










2022 Australian Competition and Consumer Law Outlook

PwC Legal

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The year ahead & ACCC enforcement priorities for 2022-23

With the ACCC recently announcing its 2022-23 enforcement priorities and a new ACCC Chair to succeed Rod Sims later this month, we share our insights and expectations on key competition and consumer law issues and developments that may impact your business for the remainder of 2022 and beyond.

Snapshot of ACCC enforcement priorities 2022-23

Consumer and fair trading issues relating to:

- Environmental claims and sustainability
- Manipulative or deceptive advertising and marketing practices in the digital economy
- COVID-19 pandemic
- Pricing and selling of essential services (focus on energy and telecommunications)
- Consumer guarantees (focus on high value goods including motor vehicles, caravans)
- Small business protections, including in agriculture and franchising
- Product safety, including in relation to button batteries and issues for young children

Competition issues relating to:

- Global and domestic supply chains, particularly if disrupted by COVID-19 pandemic
- Exclusive arrangements by firms with market power
- Anti-competitive conduct in the financial services sector (focus on payment services)
- Digital platforms

Enduring ACCC priorities

- Cartel conduct
- Anti-competitive conduct
- Product Safety
- Vulnerable or disadvantaged consumers
- Conduct impacting indigenous Australians

New ACCC Chair: After more than 10 years with Rod Sims at the helm, highly regarded competition lawyer Gina Cass-Gottlieb has been nominated to succeed Rod Sims as ACCC Chair from 21 March 2022. With Ms Cass-Gottlieb having spent more than two decades in private practice assisting businesses in their dealings with the ACCC, it will be interesting to see what new perspectives and direction this change in leadership may bring to the ACCC in the coming years.

Cartel conduct to remain an enduring ACCC priority

Cartel conduct to remain an enduring ACCC priority despite challenges with contested criminal proceedings

The CDPP/ACCC have recently continued their poor track record in prosecuting contested criminal cartel cases, which require a higher standard of proof than civil cartel proceedings (i.e. beyond reasonable doubt rather than balance of probabilities) and involve different procedural and evidentiary considerations.

In February 2022, the CDPP withdrew all remaining charges against Citigroup, Deutsche Bank and four senior executives for alleged criminal cartel conduct arising from an ANZ institutional share placement in 2015. This followed an earlier contested outcome in June 2021 where a Federal Court jury acquitted Country Care and 2 individuals of 8 criminal cartel offences in relation to alleged attempted price fixing and bid rigging involving the supply of assistive technology products used in rehabilitation and aged care.

However, the CDPP/ACCC have had some success in prosecuting uncontested criminal cartel proceedings (i.e. where the accused pleads guilty rather than contesting the charges) since the criminal cartel provisions were first introduced in 2009. This includes three convictions in related cases against international shipping lines with penalties totalling \$83.5 million, and guilty pleas by individuals in two other recent cases in the pharmaceutical and money remittance sectors.

We expect cartel conduct to remain a key ACCC focus for 2022 and beyond. ACCC Chair Rod Sims noted in March 2022 that the ACCC “... currently have 6 cartel matters before the Court, and a number of other cartel investigations on foot”, which will continue to play out in the coming year.



... While there can be challenges involved in bringing criminal cartel prosecutions, particularly due to the complexity of the cartel laws, we will continue our efforts to deter, detect and dismantle cartels, and will continue to refer serious cartel conduct to the CDPP for its consideration.”

(ACCC media release, “CDPP withdraws charges in bank criminal cartel case”, 11 February 2022)

ACCC to prioritise new areas of anti-competitive conduct

The ACCC has announced two new competition priorities for 2022-23, in addition to a continued focus on competition issues relating to digital platforms and the financial services sector, and anti-competitive conduct remaining an enduring ACCC enforcement priority more generally

Two new competition priorities



- **Competition issues in global and domestic supply chains (particularly where disrupted by COVID-19 pandemic):** The ACCC announced in February 2022 that it had formed a “five eyes working group” with competition authorities in the US, UK, Canada and NZ to share intelligence and work together to detect and prosecute attempts by businesses to use the pandemic as a veil for illegal conduct, including collusion in global supply chains.
- **Exclusive arrangements by firms with market power that impact competition:** The ACCC intends to target firms with market power restricting access to bottleneck goods or services which impact the ability of competitors or new entrants to compete, and also identified “most favoured nation clauses” that prevent competitors from offering a better deal as being of potential concern.

