

## Article Information

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## Competition & Consumer Law: 2022 in Summary and the ACCC Priorities for 2023

**On 7 March 2023, the Australian Competition and Consumer Commission (ACCC) announced its Compliance and Enforcement Priorities for 2023-24. From unfair contract terms to misleading environmental claims, Piper Alderman recaps the ACCC's key areas of focus for 2023-24 in the context of its recent compliance and enforcement activities.**

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### Enduring Priorities

The ACCC has identified a number of enduring priorities for 2023-24. These are areas considered by the ACCC to involve conduct so detrimental to consumer welfare that they will always be regarded as forming part of its priorities. These categories include:

1. cartel conduct;
2. anti-competitive conduct;
3. product safety;
4. consumers experiencing vulnerability; and
5. conduct impacting First Nations people.

An area where the ACCC has increased its efforts over recent years is cartel conduct. Cartel conduct was a key aspect of the ACCC's compliance and enforcement action throughout 2022, with the ACCC taking action to investigate and deter three main forms of cartel conduct:

1. **Bid rigging** - where competitors agree that they will not compete genuinely (or will not compete at all) in a tender process, to allow one particular competitor to win;
2. **Market sharing** - where competitors enter into a contract or arrangement which has the purpose of directly or indirectly dividing or allocating a market between them where they otherwise would have been in competition with each other, for example by agreeing to divide a market by geographic regions; and
3. **Price fixing** - where competitors agree to raise, lower, maintain, or stabilise prices or price levels.

Since the introduction of a criminal offence for engaging in cartel conduct in 2009, the ACCC has shown its willingness to refer instances of potential cartel conduct to the Commonwealth Director of Public Prosecutions to commence criminal proceedings against both companies and their directors.

The potential for criminal sanctions (including possible terms of imprisonment) highlights the need for significant caution by companies and individuals when dealing with their competitors to avoid engaging in conduct which could constitute cartel conduct.

### Continuing Priorities

There are several areas the ACCC prioritised in 2022-23 which it announced it will continue to prioritise throughout 2023-24. These priorities reflect a focus on recent increases to the cost of living, which appear to have influenced the ACCC's continuing priorities with respect to the essential services sector in particular.

The ACCC announced that its continuing priorities for 2023-24 are:

**Priorities****Pricing of Essential Services****Financial Services Sector****Exclusive Arrangements that Affect Competition****Environmental Claims****Advertising and Marketing Claims in Digital Economy****Consumer Guarantees****Small Business Protections****Consumer Product Safety Issues****Key Areas of Focus***Energy and telecommunications**Payment Services**Barriers to entry**Greenwashing**Online reviews / Disclosure obligations**Motor vehicles and caravans**Agriculture and franchising**Young children****Environmental Claims and Sustainability***

As consumers and businesses are more focused on sustainability to inform their purchasing decisions and are often prepared to pay more for sustainable practices, the ACCC has announced that it will continue to monitor the market to ensure that businesses who make claims that their products or services are “environmentally friendly”, “green”, or “sustainable” are backed-up either by:

- reliable scientific reports;
- transparent supply chain information;
- reputable third-party certification; and/or
- other forms of evidence.

Last month, the ACCC announced the results of an internet sweep it conducted to examine potential “greenwashing” claims. These results highlighted problems in the way in which businesses were marketing their environmental credentials, with the ACCC reporting that 57% of businesses reviewed in the sweep made concerning claims about their environmental credentials. Of these businesses, those operating in the cosmetic, clothing, footwear, food and drink sectors were found to have the highest proportion of concerning claims.

The key areas of concern identified by the ACCC include:

- businesses making vague or unclear environmental claims or claims that consumers are unable to verify;
- insufficient evidence provided by businesses to justify their claims; and
- the use of third-party certifications in confusing or unjustified ways, or in circumstances where businesses have not earned these certifications.

***Consumer Guarantees***

The ACCC will also continue to focus on improving industry compliance with consumer guarantees, with a focus on high value goods, including motor vehicles.

In recent years, the ACCC has pursued a range of enforcement proceedings regarding alleged misrepresentation of consumer guarantees to consumers, including in relation to:

1. **Mazda** - where it was found following a trial in the Federal Court of Australia that Mazda ignored or rejected consumer requests for refund or replacement vehicles in circumstances where vehicles had experienced serious and ongoing faults, and that false representations were made to consumers that they could not seek a replacement or refund because the only available remedy was a repair;
2. **Tiger Mist** - where the ACCC issued infringement notices alleging that misleading representations were made to consumers about their rights to return faulty items (including time limitations and requirements about the condition of return); and
3. **FitBit** - where the ACCC has filed proceedings alleging that FitBit made false or misleading representations to consumers about their consumer guarantee rights through its reliance on returns and warranty policies.

The key takeaways from the ACCC’s compliance and enforcement activity in this area is that it is a breach of the Australian Consumer Law for businesses to mislead consumers about the rights and remedies available to them under consumer guarantees, even if done unintentionally, and the ACCC has shown an appetite to pursue breaches, particularly those reported by consumers.

Businesses should therefore be careful to ensure that no representations are made to consumers which could mislead them about their entitlements under the consumer guarantees – this includes representations made, for example, in written terms and conditions, by information on a website, such as a returns FAQ page, or by employees in consumer-facing roles.

