



# 2019 Compliance and Enforcement Policy and Priorities

February 2019

## About this policy

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

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

- promoting competition among business
- promoting fair trading by business
- protecting consumers in their dealings with business.

The ACCC uses a range of tools to encourage compliance and prevent breaches of the Act, including business and consumer education, and working closely with stakeholders and other agencies. The Act also provides the ACCC with a range of enforcement remedies to address contraventions of the Act, including court-based outcomes and court enforceable undertakings.

This policy sets out the principles we adopt to achieve compliance with the Act, and outlines our compliance and enforcement functions, strategies and tools.

Each year the ACCC reviews its compliance and enforcement priorities. Our current compliance and enforcement priorities are:

### 2019 Priorities (listed in no particular order)

- Consumer guarantees on high value electrical and whitegoods products, in particular those supplied by large retailers and manufacturers.
- Conduct that may contravene the misuse of market power provisions and the concerted practices provisions.
- Anti-competitive conduct and competition issues in the financial services sector, including issues with respect to foreign exchange services.
- Consumer and competition issues arising from opaque and complex pricing of essential services, in particular those in energy and telecommunications.
- The impact on consumers arising from the collection and use of consumer data by digital platforms, with a focus on the transparency of data practices and the adequacy of disclosure to consumers.
- Competition and consumer issues arising from customer loyalty schemes.
- Emerging consumer issues in advertising and subscription service practices on social media platforms, with a focus on the impact on younger consumers.
- Ensuring that small businesses receive the protections under the CCA, with a focus on the Franchising Code of Conduct and unfair contract terms
- Competition and fair trading issues in the agriculture sector, with a focus on unfair contract terms in supply agreements and the viticulture sector.
- Ensuring the effectiveness of the compulsory recall of vehicles with Takata airbags.
- Improving the safety of quad bikes
- Anti-competitive conduct and unfair business practices impacting competition in commercial construction markets.

The ACL was amended in 2018 and there are increased penalties for contraventions of the consumer law. The ACCC has long advocated equivalent penalties for contraventions of consumer law and competition law, and will now be able to seek increased penalties in appropriate consumer law cases.

## Enduring priorities

There are some forms of conduct that are so detrimental to consumer welfare and the competitive process that the ACCC will always regard them as a priority.

### **Cartel conduct**

- The ACCC will always prioritise cartel conduct causing detriment in Australia.

When dealing with international cartels, the ACCC will focus on pursuing cartels that have a connection to, or cause detriment in Australia; that is, cartels that involve Australians, Australian businesses or entities carrying on business in Australia

### **Anti-competitive conduct**

- The ACCC will always prioritise anti-competitive agreements and practices, and the misuse of market power.

### **Product safety**

- The ACCC will always prioritise product safety issues which have the potential to cause serious harm to consumers.

### **Vulnerable and disadvantaged consumers**

- The ACCC recognises that vulnerable and disadvantaged consumers can be disproportionately impacted by conduct in breach of the Act. The ACCC therefore prioritises conduct that impacts these consumers.

### **Conduct impacting Indigenous Australians**

- The ACCC acknowledges that certain conduct in breach of the Act has the potential to specifically impact on the welfare of Indigenous Australians. The ACCC also recognises that Indigenous consumers living in remote areas face particular challenges in relation to asserting their consumer rights. The ACCC will always prioritise its work in these areas while these challenges remain.

## Principles and approaches underlying this policy

The ACCC exercises its enforcement powers independently, in the public interest, and with integrity and professionalism. These principles govern our compliance and enforcement work:

**Accountability** – the ACCC’s decision-making takes place within rigorous corporate governance processes, and our actions can be reviewed by a range of agencies including the Commonwealth Ombudsman, Parliamentary Committees and the courts.

**Transparency** – the ACCC does not do private deals – enforcement matters that are finalised by litigation or other formal resolution are made public because we are transparent about what action we take and why.

**Confidentiality** – the ACCC seeks to conduct investigations in confidence and we do not comment on matters that we may or may not be investigating; however, where a matter is already in the public domain the ACCC may make a public statement about it if it is in the public interest to do so.<sup>1</sup>

**Timeliness** – the ACCC’s investigations and the resolution of enforcement matters are done as efficiently as possible to avoid costly delays and uncertainty for business.

**Proportionality** – the ACCC’s enforcement responses are proportionate to the conduct and the resulting harm or potential harm.

**Fairness** – this has a number of aspects, and we seek to:

- balance voluntary compliance with enforcement activity, while responding to many competing interests
- take into account our approach in one matter when deciding how to pursue another, and
- balance fairness to individuals and traders subject to ACCC enforcement action, with informing the public about the ACCC’s work and being transparent about what action the ACCC is taking and why.

