



Australian
Competition &
Consumer
Commission



COMPLIANCE AND ENFORCEMENT POLICY

www.accc.gov.au

Policy purpose

This policy sets out the principles adopted by the Australian Competition and Consumer Commission to achieve compliance with the law, and outlines the ACCC's enforcement powers, functions, priorities, strategies and regime.

ACCC jurisdiction and available enforcement options

The ACCC is Australia's peak consumer protection and competition agency. The ACCC is an independent statutory government authority serving the public interest. Most of the ACCC's enforcement work is conducted under the provisions of the *Competition and Consumer Act 2010*.

The purpose of the Competition and Consumer Act is to enhance the welfare of Australians by:

- promoting competition among business
- promoting fair trading by business
- providing for the protection of consumers in their dealings with business.

The Competition and Consumer Act provides the ACCC with a range of enforcement remedies, including court-based outcomes and court enforceable undertakings. The ACCC also resolves many matters administratively. These options are discussed more fully below.

Australian Consumer Law

The Australian Consumer Law is the national consumer law and is applied at the Commonwealth level and in each state and territory.

At the Commonwealth level it is included as part of the Competition and Consumer Act. Compliance and enforcement with the law will be on a 'one-law, multiple-regulators' model, with existing consumer regulators enforcing the uniform law.

This policy is consistent with and expands on the principles in the ACL Compliance and Enforcement Guide and outlines the ACCC's approach to compliance and enforcement more generally.

Prioritisation of enforcement matters and the exercise of the ACCC's discretion

In enforcing the provisions of the Competition and Consumer Act, the ACCC's primary aims are to:

- stop the unlawful conduct
- deter future offending conduct
- undo the harm caused by the contravening conduct (for example by corrective advertising or restitution for consumers and businesses adversely affected)
- encourage the effective use of compliance systems
- where warranted, punish the wrongdoer by the imposition of penalties or fines.

The ACCC cannot pursue all the complaints it receives and the ACCC is unlikely to become involved in resolving individual disputes. While all complaints are carefully considered, the ACCC's role is to focus on widespread consumer detriment and the ACCC exercises its discretion to direct resources to the investigation and resolution of matters that provide the greatest overall benefit for consumers.

To assist with this determination, the ACCC gives enforcement priority to matters that demonstrate one or more of the following factors:

- conduct of significant public interest or concern
- conduct resulting in a substantial consumer (including small business) detriment
- anticompetitive conduct involving cartel behaviour or misuse of market power
- unconscionable conduct, particularly involving large national companies or traders
- conduct demonstrating a blatant disregard for the law
- conduct involving issues of national or international significance
- conduct detrimentally affecting disadvantaged or vulnerable consumer groups
- conduct in concentrated markets which impacts on small business consumers or suppliers
- conduct involving a significant new or emerging market issue
- conduct that is industry-wide or is likely to become widespread if the ACCC does not intervene
- where ACCC action is likely to have a worthwhile educative or deterrent effect, and/or
- where the person, business or industry has a history of previous contraventions of competition, consumer protection or fair trading laws.

Where appropriate the ACCC may also pursue matters that test or clarify the law.

The ACCC reviews its priorities regularly. In addition to those matters that demonstrate the factors above, the ACCC is currently prioritising its work in the following areas:

- consumer protection in the telecommunications and energy sectors
- conduct that may impede emerging competition involving online traders
- competition and consumer issues in highly concentrated sectors, in particular in the supermarket and fuel sectors
- carbon pricing representations
- the ACL consumer guarantees regime
- consumer protection issues impacting on Indigenous consumers.

When the ACCC decides not to pursue enforcement action in relation to complaints it receives, it may nevertheless:

- provide information to the parties to help them deal with the matter and gain a better understanding of the Competition and Consumer Act even where a possible contravention of the Act is unlikely
- postpone or cease investigations where insufficient information is available to it, with a view to later investigation should further information become available
- draw the possible contravention to relevant parties' attention and provide information to encourage rectification and future compliance where the possible contravention appears accidental, of limited detriment to consumers, or of limited gain to the business concerned
- place the relevant parties on notice about the ACCC's concerns and the possibility of future investigation and action should the conduct continue or re-emerge
- deal with the matter informally where a business has promptly and effectively corrected a possible contravention and has implemented measures to prevent recurrence.

While the ACCC relies on complaints to identify issues and inform its compliance and enforcement activities, the ACCC is not a complaint handling body that seeks to resolve every approach. It is unlikely to pursue matters that:

- are one-off, isolated events, unless the conduct involves a blatant and deliberate breach of the law
- are more appropriately resolved directly between the parties under an industry code (for example by way of mediation)

- involve issues more effectively dealt with at the local level by state and territory agencies (for example by way of individual dispute resolution of a complaint)
- are primarily contractual or private right disputes (the Competition and Consumer Act provides complainants with a private right of action in these circumstances).

Principles and approaches underlying this policy

The ACCC exercises its enforcement powers independently in the public interest with integrity and professionalism and without fear, favour or bias.

The ACCC's enforcement response is proportionate to the conduct and resulting harm, and the implementation of the ACCC's enforcement policy is governed by the following guiding principles:

- Transparency—this has two aspects:
 - the ACCC's decision-making takes place within rigorous corporate governance processes and is able to be reviewed by a range of agencies, including the Commonwealth Ombudsman and the courts
 - the ACCC does not do private deals—every enforcement matter that is dealt with through litigation or formal resolution is made public.
- Confidentiality—in general, investigations are conducted confidentially and the ACCC does not comment on matters it may or may not be investigating.
- Timeliness—the investigative process and the resolution of enforcement matters are conducted as efficiently as possible to avoid costly delays and business uncertainty.
- Consistency—the ACCC does not make ad hoc decisions; it sets its focus clearly to give business certainty about its actions.
- Fairness—the ACCC seeks to strike the right balance between voluntary compliance and enforcement while responding to many competing interests.

