

TRADE ASSOCIATIONS AND THE COMPETITION ACT

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On the 27th of October the Competition Bureau released, in draft for discussion, an Information Bulletin on the application of the Competition Act to trade associations, which is available [here](#).

Trade associations face particular competition law/antitrust risks because, by definition, they involve meetings, discussions and cooperation amongst various – often virtually all – competitors in a particular line of business. The Bulletin notes that trade associations undertake many legitimate activities, including such things as lobbying, establishing product specifications (although this can involve issues of concern with regard to competition law from time to time), improving the quality and safety of products, publishing trade journals, market research, and advertising and promoting the product. The Bulletin also notes that trade associations can be a good venue to provide Competition Act antitrust education to industry members and can assist the Bureau in reaching members of industries.

Nevertheless, the Bureau notes that when trade associations, or their members, consider such things as pricing, customers, territories, market shares, terms of sale, or advertising restrictions, amongst other matters, there can be anti-competitive concerns.

Issues noted in the Bulletin which could give rise to concerns under the Competition Act, when undertaken by or through trade associations, include not only outright agreements between competitors as to price, but also the exchange of competitively sensitive information such as current or future prices, market shares, costs, level of output, strategic or marketing plans, costs, market allocation, production, and market shares, discount payment terms, business strategy and bidding tactics. Where competitively sensitive information is collected and disseminated the Bulletin notes that reasonable measures to reduce Competition Act risk may include:

- a. Collecting only historical information;
- b. Disseminating information only in aggregated form with no specific firm information identifiable;
- c. Using an independent data collection agency; and
- d. Not requiring that data be provided by members – making the information supply voluntary only.

The Bulletin suggests that meetings of association members employ clear agendas, and that minutes be taken that comprehensively note all issues discussed. Issues not on the agenda should not be discussed, and informal

conversations or side discussions amongst members should be avoided. The Bureau also recommends that trade associations have legal counsel review agendas and minutes, and attend all association meetings where there is potential for discussion of sensitive subjects. It suggests that the association should have a document retention program setting out what documents are to be kept and for how long.

The Bulletin also notes that association membership should be voluntary, and based on transparent, objective criteria. Association membership becomes a particular concern if being a member of the association is in somehow necessary or at least materially advantageous for a firm's ability to compete.

Specifically with respect to industry fee schedules or guidelines – which have been an area of enforcement activity for the Competition Bureau in the past – the Bulletin recognizes that trade associations often disseminate fee guidelines. The Bureau notes that these guidelines may facilitate agreements on the fees to be charged. Dissemination of a fee guideline genuinely intended to be a source of information as to current fees charged in a particular market should not, in and of itself, raise an issue under the Competition Act, but it could raise issues under the Competition Act if it is used to establish or facilitate an agreement on prices or to promote adherence to specified fees. That is, members must feel free to deviate from the guideline without fear of recrimination or sanctions. The Bureau notes that fee guidelines which are prepared in a systematic and scientific fashion, are comprised of statistics gathered and compiled by an independent third party, based on questionnaires as to fees charged in the past, and are based on independent verification, are less likely to raise concerns under the Act than otherwise.

The Bulletin also notes that the activity of standard-setting organizations may give rise to concerns under the Competition Act if the standards they establish have the effect of restricting entry into an industry, deterring innovation or otherwise inhibiting the ability of persons to compete and those goals are not consistent with the legitimate goals and purposes of the organization.

Finally, the Bulletin recommends that trade associations establish competition law compliance programs to assist them with complying with the requirements of the Competition Act.