## Compliance and enforcement strategy

To achieve our compliance objectives, we use four flexible and integrated strategies:

- encouraging compliance with the law, particularly by educating and informing consumers and traders about their rights and responsibilities under the Act
- enforcement of the law, including resolution of possible contraventions both administratively and by litigation and other formal enforcement outcomes
- undertaking market studies, or reporting on emerging competition or consumer issues with a view to identifying any market failures and how to address them, and to support and inform our compliance and enforcement measures and identify possible areas for policy consideration
- working with other agencies to implement these strategies, including through coordinated approaches.

The ACCC is selective in the matters we investigate and the sectors in which we engage in education and market analysis. We use this policy, and our annual compliance and enforcement priorities, to inform our decision making in this regard.

The ACCC uses a range of compliance and enforcement tools to encourage compliance with the Act. In deciding which compliance or enforcement tool (or the combination of such tools) to use, our first priority is always to achieve the best possible outcome for the community and to manage risk proportionately. Our enforcement actions seek to maximise impact and leverage any outcomes across an industry sector. For example, we use the outcome of one court proceeding to encourage other industry participants in the sector to change their practices.

The ACCC cannot pursue all matters that come to our attention. The ACCC’s role is to focus on those circumstances that will, or have the potential to, harm the competitive process or result in widespread consumer or small business detriment. The ACCC exercises discretion to direct resources to matters that provide the greatest overall benefit.

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<sup>1</sup> <https://www.accc.gov.au/media/media-code-of-conduct>.

## Compliance and enforcement priorities

Each year we review our compliance and enforcement priorities. Priorities are determined following external consultation and an assessment of existing or emerging issues and their impact on consumer welfare and the competitive process. They include current priorities and those that we consider to be enduring. The ACCC may also be funded from time to time by the Government to conduct inquiries or work in specific industries or areas.

This year's priorities and areas of focus, along with those priorities that we consider to be enduring, can be seen above.

The ACCC has developed Product Safety Priorities. These priorities reflect that the ACCC also has a role in conducting consumer product safety investigations and surveillance, administering consumer product safety recalls and making recommendations on product safety regulations, including standards and bans. A copy of these priorities and principles that are applied in determining the priorities can be seen at: [Product safety priorities](#).

## Priority factors

While the ACCC prioritises matters that fall within our current priority areas, we will always retain capacity to pursue other matters that have the following factors:

- conduct that is of significant public interest or concern
- conduct that results in substantial consumer or small business detriment
- national conduct by large traders, recognising the potential for greater consumer detriment and the likelihood that conduct of large traders can influence other market participants
- conduct involving a significant new or emerging market issue or where our action is likely to have an educative or deterrent effect
- where our action will assist to clarify aspects of the law, especially newer provisions of the Act.

The ACCC will also continue important residual work in areas previously identified as priority areas.

The ACCC is not a complaint handling body. We rarely become involved in individual consumer or small business disputes. We are unlikely to pursue matters that:

- are one-off, isolated events, unless the conduct involves wider implications for competition or consumers
- are more appropriately resolved directly between the parties
- solely for the purpose of obtaining redress for consumers or small businesses
- involve consumer issues more effectively dealt with at the local level by state and territory agencies (for example, activity that occurs within a single state or territory, or complaints that may be resolved by way of individual dispute resolution)
- are better considered by industry specific regulators that have the regulatory focus and expertise to properly assess the issue
- are primarily contractual or private right disputes (the Act provides complainants with a private right of action in these circumstances).

## Compliance activities

Compliance activities can assist businesses and consumers to understand impending changes to the law, or provide a quick intervention that may address emerging issues. They are particularly useful where businesses are keen to ensure they are doing the right thing. The kinds of compliance activities the ACCC may undertake are set out below.

### Education and campaigns

The ACCC uses targeted education campaigns to provide information and advice to businesses and consumers, and to encourage compliance with the Act. The ACCC considers that prevention of a breach of the Act is always preferable to taking action after a breach has occurred. The ACCC also seeks to ensure that consumers and small businesses are aware of both their rights and responsibilities under the Act through clear and targeted communications. We actively seek feedback to ensure that our communication is effective.

The ACCC also provides information, tips and tools to help consumers via a wide range of channels; we liaise extensively with business, consumer and government agencies about the Act and the ACCC's role. The ACCC also maintains and promotes a suite of online education tools for small businesses, tertiary students and prospective franchisees.

The ACCC aims to ensure that consumers and small businesses are well-informed to benefit from, and stimulate, effective competition.

