Policy

Title	BOARD POLICY - Competition and Consumer Act (Australian Consumer Law) Compliance Policy	**Version**	4
Policy No.	BP2025/03	**Effective date**	12/08/2025

Acknowledgment of Country

Forestry Corporation of NSW acknowledges the traditional custodians of the land on which we live and work, and pay our respects to Elders past, present and future.

1. PURPOSE

This policy relates to the requirement for the Corporation and all its employees to comply with the restrictive trade practices and consumer protection provisions contained in the Competition and Consumer Act 2010 (Cth) (**CCA**).

2. BACKGROUND

2.1. All government authorities that carry on a business, including State Owned Corporations like the Forestry Corporation are subject to the CCA. The CCA contains provisions dealing with restrictive trade practices as well as consumer protection. The consumer protection provisions are contained in Schedule 2 to the CCA which comprises the Australian Consumer Law (**ACL**).

2.2. The Forestry Corporation will be liable for damages for a breach of the CCA if it is knowingly concerned in, or a party to, a contravention of the provisions of Part IV of the CCA and a person suffers a loss because of that breach. The Forestry Corporation may be liable as the employer of a person who participates in or assents to the contravention.

2.3. An injunction prohibiting any further breach of the CCA may also be obtained against the Forestry Corporation.

2.4. Pecuniary penalties apply to breaches of the CCA. The penalty for corporations and authorities of the State may exceed $10 million.

2.5. An individual employee can be liable for a pecuniary penalty for a breach of the CCA even where the person is acting within the scope of his or her duties. The maximum penalty for individuals is currently $500,000.

3. SCOPE

3.1. The CCA expressly provides that a State Government will not be liable to a pecuniary penalty under the Act. But this protection does not apply to an authority of the State such as the Forestry Corporation.

3.2. The restrictive trade practices provisions of the CCA apply to the State, when it or an authority of the State such as the Forestry Corporation is “carrying on a business” (see s2B(1)).

3.3. However, as a statutory State owned corporation the Forestry Corporation does not represent the State (see s20F State Owned Corporations Act 1989 (NSW) (SOC Act)). Therefore, it is not necessary that the Forestry Corporation is carrying on a business before it is subject to Part IV of the CCA. In any event, it is clear that the Forestry Corporation is, in the conduct of its core activities of managing native forests and plantations and harvesting and selling the timber on them, carrying on a business.

3.4. This policy applies to Forestry Corporation Board members, employees, contractors and/or any other person conducting business on behalf of the Corporation.

4. POLICY

4.1. Given the nature of its business, the degree of sophistication of its commercial counterparties and the preponderance of the use of long term wood supply agreements the terms of which are often publicly available, the likelihood of Forestry Corporation being in breach of the CCA (or more specifically the ACL) in the conduct of its normal business is low. However, it is nonetheless important that staff and contractors are aware of these provisions and make every effort to ensure compliance.

4.2. More detail in relation to Forestry Corporation's obligations under the CCA and the ACL is set out in section 7 of this Policy. A copy of the CCA (which includes the ACL) is available on the intranet together with links to various factsheets produced by the Australian Competition and Consumer Commission. All staff are required to familiarise themselves with this Policy, the relevant provisions of the CCA referred to in section 7 of this Policy and ensure that their actions do not result in a breach of the CCA.

4.3. Any breach or potential breach of the CCA is to be brought to the attention of the relevant General Manager and/or Company Secretary immediately.

4.4. The Corporation may not provide financial assistance to and may take disciplinary action against any individual who deliberately or by reckless indifference places the Corporation in breach of the CCA.

4.5. Staff engaged in negotiating contracts and setting prices must ensure that they keep their knowledge current and undertake training as and when required.

5. ROLES AND RESPONSIBILITIES

Role	**Responsibility**
Board	Review and update this policy as and when required
CEO	Update the Board as required and ensure that this policy is implemented via appropriate education and training
Company Secretary and Senior Managers	Ensure that this policy is implemented via appropriate education and training
All Staff	Familiarise themselves with this policy and undertake further education and training as required.
Contractors, Consultants and Volunteers	Familiarise themselves with this policy and undertake further education and training as required.

6. RELATED POLICIES

- FCNSW Code of Conduct
- Board Charter
- Forestry Corporation Constitution

7. RELATED DELEGATIONS

- N/A

8. RELATED DOCUMENTS

- Notes and Guidance: The Competition and Consumer Act 2010

9. REVISION HISTORY

[Refer to the Document Framework Procedure for information on minor versus major changes and authorised approvers.]

Version	Author	Summary of changes	Approver	Approval date
1	FCNSW General Counsel	New Policy	Board	2/7/2013
2	FCNSW General Counsel	Policy remains unchanged.	Board	1/7/2016
3	FCNSW General Counsel	Policy remains unchanged but Discussion Paper updated	Board	11/9/2019
4	External Legal Adviser	New Policy	Board	29/04/2025

For previous document versions, refer to Content Manager

10. CONTACT OFFICER

General Manager – Governance & Assurance

Executive Endorsement

Chief Executive Officer

Notes and Guidance - Competition and Consumer Act (Australian Consumer Law) Compliance Policy – BP2025/03

Definitions and acronyms

Market

A market is a market for goods or services. It has been defined as the “area of close competition between firms”. Within a market there is substitution between products and services and between sources of supply in response to changes in prices. Section 4E of the CCA reinforces this definition by examining goods or services that are substitutable with other goods or services.