The ACCC has also indicated it will continue a push for law reform to make failure to comply with consumer guarantees a contravention of the Australian Consumer Law which would be subject to penalties – so the scope and penalties for failing to abide by the consumer guarantees regime could soon be broadened.

## **New Priorities**

The ACCC announced that, for 2023-24, it will be focusing on four new priorities, being:

1. **unfair contract terms** in consumer and small business contracts;
2. **competition and pricing issues** in the gas market, including compliance with the price cap order and other legal obligations for wholesale gas markets;
3. competition and consumer issues relating to **digital platforms**; and
4. **scam detection and disruption**, including supporting the implementation of the National Anti-Scams Centre.

## **Unfair Contract Terms**

In late 2022, the *Competition and Consumer Act 2010* (Cth) (**Competition and Consumer Act**) was amended. This had the effect of [increasing penalties for breaches of the Act, and from November 2023, will prohibit unfair contract terms in standard form consumer and small business contracts](#).

The ACCC has announced that it is currently undertaking a review of business terms and conditions across a number of different sectors which will be used as the basis for future enforcement cases.

### Standard form contracts

Courts are permitted to consider a range of relevant matters when determining whether an agreement is a standard form contract, however, must take into account whether:

1. one party has all or most of the bargaining power;
2. the contract was prepared by one party prior to the transaction;
3. the contract was provided on a “take it or leave it” basis;
4. the non-drafting party could not negotiate the terms; and
5. the contract fails to take into account specific characteristics of the non-drafting party.

### Small business contracts

From 10 November 2023, the definition of a “small business contract” will change to coincide with the introduction of the new unfair contract terms regime. A contract will be considered to be a small business contract if at least one party to the contract:

- has fewer than 100 employees; and
- has a turnover of less than \$10 million per annum.

### What is an Unfair Contract Term?

What is “unfair” will depend on a case by case assessment of the agreement. Terms that will generally be considered “unfair” include (but are not limited to) terms that:

- allow one party, but not another, to change the contract;
- limit a party’s rights to sue another party;
- avoid or limit liability for negligence;
- allow one party, but not another, to solely determine if the contract has been breached; or
- penalise one party (but not another) for a breach or termination of the contract.

Recent enforcement action by the ACCC in Federal Court proceedings against Fujifilm Business Innovation Australia and Fujifilm Leasing Australia (**Fujifilm**) provides some examples of contract terms that Courts may consider to be unfair. These include:

<b>Automatic renewal terms</b>	Permitted Fujifilm to renew the contract for a further period unless customers cancelled the contract a certain number of days prior to the end of the contract term
<b>Disproportionate termination terms</b>	Allowed Fujifilm to terminate the contract in a significantly wider range of circumstances than those available to the customer
<b>Liability limitation terms</b>	Limited Fujifilm's liability or required the customer to indemnify Fujifilm without corresponding rights for the customer
<b>Termination payment terms</b>	Required customers to pay extensive exit fees to Fujifilm in the event the contract was terminated, including certain charges which Fujifilm could set unilaterally
<b>Unfair payment terms</b>	Required customers to pay Fujifilm for software, irrespective of whether Fujifilm had actually delivered the software
<b>Unilateral variation terms</b>	Permitted Fujifilm to unilaterally vary terms of the contract, including the charges and terms contained in external documents to the contract

#### What if a term is found to be "unfair"?

If a Court decides that a term in a standard form consumer or small business contract is unfair, the Court has powers to:

- declare a term void and unenforceable;
- from 10 November this year, impose penalties on corporations up to the [new maximum amounts under the new penalty regime](#);
- make orders which extend to other existing standard form contracts that a corporation has with consumers or small businesses;
- make adverse publicity orders; and/or
- impose injunctions to restrain a corporation from including a similar term in any future standard form consumer or small business contract.

Businesses should ensure that they do not delay in reviewing contracts which might be caught by these changes to the Competition and Consumer Act come November 2023. In particular, businesses should note the increased threshold for the type of business that will soon be considered a small business, as these changes will soon capture many businesses that were not previously classified as "small businesses" for the purposes of the unfair contract terms regime.

#### ***Competition and Pricing Issues: Gas Markets***

In response to the domestic and international pressures on energy prices, the Federal Government introduced an emergency cap on the sale of wholesale gas and has tasked the ACCC to enforce the cap. The ACCC has taken on significant new responsibilities in relation to the wholesale gas market and is working with the Government in developing a mandatory code of conduct for gas producers.

#### **Other Priorities**

##### ***Merger Control Reforms***

In recent years, the ACCC has expressed increasing concern as to whether Australia's merger control regime remains fit for purpose and, in particular, whether it is achieving the balance required to ensure good outcomes for consumers and the economy.

This year, the ACCC has announced that it will share its views with the Federal Government on amendments to the merger clearance process in the Competition and Consumer Act and will be "making the case" to the Government for legislative reform.

Australia is one of only a few countries in the world that has a voluntary merger clearance process. The current merger laws set out in the Competition and Consumer Act require that corporations not directly or indirectly acquire shares in the capital of a body corporate or acquire any assets of a person, if the acquisition would have the effect, or be likely to have

the effect, of substantially lessening competition in any market.

Given the ACCC's stated concerns, there is a possibility that the ACCC will lobby for the move to a more formal mandatory notification system where deals above a certain monetary threshold will be required to be reviewed by the ACCC.

Time will tell what the ACCC proposes, and whether the Federal Government ultimately acts on this advice, so watch this space.