Continued focus on digital platforms and financial services



- **Enforcement issues re: digital platforms:** The ACCC will continue to look at “*issues relating to payments, search, apps and adtech*”, while its fourth interim report for the Digital Platforms Inquiry (due 31 March 2022) will examine competition and consumer issues in general online retail marketplaces. The ACCC has also recently released a discussion paper seeking views on whether there is a need for a new regulatory framework and tools to address competition and consumer concerns with digital platform services. Submissions on this paper are due by 1 April, with the ACCC’s findings to form the basis of its fifth interim report for the Digital Platforms Inquiry to be released by 30 September 2022.
- **Anticompetitive conduct in the financial services sector:** The ACCC has flagged a continued focus on payment services, including least cost routing, competition in relation to mobile digital wallet servers, and consideration of Apple’s practices re: third party access to near field communication technology on mobile devices and use of Apple Pay.

Anti-competitive conduct remains an enduring priority



- **Misuse of market power:** We expect the ACCC to continue to focus more broadly on anticompetitive conduct including misuse of market power, following their first successful case in 2021 brought under the revised misuse of market power provisions. In that case, the Federal Court declared by consent that Tasmanian Ports Corporation engaged in conduct that had the likely effect of substantially lessening competition in the markets for supply of certain marine services at Tasmanian ports.
- **NSW Ports case:** Another case to watch in this area is the ACCC’s current appeal against the Federal Court’s decision to dismiss the ACCC’s proceedings against NSW Ports, which alleged anti-competitive conduct relating to certain Port Commitment Deeds and also raised issues of derivative Crown immunity.

Potential merger reforms on the horizon?

The ACCC's wish list for merger reform includes:

- A single new formal merger review process, where it would be mandatory to obtain ACCC clearance prior to completing any acquisition over certain thresholds, the ACCC would only clear a transaction if satisfied it was not likely to substantially lessen competition, and there would only be limited merits review of ACCC merger decisions by the Australian Competition Tribunal;
- Changes to the merger test including reducing the standard of “likely” to substantially lessen competition from “a real commercial likelihood” to “a possibility that is not remote”, deeming that certain acquisitions involving firms with substantial market power substantially lessen competition (i.e. without the ACCC having to prove this), and other changes to factors relevant to merger assessments; and
- Reforms to deal with acquisitions by large digital platforms, including a tailored merger test.

ACCC to continue to press for merger reform in 2022-23

The ACCC has continued its push for substantive merger reform in Australia. ACCC Chairman Rod Sims kicked off the debate in August 2021 when he initially outlined the ACCC’s desire for a significant overhaul of Australia’s existing merger regime, arguing that “... *when we consider the merger control system operating in Australia, including the informal process and the need to take enforcement action and prove future anti-competitive effects in Court, we believe it is skewed too far towards letting acquisitions through*”.

More recently, the ACCC has used a media release which accompanied the publication of an ACCC report in February 2022 reviewing the competition impact of past merger decisions, to support its continued calls for merger reform in Australia. ACCC Chair Rod Sims cited examples where the ACCC did not receive complete information during prior merger reviews as highlighting weaknesses in the current informal review process, and instances “*where the parties are threatening to complete the merger before the ACCC has reached a view*”, as supporting the introduction of a mandatory merger notification regime in Australia.

If adopted, the ACCC’s proposed changes would represent a major departure from the established merger regime in Australia, and would be likely to result in some mergers which would be lawful under the current merger regime instead being subject to challenge. There also remain significant questions as to whether such reforms are necessary or justified, with the ACCC already having significant tools at its disposal to gather information and prevent mergers in the relatively small number of cases which it considers are likely to contravene the law, for example:

- In October 2021, the ACCC successfully sought an interlocutory injunction from the Federal Court to restrain IVF service provider Virtus Health from completing its acquisition of Adora Fertility, with Virtus subsequently announcing in December 2021 that it had decided not to proceed with the acquisition; and
- The ACCC continues to use its compulsory information gathering powers in reviewing contentious mergers, with the ACCC’s Annual Report 2020-21 indicating that it did so on 7 occasions during that period.