Market Power

Market power is the ability of an organisation to insulate itself from competition without adverse effects. In determining market power it is important to determine the extent of the market in question. One way to determine market power is to look at the ability of a corporation to raise prices above product cost without rivals taking away customers.

Competition

“Competition” must be analysed in terms of the market in which the competition is occurring. In theory, perfect competition exists when consumers obtain the “best deal”, all firms maximise their profits, there is no collusion, products are homogenous, there is no market leader to influence price and there are no barriers to entering the market.

The aim of the CC ACT is to achieve “workable” competition, rather than “perfect” competition. By overcoming the anti-competitive behaviour of firms in the market, the CCA attempts to achieve a “level playing field” for all market participants.

Competition may take the form of competition as to price, product or service. To determine whether there is competition an examination can be made of prices. If a seller raises the price for goods or services, without altering anything else, and the seller sells less of the good or service, there is most likely competition in the market.

Substantial Lessening of Competition

The word "substantial" may mean "large or weighty", "considerable or big", "real or of substance" or not "insubstantial or nominal". The CCA also provides that substantial lessening of competition also includes preventing or hindering competition.

In assessing whether conduct has the effect of substantially lessening competition, the following factors can be relevant:

- the number, size and distribution of competitors and the degree of market competition;
- the width of the market definition - the wider the defined market, the less likely it will be that conduct will result in a substantial lessening of competition;
- the nature of any formal, stable and fundamental arrangements between market participants that restrict their ability to function as independent entities;
- the ease with which new participants can enter the market;
- the extent to which products in the same market are differentiated, whether by sales promotions or otherwise;

- the character of vertical relationships and the extent of vertical integration – that is, the relationships between manufacturers, retailers and customers;
- whether competitors rely on others to produce the product so as to reduce their capability to function independently; and
- the term of any relevant contract - the longer the term the more likely the contract may involve a substantial lessening of competition.

The analysis of whether conduct results in a substantial lessening of competition is largely an economic one that involves the definition of the relevant market, an examination of competition and the effect of conduct on that competition.

Contract, Arrangement or Understanding

Contracts, arrangements or understandings need not be in writing, nor be legally enforceable. All there need be is communication with another person from which each person has an expectation of how the other will act.

An arrangement or understanding involves a meeting of the minds between parties. Examples include parallel conduct, collusion, similar pricing, evidence of opportunities for parties to arrive at an understanding or evidence that parties are acting according to a plan.

Purpose or Effect

The purpose need not be a sole purpose but must be a substantial purpose which can be inferred from the nature of the arrangement, the circumstances in which it was made and its likely effect.

Conduct that is conditionally prohibited is only prohibited if it has the "purpose, effect or likely effect" of substantially lessening competition in the relevant market. These words are very wide and cover situations where an entity:

- intends to substantially lessen competition and succeeds;
- intends to substantially lessen competition and fails; or
- does not intend to substantially lessen competition but its actions have that effect.

An entity's conduct might consist of more than one purpose and only one purpose might be anti-competitive. The CC Act will be breached if the anti-competitive purpose is a substantial one.

Legislation and other compliance obligations

Competition and anti-competitive behaviour (Part IV OF THE CCA)

Some restrictive trade practice conduct is considered to be so serious that it is illegal no matter what its effect on competition. This conduct is strictly prohibited conduct:

- **exclusionary provisions or primary boycotts** (section 45(2)(a)(i) and section 4D)

when competitors agree not to supply (or buy) goods or services to a particular person or class of persons, or when competitors agree to prevent or hinder the acquisition of goods or services from a particular person or class of persons. For example, sharing information about defaulting debtors and agreeing not to supply to those debtors;

- **cartel conduct** (Division 1)

This Division sets out parallel offences and civil penalty provisions relating to cartel conduct. A corporation must not make, or give effect to, a contract, arrangement or understanding that contains a cartel provision. A cartel provision is a provision relating to: price-fixing; restricting outputs in the production and supply chain; allocating customers, suppliers or territories; or bid-rigging, by parties that are, or would otherwise be, in competition with each other; and

- **resale price maintenance** (section 48)

Resale price maintenance occurs when a supplier prevents, or attempts to prevent, a business such as an independent retailer or distributor from advertising or selling products below a specified minimum price. This includes suppliers agreeing to supply goods or services to a business, or offering a discount or other incentive, on the condition that the retailer or distributor sells those goods at or above a certain price. It also occurs when suppliers withhold or threaten to withhold supply to a business to maintain certain prices for goods or services. A supplier is allowed to issue a recommended resale price (**RRP**) so long as they make it clear that it is just a recommendation and that their customers must be free to discount if they choose to.