### Scams prevention

In relation to scam conduct, the ACCC prioritises awareness-raising and education, and works with government and the private sector to reduce opportunities for scams to occur. We analyse data collected through our Scamwatch service to identify trends, monitor financial losses and inform our scam prevention strategies.

On behalf of the Australian Scams Awareness Network, the ACCC runs National Scams Awareness Week – an annual campaign to warn consumers about the ongoing risk of scams.

### Industry engagement

The ACCC maintains relationships with many industry groups or associations and assists them in queries they may have about the Act, as well as attending events, giving presentations and hosting webinars.

The ACCC also provides general guidance to industries looking to develop their own voluntary industry codes of conduct or industry charters that apply the requirements of the Act to the specific circumstances of a particular industry sector. Where mandatory industry codes of conduct are in place, the ACCC conducts compliance checks which inform our further compliance and enforcement activities.

### Research and advocacy

The ACCC conducts in-depth market, sector or industry reviews, some of which may form formal market studies (discussed further below). The ACCC may also conduct research into potential new or emerging competition and consumer policy issues in line with a priority area which may require broader policy considerations, research and analysis, and subsequent engagement with relevant external stakeholders, including other government agencies and industry bodies.

## Market studies

The ACCC analyses selected industries or market sectors to improve our understanding of industry practices and dynamics. This assists the ACCC to proactively identify risks to consumers and the competitive process that may require intervention by the ACCC or others. Market studies also assist the ACCC to identify any market failures and how to address them, including advocacy for law reform. Publicising this work can help inform government, business and consumers, as well as encourage public debate over competition and consumer matters and inform policy consideration.

The ACCC may initiate market studies or undertake them at the direction of the Minister. Where market studies are undertaken at the direction of the Minister, we have the power to compel industry participants to provide information and documents.

## Enforcement action

### 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 the trader in correspondence to a signed agreement between the ACCC and the trader setting out detailed terms and conditions of the resolution.

Administrative resolutions generally involve the trader agreeing to stop the conduct of concern and compensate those harmed by the conduct, 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 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 Act by accepting court enforceable undertakings under section 87B of the Act. In these undertakings, which are on the public record, companies or individuals generally agree to remedy the harm caused, accept responsibility for their actions and establish or review and improve processes and procedures to improve compliance with the Act.

### 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 compliance objectives. We consider the priority factors listed above and are more likely to use litigation where the conduct is by a large company or results, or has the potential to result, in competitive harm or substantial consumer or small business detriment.



Under the Act, legal action may result in the court:

- making declarations that a company or individual has contravened the Act and injunctions restraining current or future conduct
- imposing pecuniary penalties
- requiring respondents to publish corrective advertising or notices
- making orders to achieve financial redress for consumers or businesses harmed by the conduct
- making various other behavioural orders, including community service or probation orders, or orders for implementing a compliance or an education and training program
- making orders disqualifying individuals from being directors of corporations
- convicting persons found to have contravened various offence provisions in the Act, and/or
- imposing prison sentences for serious cartel conduct.

## Other action

In some matters the ACCC may decide not to pursue enforcement action to deal with a matter or issue but we may instead:

- draw the issue to the relevant parties' attention and provide information to help them gain a better understanding of the Act, and to encourage rectification and future compliance
- 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 if the trader has promptly and effectively corrected a possible contravention and implemented measures to prevent recurrence
- postpone or cease an investigation with a view to reactivating the investigation should further information become available
- seek to address the issue through compliance or advocacy activities identified above.

## Working with other agencies

The ACCC liaises closely with other domestic and international regulators and government agencies on competition and consumer issues arising in their area of expertise, and we have a close working relationship with the Australian Energy Regulator on issues affecting the energy sector.

The ACCC is not always the agency best placed to deal with particular consumer and small business issues, particularly when doing so creates duplication.

Compliance and enforcement of the Australian Consumer Law is carried out by the ACCC and state and territory consumer regulators on a 'one law, multiple regulators' model. Some issues may be more appropriately addressed at the state/territory level. Most state and territory fair trading agencies also facilitate dispute resolution between consumers and traders and have enforcement responsibilities under the Australian Consumer Law.

Various Ombudsman services, including small business commissioners, may also provide a more appropriate resolution through dispute resolution schemes.



Given ASIC's remit to enforce and administer consumer protection laws for many financial products and services, the ACCC coordinates with ASIC on many matters, particularly those involving combined financial and non-financial issues.

The ACCC will continue to work closely with other law enforcement agencies in respect of fraudulent operators where those agencies are better placed to seek effective sanctions, including criminal penalties, against individuals involved.

Similarly, there are a number of agencies with expertise and lead responsibility for safety outcomes in relation to products such as gas and electrical appliances, motor vehicles, therapeutic goods and food products.