

ACCC'S 2021 ENFORCEMENT PRIORITIES

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Legal Briefings - By **Paul Burton and Saloni Sharma**

ACCC EXPECTS ANOTHER BUSY YEAR IN 2021

Delivering his 10th annual CEDA address yesterday, Chair of the Australian Competition and Consumer Commission (**ACCC**), Rod Sims, announced the ACCC's compliance and enforcement priorities for 2021. These priorities highlight the areas in which the ACCC will focus its litigation and enforcement activity over the next 12 months, some of which will continue the ACCC's work from 2020.

Key areas of note are:

- The ACCC expects to commence 2-3 further criminal cartel prosecutions this year, and has a "full slate" of cartel investigations for future years;
- Over the next 12 months, the ACCC will closely watch pricing and selling practices of essential services. The ACCC will also particularly focus on a number of key sectors of the economy including the digital, finance, travel and aviation sectors; and
- The ACCC will continue advocating for law reform to:
 - price regulate stand-alone monopoly infrastructure service providers;

- recalibrate the merger laws so that they “achieve the balance required to ensure good outcomes for consumers and the economy”; and
- introduce a prohibition on unfair trading practices, and penalties for unfair contracts and consumer guarantee failures.

COVID-19 AUTHORISATIONS

During 2020, the ACCC granted a number of [authorisations](#) allowing competitors to coordinate their behaviour to enable the supply of essential goods and services, distribution of consumer and business relief and to ensure commercial viability and competition between businesses in post-pandemic markets.

The authorisations granted in 2020 will cease by 30 September 2021, subject to any revisions to the ACCC’s current plans.

COURT PROCEEDINGS AND INVESTIGATIONS

The ACCC’s competition enforcement activities remain active, with the ACCC having commenced a number of criminal cartel prosecution cases in a number of different sectors which are expected to proceed to trial during 2021. In addition, the ACCC has noted it has a ‘full slate of investigations’ and expects to commence 2 – 3 new civil or criminal cartel cases this year and in future years.

Despite some recent court losses, the ACCC will continue to pursue cases it believes to be in the public interest. We expect the ACCC will actively monitor conduct which potentially results in significant consumer detriment and will not hesitate to commence court proceedings where such detriment is found to exist. A recent example involved Telstra’s supply of mobile phone services to over 100 indigenous consumers.

Mr Sims also noted that acquisitions in the Australian banking sector which is ‘dominated by four major banks’ will be closely monitored, including those involving fintech start-ups such as NAB’s proposed acquisition of neobank, 86400, in respect of which the ACCC has recently commenced a public review.

NBN NETWORK

As the current commercial arrangements come to end in December 2022, the ACCC will prioritise the establishment of a regulatory framework for the multi-technology NBN network to ensure the efficient utilisation of the significant public investment made in the network. The views of industry and other stakeholders will play a key role in the development of any future regulatory framework developed by the ACCC.

PRIORITIES FOR 2021

The ACCC's 2021 enforcement priorities reflect the breadth of the ACCC's activity, with a number of new and refined priorities. In 2021, the ACCC will focus, in particular, on:

- **Pricing and selling practices of essential services** such as electricity and telecommunications – the ACCC remains concerned about a lack of transparency in the pricing of these services. As the law now requires electricity retailers to pass on significant reductions in wholesale electricity costs, the ACCC will be actively monitoring costs and retailer's responses.
- **Digital platforms** – a number of cases have already been commenced against a number of digital platforms. Current investigations will be advanced with some further cases expected to follow. The ACCC is also studying 'Adtech' and 'apps' markets in conjunction with overseas consumer and competition regulators and by consulting widely with various stakeholders in order to address controversial issues.
- **Finance sector** – the ACCC will be following through on the recommendations contained in its Home Loan Price Inquiry report which was released to the Treasurer in December 2020. Several enforcement investigations involving the sector are well advanced and further announcements will be made in the coming months. The ACCC will also be carefully monitoring the debt collection industry for any signs of concerning behaviour.
- **Travel sector** – during 2020 the ACCC's role in this sector grew exponentially with a 500% increase in complaints regarding the sector. The ACCC's COVID-19 Enforcement Taskforce will continue to actively monitor the forward sales practices of travel businesses to ensure compliance with the consumer law, especially the misleading and deceptive conduct provisions.
- **Aviation sector** – the ACCC will monitor the aviation sector, as directed by the Treasurer in June 2020, and will be reporting quarterly to the Government on prices, costs and profits of the Australian domestic aviation sector. In addition, the ACCC will be closely monitoring the entry of regional airline, REX, onto the key east coast routes as well as REX's ability to secure access to slots at Sydney Airport.
- **Commercial construction** – the ACCC already has a number of cases on foot, but more are expected to follow in 2021.
- **Agriculture sector** – the ACCC remains concerned about the supply of perishable agriculture products. The ACCC will be prioritising compliance with the Horticulture Code.
- **Caravan sector** – the ACCC is concerned about the increasing number of complaints about failures by caravan manufacturers and dealers to comply with their consumer guarantee obligations.

- **Product safety** – the implementation of the new safety standards about button batteries will be a key priority for the ACCC as well as working with the States and Territories on monitoring compliance with a new mandatory safety standard for quad bikes.
- **Funeral businesses** – many of these businesses possess significant market power and use that power to bundle services and to prevent new entrants from effectively competing in the market. The ACCC remains concerned about such practices and will take action where appropriate.

ACCC TO CONTINUE TO ADVOCATE FOR LAW REFORM

Mr Sims also noted that the ACCC will continue to advocate for law reform in areas where it considers reform is necessary. Some of the areas he identified were:

1. **National access regime:** The ACCC will continue to advocate for legislative reform to price regulate non-vertically integrated “monopoly” infrastructure.

The Chair noted, “Our current regime is not meeting that objective in relation to stand-alone monopoly infrastructure. Given the economic damage to the businesses using such infrastructure, this is not consistent with the objective of efficiency and is an unnecessary drag on the economy.”

2. **Consumer law framework:** The ACCC will continue to advocate for changes to the consumer law framework to incorporate more robust provisions in respect of:

- consumer guarantees – the inclusion of a penalty provision relating to consumer guarantees;
- unfair contract terms;
- the inclusion of an unfair trading practice provision; and

- establishing national product safety standards.

3. **Merger approval framework:** The current merger clearance framework in Australia remains an ongoing area of concern for the ACCC. Mr Sims noted, *“Merger parties and the courts are focused on what is likely to happen in the future without the acquisition, which is challenging to 'prove' in court. While this is a relevant issue to be considered, it is also open to manipulation, and the focus on the counterfactual in many cases risks overlooking the likely anticompetitive effects of the merger itself.”*

In this context, the ACCC will explore options for reform with a view to ‘rebalance’ the national merger laws with an increased focus on the preservation and promotion of competition for the ultimate benefit of consumers.

WHAT SHOULD YOU DO?

We recommend that businesses, particularly those dealing in the ACCC’s focus areas, get well-acquainted with the ACCC's priorities for the year and prepare for increased scrutiny. As the ACCC continues to push for record high penalties for both consumer and competition law contraventions, businesses operating in Australia should proactively review their own business practices and tackle compliance issues head on. Businesses should ensure effective compliance programs are in place and seek legal advice where necessary to get on the front foot of addressing the ACCC’s concerns.

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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