

Article Information

Authors: Tom Griffith, Meshal Althobaiti, Tania Maystrenko

Service: Competition & Consumer, Corporate & Commercial

ACCC 2019 Compliance and Enforcement Policy

On 26 February 2019, ACCC Chairman Rod Sims outlined the ACCC's Compliance and Enforcement Policy and Priorities for 2019.

The Australian Competition and Consumer Commission's (ACCC) 2019 Compliance and Enforcement Policy and Priorities was released last week as part of ACCC Chairman Rod Sims' annual address to the Committee for Economic Development of Australia. The policy details the areas that the ACCC will prioritise for investigation, enforcement and reform over the next year. It is evident the ACCC will be active and thorough in pursuing the areas it has nominated for particular focus.

Broadly the ACCC's focus areas for the next 12 months will be on enforcement of competition and consumer law priorities; product safety; new and continuing market studies; with a particular attention on advocacy.

Competition enforcement approach and objectives

Mr Sims said that with increased budget support from the Government at the end of 2018 the ACCC established the 'SLC Project' (the "substantial lessening of competition" project) to experiment with a different approach to competition investigations and allow it to gain an early understanding of the relevant market, in other words, to help determine "what is going on here?".

In his speech, Mr Sims emphasised that the ACCC's cartel investigations team is expecting three criminal cartel investigations to be referred to the Commonwealth Director of Public Prosecutions each year.

The ACCC will have a particular focus on conduct which may contravene the misuse of market power and concerted practices provisions of the Competition and Consumer Act (CCA).

In the wake of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (**Financial Services Royal Commission**), Mr Sims noted that the ACCC has established a Financial Services Competition Branch, which includes a permanent competition investigation team. He observed that the underlying theme of the Final Report of the Financial Services Royal Commission was that competition is not vigorous among the major banks or in some parts of the financial sector.

Mr Sims mentioned the current criminal cartel proceedings against ANZ, Citibank and Deutsche Bank brought by the Commonwealth DPP.

Competition and consumer issues in the commercial construction sector will also continue to be a key area of focus.

Consumer law enforcement

Mr Sims noted that the maximum penalties for contraventions of the Australian Consumer Law (ACL) have now increased from \$1.1 million to: the greater of \$10 million; or 3 times the benefit obtained from the conduct; or where the benefit cannot be calculated, 10% of annual Australian sales turnover.

To improve deterrence Mr Sims is advocating for penalties of over \$100 million for breaches of both the ACL and the CCA.

The key consumer enforcement priorities for 2019 include:

- competition and consumer issues arising from customer loyalty schemes;
- consumer guarantees on high value electrical products and whitegoods;
- advertising practices on social media platforms, and "subscription traps"; and

- the complexity and opacity of pricing in the energy and telecommunications sectors.

The ACCC will continue its focus on the franchising sector. It will also focus on the business-to-business unfair contract term laws, particularly in the agricultural sector. Mr Sims noted that unfair contract terms can cause great harm to small businesses and farmers.

Product safety focus

The ACCC will also focus on ensuring the effectiveness of the compulsory recall of vehicles with Takata airbags, and improving the safety of quad bikes and will release a separate Product Safety Priorities at the Consumer Congress later this month.

Current market studies

Market studies will continue to play a pivotal role for the ACCC in a number of areas including wine grape production, foreign exchange fees, insurance in Northern Australia, and electricity markets.

The ACCC will monitor the impact on consumers arising from the collection and use of data by digital platforms. It will also advance its work on the Consumer Data Right (**CDR**) of writing the rules for the CDR system, building an address book and accreditation process to facilitate the sharing of data, with safeguards to address security and privacy.

Advocacy

Mr Sims noted some of the legislative reforms which the ACCC has advocated for in the past including changes to section 46 of the CCA which prohibits misuse of market power and the introduction of a prohibition against concerted practices. He stated that advocacy will continue to be a priority for the ACCC.

Mr Sims announced some of the advocacy priorities for 2019 which will include:

- reforming the unfair contract terms regime;
- introducing a prohibition in relation to the sale of unsafe goods; and
- assessing the adequacy of laws against companies engaging in “harsh and unfair conduct” towards consumers with the aim of capturing conduct and practices that fall “between the gap” of the laws on misleading conduct, unconscionable conduct, and unfair contract terms.

Mr Sims pointed out that the ACCC is increasingly concerned that the bar for establishing a “likely substantial lessening of competition” is failing to protect competition and consumers. The ACCC’s advocacy policy will therefore focus on protecting the competitive process.

Conclusion

As always, Chairman Sims has continued to press for harsher penalties for breaches of the CCA and the ACL. He described past instances where the financial penalty for serious offending was described by financial analysts as a “rounding error”. He regarded this as unacceptable. By tying serious misconduct to potential criminal liability, and seeking benefit-related or turn-over related financial penalties, the ACCC is meeting its mandate of being the “tough cop on the beat”.