Given there has been no draft legislation or consultation on the ACCC’s reform proposals by the Federal Government to date, no changes to the merger law are expected before the upcoming Federal election, and there will likely be further industry consultation even assuming the new government is in favour of merger reform. However, this may continue to be a key area for vigorous debate in coming year, with outgoing ACCC Chair Rod Sims confirming in March 2022 that “*Continuing the discussion of these issues will remain a priority for the ACCC in 2022-23*”. It will also be interesting to see whether the ACCC’s incoming Chair shares the same appetite for merger reform as her predecessor.

Australian Consumer Law enforcement priorities



Environmental claims and sustainability

With customers increasingly considering the environmental credentials of their suppliers in making purchasing decisions, the ACCC has identified “greenwashing” as a new enforcement priority for 2022-23.

The ACCC’s focus will extend beyond consumer goods to other areas such as claims made in manufacturing and energy sectors (e.g. misleading claims about the carbon neutrality of production processes, or falsely promoting environmental or green credentials to capitalise on consumer preferences).

Businesses should carefully consider any representations they make concerning environmental claims or sustainability (whether that be in marketing, formal reporting, social media or any other forum) to ensure that these can be substantiated. The ACCC will work closely with other regulators including ASIC and the Clean Energy Regulator in this area.



Consumer Guarantees

The ACCC will continue to focus on non-compliance with consumer guarantees, which it identified as the issue most reported to the ACCC by consumers, particularly in relation to motor vehicles and caravans. It is a timely reminder for businesses that from 1 July 2021, the monetary threshold for determining whether a person acquires products as a “consumer” under the ACL increased from \$40,000 to \$100,000, broadening the net of suppliers likely to be caught by consumer guarantees.

The ACCC is also advocating for new prohibitions for non-compliance with consumer guarantees and supplier indemnification requirements (see slide 11 regarding the Government’s recent consultation on this issue).



Deceptive practices in the digital economy

The ACCC will target manipulative or deceptive advertising and marketing practices in the digital economy. Areas of likely focus will include:

- False scarcity reminders or countdown timers, targeted advertising using consumer’s own data to exploit their characteristics, pre-selected add-ons and interfaces which discourage unsubscribing;
- Other practices which distort consumer choice, such as manipulation of online reviews, or influencers who do not disclose they are paid to promote products they are endorsing.

Important cases to watch in the coming year include:

- The penalty decision in the Trivago case, concerning misleading conduct relating to cheapest hotel room rates (the ACCC is reportedly seeking \$90 million)
- ACCC proceedings against Google (awaiting penalty) and Facebook (awaiting initial judgment), both concerning allegations of misleading consumers as to the collection and use of personal data.

The Google and Facebook cases highlight the ACCC’s ongoing willingness to pursue cases in the digital space at the intersection of competition, consumer and privacy law. The ACCC also continues to advocate for a broader prohibition on unfair practices to address what it perceives as gaps in this area of the law (see also slide 11).

Australian Consumer Law enforcement priorities (cont'd)



COVID-19 pandemic issues

The ACCC has done a good job so far in adjusting its focus to address new consumer issues arising during the course of the COVID-19 pandemic, most recently working with the Australian Federal Police and the TGA to address public concerns regarding the supply of rapid antigen tests and reports of excessive pricing by some suppliers.

With COVID-19 continuing to cause disruption and cancellations in the travel and event sectors, we expect these sectors to remain on the ACCC's radar in the coming months as businesses and their customers continue to strive towards the "new normal".



Pricing and selling of essential services

Following a number of recent cases against telecommunications and energy companies for false and misleading representations, the ACCC has retained its priority of consumer issues arising from the pricing and selling of essential services, and is expected to continue its close monitoring of these sectors.

Ongoing concerns raised by the ACCC include the lack of transparency in customer agreements and misleading advertising, and the impact this has on vulnerable and disadvantaged customers.



Product safety

Product safety remains a key priority for the ACCC, with particular areas of focus for 2022-23 to include compliance with button battery safety standards and consumer product safety issues for young children.

The ACCC will also continue to advocate for the introduction of a general safety provision that prohibits the supply of unsafe products to consumers, and support the Government's initiatives to make mandatory standards under the ACL more flexible (see further slide 11).



Protection of small businesses (particularly agriculture & franchising)

The ACCC has stated that it will continue to ensure small business receive the protections of the competition and consumer laws when dealing with larger businesses.