Other restrictive trade practice conduct is illegal only if it has the purpose, effect or likely effect of substantially lessening competition in the relevant market. This conduct is conditionally prohibited conduct:

- **anti-competitive contracts, arrangements or understandings** (section 45)

The CCA contains a general provision that prohibits the making or giving effect to general anti-competitive contracts, arrangements or understandings. These are any contracts, arrangements or understandings that have the purpose or effect (or likely effect) of substantially lessening competition in a market;

- **secondary boycotts** (section 45D-45DD);

If a person acts in concert with a second person to hinder or prevent the supply of goods or services by a third person to a fourth person and this conduct has the likely effect of substantially lessening competition in any market in which the third and fourth person operates that can constitute a secondary boycott;

- **misuse of market power** (Section 46)

A misuse of market power happens when an entity that has a substantial degree of market power, takes advantage of that power for one of the proscribed purposes: eliminating or damaging a competitor; preventing a person from entering a market; or deterring or preventing a person from engaging in competitive conduct;

- **exclusive dealing** (section 47)

Exclusive dealing happens when one business trading with another puts conditions on the other's freedom to: choose what it buys or sells; who it does business with; or where it trades; and

- **mergers and acquisitions** (section 50).

The CCA prohibits an entity from buying shares in another entity or the assets of another entity or person if the effect of the purchase would be to substantially lessen competition in a market.

Authorisation by the ACCC

A business planning to engage in conduct that may breach the CCA can apply to the Australian Competition and Consumer Commission (**ACCC**) for an exemption. The ACCC may authorise any anti-competitive conduct except misuse of market power provided that it won't substantially lessen competition or is in the public interest.

UNFAIR PRACTICES

Misleading or Deceptive Conduct (section 18 of the ACL)

Section 18 of the ACL provides that ‘A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.’ In addition to applying to persons generally, this section applies as a Commonwealth law to the conduct of corporations (s131, CCA).

Remedies for misleading conduct are found elsewhere in the legislation and include damages, injunction, rescission of contract and other measures.

Although section 18 appears in the ACL, the section is not limited to consumer transactions or dealings. Many of the cases on misleading conduct are business-to-business cases.

‘Deceptive’ requires an intention to deceive (ie fraud).

But ‘misleading’ requires no intention or particular state of mind. In fact, the prohibition of misleading conduct imposes a strict liability not to lead another into error in commercial and consumer dealings. An innocent (non-fraudulent and non-negligent) statement may generate liability. It is also possible to be liable for what was not said if the failure to speak up was in context misleading. This usually arises when a person has made a statement but fails to qualify it sufficiently.

‘Conduct’ includes actions and statements, such as: advertisements; promotions; quotations; statements; and any representation made by a person in ‘trade or commerce’ the definition of which is extremely broad.

False or Misleading Conduct (sections 29 and 30 of the ACL)

The making of false or misleading representations about the supply or use of goods or services or the sale of land in trade or commerce is also prohibited under sections 29 and 30 of the ACL which deal with Unfair Practices.

Unconscionable Conduct (sections 20 and 21 of the ACL)

‘Unconscionable conduct’ is not defined in the ACL but has been interpreted to mean behaviour that is particularly harsh, unfair, or oppressive, going against the norms of society and potentially violating a person's conscience.

Section 21 of the ACL provides that a person must not, in trade or commerce, in connection with the supply or acquisition of goods or services engage in conduct which is, in all the circumstances, unconscionable.

Regard must therefore be had to ‘all the circumstances’ which section 22 provides include matters like the relative bargaining position of the parties, the history of dealing between them and the circumstances in which the customer could have otherwise acquired the goods or services.

In circumstances where section 21 does not apply, section 20 nonetheless prohibits a person from engaging in unconscionable conduct in trade or commerce ‘within the meaning of the unwritten law’ (which is a reference to the common law as that evolves from ‘time to time’).

Unfair Contract Terms (Part 2.3 OF THE ACL)

The ACL has always contained provisions which mean that a term in a consumer or small business standard form contract is unfair if it: causes a significant imbalance in the parties’ rights and obligations; is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by such a term; and would cause detriment to a party if the term were to be applied or relied on. This applied to contracts entered into on or after 1 July 2010.

However, for contracts entered into on or after 9 November 2023, Unfair Contract Terms (**UCT**s) are illegal with each UCT constituting a separate contravention and substantial penalties applying.

The class of small business that can rely on UCT protections has also been expanded to include businesses which employ fewer than 100 people or have a turnover of less than $10 million for the previous income year.

The onus of proof is on the defendant to prove that the contract is not a 'standard form contract.'

Examples of UCTs include: terms that allow the business to make unilateral changes to important aspects of the contract, such as increasing charges or varying the type of product to be supplied, with no right for the counterparty to cancel the contract without penalty; terms that avoid, limit, or restrict the liability of a supplier, its employees or agents for a breach of the contract; and terms that require consumers who breach the contract or end it early to pay an excessive amount in compensation or cancellation charges.