ACCC compliance and enforcement strategy

To achieve its compliance objectives the ACCC employs three flexible and integrated strategies:

- Enforcement of the law, including resolution of possible contraventions both administratively and by litigation.
- Encouraging compliance with the law by educating and informing consumers and businesses about their rights and responsibilities under the Competition and Consumer Act.
- Working with other agencies to implement these strategies.

These strategies are discussed further below.

The ACCC has two additional enforcement strategies, the cooperation policy and the immunity policy for cartels. These are discussed briefly below.

Cooperation policy

The ACCC encourages persons and companies who might have contravened the Competition and Consumer Act to come forward and cooperate with the ACCC to address these possible contraventions.

The ACCC may recognise cooperation by:

- permitting complete or partial immunity from ACCC action
- making submissions to the court for a reduction in penalty, or
- agreeing to an administrative settlement instead of litigation.

This policy is flexible, with the ACCC determining each case on its merits. Further information regarding the ACCC cooperation policy for enforcement matters is available at the ACCC website www.accc.gov.au.

Immunity policy for cartels

The ACCC also has an immunity policy designed to encourage self-reporting of cartel involvement. The immunity policy confers immunity from ACCC action to the first eligible cartel participant to report involvement in a cartel. Immunity is provided subject to certain conditions being met, including full, frank and truthful disclosure and continued cooperation with the ACCC's investigation and any subsequent legal proceedings against other participants. Further information regarding the ACCC immunity policy for cartels is available at the ACCC website www.accc.gov.au.

Compliance and enforcement outcomes

The ACCC uses a range of compliance and enforcement tools in order to encourage compliance with the Competition and Consumer Act. In deciding which compliance or enforcement tool (or the combination of such tools) to use, the ACCC's first priority is always to achieve the best possible outcome for the community.

Education, advice and persuasion

The ACCC makes comprehensive use of educational campaigns to provide information and advice to consumers and businesses, and to use persuasion to encourage compliance with the Competition and Consumer Act. The ACCC takes the firm view that prevention of a breach of the Competition and Consumer Act is always preferable to taking action after a breach has occurred.

The ACCC provides targeted and general publications; it liaises broadly with business, consumer and government agencies about the Competition and Consumer Act and the ACCC's role in its administration. The ACCC aims to ensure that consumers are sufficiently well-informed to benefit from, and stimulate, effective competition.

Communicating its enforcement role is fundamental to the effectiveness of the ACCC's information and liaison activities.

Voluntary industry self-regulation codes and schemes

The ACCC encourages and assists genuine voluntary compliance initiatives by individual businesses and industry sectors. These initiatives range from individual trader compliance programs to sector-wide initiatives, including industry charters and voluntary codes of conduct that apply the requirements of the Competition and Consumer Act to the specific circumstances of a particular industry sector.

Administrative resolution

In some cases—for example, where the ACCC assesses potential risk flowing from conduct as low—the ACCC may accept an administrative resolution. Depending on the circumstances, administrative resolutions can range from a commitment by a trader in correspondence to a signed agreement between the ACCC and a trader setting out detailed terms and conditions of the resolution. Administrative resolutions generally involve

the trader agreeing to stop the conduct and compensate those who have suffered a detriment because of it, and to take other measures necessary to ensure that the conduct does not recur. The ACCC is unlikely to accept an administrative resolution for conduct that recurs after having been subject to a previous administrative resolution.

Infringement notices

The ACCC may issue an infringement notice where it believes there has been a contravention of the Competition and Consumer Act that requires a more formal sanction than an administrative resolution but where the ACCC considers that the matter may be resolved without legal proceedings.

Section 87B enforceable undertakings

The ACCC often resolves contraventions of the Competition and Consumer Act by accepting court enforceable undertakings under s. 87B of the Act. In these undertakings, which are on the public record, companies or individuals generally agree to:

- remedy the mischief
- accept responsibility for their actions
- establish or review and improve their trade practices compliance programs and culture.

Court cases

Legal action is taken where, having regard to all the circumstances, the ACCC considers litigation is the most appropriate way to achieve its enforcement and compliance objectives. The ACCC is more likely to proceed to litigation in circumstances where the conduct is particularly egregious (having regard to the factors set out on page 2), where there is reason to be concerned about future behaviour or where the party involved is unwilling to provide a satisfactory resolution.

Under the Competition and Consumer Act, legal action may result in the court:

- making declarations that a company or individual has contravened the Act
- making injunctions restraining current or future conduct, or requiring respondents to take certain action
- requiring respondents to publish notices about their conduct and corrective advertising, and to disclose relevant information to others (for example to their customers)
- making findings of fact that show contraventions of the Act so that damages may be recovered by consumers and businesses affected by the conduct
- making orders to achieve financial redress for consumers or businesses harmed by the conduct
- making various non-punitive orders, including community service or probation orders (which may include orders for implementing a compliance or an education and training program)
- imposing significant pecuniary penalties for breaches of the consumer protection or restrictive trade practices provisions (the ACCC is more likely to seek pecuniary penalties in matters which result in significant consumer detriment, involve blatant conduct or where the traders or individuals concerned have a history of past conduct)
- convicting persons found to have contravened various offence provisions in the Act, and/or
- imposing prison sentences for serious cartel conduct.

Australian Competition and Consumer Commission
23 Marcus Clarke Street, Canberra, Australian Capital Territory 2601

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