

ACCC TO UP THE ANTE IN CONSUMER PROTECTION MATTERS

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Legal Briefings – By **Sue Gilchrist, Patrick Gay and Anna Vandervliet**

The ACCC recently released its Annual Report for the 2017/2018 financial year.¹ As well as looking back at the ACCC's performance over the year, for companies operating in the consumer and retail sectors, it also provides useful insights into where the ACCC is heading in the area of consumer protection.

KEY TAKEAWAY

The year ahead is likely to be another busy year for the ACCC on consumer protection issues, with a continued focus by the ACCC on proactive enforcement action. However, given the ACCC describes itself as a “strategic regulator with finite resources”, we expect it will focus on cases that will give it “bang for its [litigation] buck”. This includes cases with the potential for industry-wide impact, as well as those with the potential for significant penalty outcomes, to send a strong deterrent message to businesses. It might just be busy for you too, if you are a large business operating on a national basis or engaged in the ACCC's priority areas, such as the telecommunications or health and medical areas.

THE YEAR THAT WAS

Looking back over the year, the ACCC reports that it has met or exceeded most of the annual targets for Australian Consumer Law (**ACL**) enforcement investigation in 2017-2018, including initiating 56 new ACL enforcement interventions. This exceeded the annual target of 40 by a significant margin, and demonstrates the ACCC's commitment to actively investigating alleged breaches and enforcing the consumer law.

In recent times, the ACCC has been a vocal advocate for increased penalties for breaches of the ACL, and this approach has resulted in some significant penalties over the last year, including:

- **Ford Motor Company:** penalty of **\$10 million** (unconscionable conduct in dealing with complaints relating to PowerShift Transmission cars);
- **Telstra Corporation:** penalty of **\$10 million** (false or misleading representations in relation to third party billing service);
- **Apple Inc:** penalty of **\$9 million** (false or misleading representations about consumers' rights in respect of Apple devices repaired by a third party);
- **Get Qualified:** penalty of **\$8 million** and **\$500,000** against company's sole director (false or misleading representations and unconscionable conduct in the education sector);
- **Thermomix:** penalty of **\$4,608,500** (false or misleading representations in relation to a known safety issue);
- **Pental Products:** **\$700,000** penalty (false or misleading representations in relation to 'flushable' toilet and bathroom wipes).

Over the year, the ACCC was also particularly active in enforcing the ACL in a number of its priority areas. In particular:

- **Telecommunications sector:** the ACCC took action in relation to a number of internet service providers in relation to misleading speed claims and other statements in relation to the national broadband network, resulting in penalties or enforceable undertakings, including from Optus, Dodo, Primus, iiNet and TPG.
- **Health and medical:** the ACCC took action in relation to misleading and unconscionable conduct in relation to health insurance benefits against Medibank, as well as against GSK and Novartis in relation to the misleading marketing of pain relief products.
- **Consumer guarantees:** the ACCC has been particularly active in this area, with action taken against companies such as Jayco, LG, Fitbit Australia Ltd, NETGEAR Australia Pty Ltd and Lululemon Athletica Australia Pty Ltd (in addition to Apple, referred to above).
- **Indigenous Australians:** the ACCC took action against Birubi Art Pty Ltd for misleading Indigenous art claims;
- **Online consumer issues:** the ACCC has taken action in relation to various online conduct, including taking action against Meriton in relation to online review websites and

Viagogo for misleading and deceptive ticket pricing on its online platform.

WHAT CAN WE EXPECT FROM THE ACCC IN THE FUTURE?

The ACCC acknowledges in its Annual Report that the operating environment for regulators in Australia is changing, and that developments such as the Royal Commission into Banking have highlighted *“the importance of a strong regulatory framework and regulator action to provide confidence to the public and to correct emerging conduct”*.

This is reflected in the Annual Report, where one of the key themes is that the ACCC is likely to continue to be an active regulator, and is committed to enforcing the ACL, including by court action where necessary. As the ACCC Chair, Rod Sims says: *“You can expect the ACCC to take more enforcement action and continue to take a resolute stance in advocating higher and more substantial penalties for businesses which engage in anti-competitive or other conduct that carries significant consumer harm”*.

The Annual Report also indicates that we are likely to see continued action from the ACCC in its areas of priority. For example, in relation to broadband services, the Annual Report states that the consumer protection issues in this sector *“have become one of the most prominent areas of focus in the past two years”*, and with the rollout of the national broadband network not yet complete, we can expect this area of focus to continue. Other areas which are likely to continue to be in the ACCC’s crosshairs include:

- Consumer issues in new car retailing;
- Consumer guarantee rights, particularly in relation to systemic issues involving large or national traders misrepresenting or attempting to avoid these rights;
- Product safety issues, particularly in online marketplaces;
- “truth in advertising” issues, particularly in cases involving large companies engaging in conduct on a national basis, and there is a likelihood that the conduct of larger businesses can influence the behaviour of other market participants.

Finally, the ACCC has also indicated that competition and consumer issues concerning the use of digital platforms, algorithms and consumer data will continue to be a focus in the year to come. The ACCC is currently undertaking an Inquiry into digital platforms, with the preliminary report due to be submitted to the Treasurer by 3 December 2018, and the final report due by 3 June 2019. Importantly, the ACCC has indicated its intention to consider digital platforms from both a competition and consumer perspective, and to focus on (among other things) improving transparency for consumers in this area.

ENDNOTES

1. A copy is available here: <https://www.accc.gov.au/publications/accc-aer-annual-report/accc-aer-annual-report-2017-18-0>

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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