A key ACCC focus for the agriculture sector this year will be ensuring compliance with relevant codes of conduct, including in the dairy and horticulture sectors.

The other priority will be the franchising sector where the ACCC has noted potential breaches of the Franchising Code and ACL.

Upward trend in Australian Consumer Law penalties

Uptick in penalties imposed for Australian Consumer Law contraventions likely to continue

The significant upward trend in Federal Court penalties for Australian Consumer Law contraventions is likely to continue in 2022 and beyond. Maximum penalties for companies under the ACL were increased in 2018 from \$1.1 million per contravention to the greater of \$10 million, three times the benefit obtained, or 10% of annual turnover per contravention (i.e. the same as for breaches of the competition provisions of the Competition and Consumer Act). At that time in 2018, the highest ever aggregate penalty imposed in an ACL case was \$10 million, compared to \$46 million for a cartel conduct case.

However, since that time the ACCC has continued to successfully press the Federal Court to impose increasingly higher penalties for ACL contraventions, including in the following recent cases:

- A record \$153m penalty for AIPE for engaging in unconscionable conduct in enrolling consumers in online diploma courses;
- \$125 million penalty for Volkswagen for false representations concerning compliance with Australian diesel emissions standards, which Volkswagen unsuccessfully sought special leave to appeal to the High Court; and
- \$50m penalty for Telstra following admissions of unconscionable conduct in the sale of post-paid mobile products to Indigenous consumers.

Notably, the relevant conduct in each of these cases predated the change in maximum penalties under the ACL in 2018 (i.e. each of these cases were considered under the previous penalty regime of \$1.1 million per contravention), which suggests that the penalties may have been even higher had current regime applied. The ACCC is also reportedly seeking a penalty of at least \$90m against Trivago, following the Federal Court's finding that the hotel booking website misled consumers by representing that the cheapest rooms were displayed when in fact, the displays favoured hotels which paid the most (see also slide 7 above).



... The magnitude of these penalties should serve as a significant warning to all Australian businesses that there can be very serious consequences for those who choose to engage in misleading and unconscionable conduct."

(ACCC media release, "Record \$153 million in penalties ordered against training college AIPE", 30 December 2021)

Consumer Data Right update



Overview of the CDR Regime

The Consumer Data Right (**CDR**) was introduced to give consumers greater control over their consumer data. As set out in further detail in our 2020 Privacy Outlook [publication](#), the CDR creates a data-transfer and access regime, giving consumers access, and the ability to request access for other organisations, to data relating to the individual that is held by businesses. It enables a consumer to direct a data holder to provide their CDR data to an accredited data recipient, in a CDR compliant format.



The legislative framework

The CDR was enacted by the *Treasury Laws Amendment (Consumer Data Right) Act 2019* (Cth), which inserted a new Part IVD into the *Competition and Consumer Act 2010* (Cth).

Section 56AA outlines the objective of the CDR to enable consumers in certain sectors of the Australian economy to access information relating to themselves regulated businesses within designated sectors, and have that information disclosed to them (or an accredited person subject to privacy safeguards) safely, efficiently and conveniently. The regime also enables consumers to access information about goods or services, contributing to an economy with choice and competition, to promote public interest.

The Competition and Consumer (Consumer Data Right) Rules 2020 (the **CDR Rules**) provide the framework for how the CDR operates. The CDR Rules define the elements for consent, outline the accreditation framework and elaborate on the privacy aspects of the scheme. There are also 'data standards' that are made by the Data Standards Body, including standards about the format and process for transferring data.



Designated Sectors

A sector needs to be designated by the Minister to be part of the CDR system. Currently, only the banking, energy and telecommunications sectors have been designated.

Last year, Treasury released a Consumer Data Right Strategic Assessment Consultation paper seeking input from interested parties on the potential expansion of CDR to other sectors including groceries, health insurance, loyalty schemes, superannuation, transport, health, general insurance and education.



Upcoming developments

February 2022: Customers of the non-major banks can now share information on overdrafts and business finance (Phase 3 data).

July 2022: Federal Government review of the implementation of the CDR due by 1 July 2022.

October 2022: Product reference data-sharing commences for energy sector.

November 2022: Consumer data-sharing commences for customer data held by the Australian Energy Market Operator, AGL Energy Group, Origin Energy Group and Energy Australia Group.

