f))

- > the price of goods or services, for example, that it is less than a competitor's price (ss. 53(e) and 75AZC(1)(g))
- > a buyer's need for goods or services (ss. 53(f) and 75AZC(1)(j))
- > the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy (ss. 53(g) and 75AZC(1)(k)).

### Unreasonable predictions

Sections 51A and 75AZB deem as misleading the making of representations about the happening of any future event without reasonable grounds. A business is considered not to have had reasonable grounds for making a prediction unless it can produce evidence to the contrary.

### Not specifying the full cash price

Sections 53C and 75AZF require a corporation to specify the full cash price when it advertises part of the price of goods or services, for example, the deposit or the terms of repayment.

### Falsely offering prizes

Sections 54 and 75AZG prohibit a corporation offering gifts, prizes or other free items with the supply of goods or services if it does not intend to provide them as offered.

### Bait advertising

Sections 56 and 75AZJ provide that goods or services must not be advertised at a specified price (not necessarily a 'special' price) if the seller is or should have been aware that it couldn't supply reasonable quantities at that price for a reasonable period. What is 'reasonable' depends on the circumstances, such as the market in which the goods are sold and the nature of the advertisement.

### Harassment or coercion

Sections 60 and 75AZN prohibit the use of physical force, undue harassment or coercion by a corporation (or its servants or agents) in supplying goods or services to a consumer, or payment by a consumer for goods or services.

# Other ACCC small business publications

The ACCC produces other publications that may help you. All publications are available by contacting the ACCC Infocentre on **1300 302 502**. Some publications are available in electronic format from our website at [www.accc.gov.au](http://www.accc.gov.au). If you would like further information on a particular issue contact the ACCC Infocentre.

## A small business guide to unconscionable conduct

(book—free)

A guide on what constitutes unfair business practices, it explains ways you can avoid problems when entering into an agreement, what your rights and responsibilities are, and how you can resolve problems when they arise.

## Guide to unconscionable conduct

(book—\$10)

This publication contains a broad discussion of the laws on unconscionable conduct, as well as a guide to effective compliance and dispute resolution.

## Best and Fairest

(Book with CD ROM—\$50; CD ROM only—\$20)

This training manual has been developed specifically to help businesses identify and manage their risks under the Trade Practices Act. It includes clear explanations of the law with examples, questions and answers, and a CD ROM.

## The franchisees guide

(book—free; flyer—free)

Franchising is currently a major growth area in small business, and the Franchising Code of Conduct applies to all industry participants. This guide states what information you are entitled to, how to resolve disputes, and the ACCC's role in franchising. *The franchisee's guide to the Franchising Code of Conduct—a small business overview flyer* is also available.

## Advertising and selling

(book—free; flyer—free)

Businesses must make sure they give customers all the information they need to make an informed purchase. This publication explains what you can and cannot say when marketing goods and services to consumers. The *Advertising and selling and the Trade practices Act—a small business overview flyer* is also available.

## Warranties and refunds

(booklet—free)

This leaflet gives a basic outline of what your obligations are to consumers regarding warranties and refunds, as well as what your rights are as a retailer.

## Refusal to deal

(booklet—free)

Generally, businesses are free to decide for themselves who they will deal with; no one has an absolute right to supply. In certain circumstances, however, refusal to deal will be illegal under the Trade Practices Act. This publication provides guidance on when a refusal to deal will be a breach.

## Videos

(\$10 each)

Fair game or fair go—unconscionable conduct in business

Straight talking—advertising, selling and the Trade Practices Act

The Competing Fairly Forum series:

Unconscionable conduct in business—May 2001

Advertising and selling—October 2001

Prevention is better than cure—May 2002

Future directions—October 2002

Delivering the goods—May 2003

Franchising—is it right for you?—September 2004

# // Contacting the ACCC

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