A Government press release announcing the designation of the telecommunications section on 24 January 2022 stated that it would shortly commence consultations on the rules to apply to the telecommunications sector. It also indicated that "*After telecommunications, the next step will be to expand the Consumer Data Right to 'Open Finance'... [to] allow consumers to compare and save across a greater range of financial products covering not only banking, but also general insurance, superannuation, merchant acquiring and non-bank lending service providers*".

Potential changes to the Australian Consumer Law

There are a number of important potential changes to the Australian Consumer Law in the pipeline that businesses should be aware of, at varying stages of development and implementation

New bill to introduce penalties and other reforms for unfair contract terms

A new Bill was introduced into Parliament in February 2022 proposing significant changes to the unfair contract terms regime for small businesses, including:

- Introducing new prohibitions to make it illegal to propose, apply or rely upon an unfair contract term;
- Introducing significant penalties for contravening these new prohibitions (being the greater of \$10m, three times the value of the benefit received or 10% of annual turnover for companies and \$500,000 for individuals), as well as other remedies such as the ability of a Court to void, vary or refuse to enforce part or all of a contract, injunctions, public warning notices and disqualification orders;
- Significantly expanding the class of contracts covered under the unfair contract term provisions. This includes removing the upfront contract value thresholds for businesses under the ACL (although a \$5m threshold is retained under the ASIC Act), and further amending the definition of small business contract to require one party to a contract to either be a business that employs fewer than 100 persons (a major increase from the current limit of 20 persons) or has an annual turnover of less than \$10m; and
- Further clarifying the definition of a standard form contract and the matters which a Court must take into consideration.

If ultimately adopted by the Government in its current form, the new law would take not effect until 12 months after it was passed, which would give businesses some time to adjust their contracts and processes if required.

Other potential changes to the ACL

- **Consultation on new remedies for consumer guarantees and supplier indemnification failures:** The Federal Government has recently consulted on potential changes to strengthen the consumer guarantee provisions, with options being considered including (among others) new prohibitions for not providing an appropriate remedy for consumer guarantee or supplier indemnification failures, supported by new penalties and other enforcement mechanisms. Submissions closed on 11 February 2022.
- **Consultation on overseas safety standards:** The Federal Government has consulted on options to amend mandatory safety and information standards provisions to make it easier for the Minister to recognise overseas standards, and to better enable updates to voluntary Australian and overseas standards recognised under Australian law. Submissions closed on 21 January 2022.
- **Other potential areas for ACL reform** – Outgoing ACCC Chair Rod Sims has continued to advocate for further ACL reform during the remainder of his tenure, noting in February 2022 that “*There are law change proposals at various stages of consideration... such as including both a general safety provision and an unfair practices provision in the CCA, but progress is slow and large established business resistance is often strong and effective*”. With many other more immediate priorities in the Government’s agenda and an upcoming Federal election, it remains to be seen if or when these further potential reforms may progress in 2022.

Proposed changes to the National Access Regime



The Government has recently consulted on the draft *Competition and Consumer Amendment (National Access Regime) Bill 2021*, which it stated was aimed at improving the timeliness of processes under the National Access Regime. Key proposals included:

- Removing the Australian Competition Tribunal's ability to review the merits of declaration and revocation decisions;
- Limiting repeat declaration and revocation processes, where the relevant infrastructure service has been the subject of a previous declaration or revocation process in the previous 10 years or if there has been a material change of circumstance; and
- Terminating arbitration proceedings and determinations where the underlying declaration is revoked or expires.

While National Access Regime timeframes have long been an area for improvement, removing the Tribunal's ability to review the merits of declaration and revocation decisions would be a very significant departure from current practice if implemented. As part of its response to an earlier consultation paper, the Business Law Section of the Law Council of Australia noted that 10 of the 18 applications for declaration or revocation of declaration since Part IIIA was enacted have been the subjects of Tribunal merits review, with the Tribunal reaching an alternate decision to the Minister in 6 of those cases.

Consultation on the draft bill closed on 14 January 2022. Although the draft legislation has not yet been introduced into Parliament, it remains an important issue to watch in 2022.

Key Australian competition and consumer law contacts

For a deeper discussion of how these competition and consumer law issues might affect your business in 2022, please contact:



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