



Australian
Competition &
Consumer
Commission

2017 ACCC Compliance and Enforcement Policy

February 2017

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 and strategies.

The ACCC and its compliance and 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 Act).

The purpose of the 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 ACCC uses a range of compliance tools to 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, 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 Act. Compliance and enforcement of the ACL is done by the ACCC and state and territory consumer regulators on a 'one law, multiple regulator' model.

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.

Compliance and enforcement strategy

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

- enforcement of the law, including resolution of possible contraventions both administratively and by litigation and other formal enforcement outcomes
- encouraging compliance with the law by educating and informing consumers and businesses about their rights and responsibilities under the Act
- working with other agencies to implement these strategies, including through coordinated approaches
- 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.

The ACCC is selective in the matters it investigates and the sectors in which it engages in education and market analysis, and our enforcement actions seek to maximise their impact

across an industry sector. For example, we may use the outcome of one court proceeding to encourage other industry participants in the sector to improve their practices.

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

In taking actions to encourage and enforce compliance with provisions of the Act, the ACCC's main goals are to:

- maintain and promote competition and remedy market failure, and
- protect the interests and safety of consumers and support fair trading in markets.

With these goals in mind, the ACCC takes action to:

- stop unlawful conduct
- deter future offending conduct
- where possible, obtain remedies that will undo the harm caused by the contravening conduct (for example, by corrective advertising or securing redress for consumers and businesses adversely affected)
- encourage the effective use of compliance systems
- where warranted obtain court orders which impose penalties or fines and deter others from breaching the Act.

The ACCC cannot pursue all the complaints and reports it receives, or issues that come to its attention, about the conduct of traders or businesses. The ACCC also rarely becomes involved in individual consumer or small business disputes. While all reports are carefully considered, 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 detriment. The ACCC therefore exercises its discretion to direct resources to matters that provide the greatest overall benefit for competition and consumers.

Priority factors

To assist with this determination, the ACCC gives compliance and enforcement priority to matters that demonstrate one or more of the following factors, including where the matter does not fall within a current priority area:

- conduct of significant public interest or concern
- conduct resulting in a substantial consumer or small business detriment
- conduct involving issues of national or international significance
- conduct involving essential goods and services
- conduct involving the misuse of public funds
- conduct detrimentally affecting disadvantaged or vulnerable consumer groups
- conduct in concentrated markets which impacts on small businesses 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 ACCC action will assist to clarify aspects of the law, especially newer provisions of the Act.

The ACCC also tends to prioritise enforcement action in relation to the conduct of larger companies. This reflects the potential for greater consumer detriment from their actions, and the likelihood that conduct of larger businesses can influence the behaviour of other market participants.

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 the individuals involved.

Priority areas

The ACCC reviews its priorities regularly. Priorities are set following an assessment of existing, new or emerging issues and their impact on consumer welfare and the competitive process. This assessment includes consultation with the ACCC's stakeholders.

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. These include cartel conduct causing detriment in Australia, anti-competitive agreements and practices, and the misuse of market power.

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

The ACCC also recognises that Indigenous consumers living in remote areas face particular challenges in relation to asserting their consumer rights, and the ACCC will always prioritise its work in these areas while these challenges remain.

Current priorities

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

- competition and consumer issues in the agriculture sector
- competition issues in the commercial construction sector
- consumer issues in private health insurance
- consumer issues in new car retailing, including responses by retailers and manufacturers to consumer guarantee claims
- issues arising from the ACCC's monitoring of broadband speed and performance claims
- consumer guarantees, including in relation to services such as those provided by the airline industry
- providing education to business and consumers in relation to new country of origin labelling laws

- ensuring compliance by business with new excessive payment surcharge laws
- consumer issues arising from commission based sales business models
- working with internet platform providers to prevent the supply of unsafe products into Australia
- ensuring small business receives the protections of:
 - industry codes of conduct, including the *Franchising Code*, the *Food and Grocery Code* and the *Horticulture Code*, and
 - the new unfair contract terms law

While the ACCC will focus its current activities in these priority areas, it will continue to monitor compliance in areas previously identified as priorities and take action where necessary.

Other ACCC action

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

- provide information to parties to help them deal with the matter and gain a better understanding of the Act
- postpone or cease investigations with a view to later investigation should further information become available
- draw the issue to relevant parties' attention and provide information 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 where a business has promptly and effectively corrected a possible contravention and has implemented measures to prevent recurrence.

In relation to reports of scam conduct, the ACCC aims to inform the public of emerging scams in a variety of ways including public warning notices or other media engagement.

While the ACCC relies on reports to identify issues and inform its compliance and enforcement activities, the ACCC is not a complaint handling body. 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
- 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).

Market studies

The ACCC will continue analysing selected industries or market sectors to improve its understanding of industry practices and dynamics. This assists the ACCC to 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 best to address them. Publicising this work can help inform consumers, encourage public debate over competition and consumer matters and inform policy consideration.

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 will be 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—enforcement matters that are dealt with through litigation or formal resolution are made public
- Confidentiality—in general, investigations are conducted confidentially and the ACCC does not comment on matters it may or may not be investigating; however, the ACCC may make a statement about an investigation where a matter is already in the public domain and the ACCC considers it to be in the public interest to do so
- 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.

Compliance and enforcement outcomes

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

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 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 provides information, tips and tools to help consumers via a wide range of channels; it liaises extensively with business, consumer and government agencies about the Act and the ACCC's role in its administration. The ACCC aims to ensure that consumers and small businesses 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 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. Where matters are resolved by an administrative resolution and involve public matters, the ACCC may publicly refer to any outcomes achieved with the trader.

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 s.87B of the Act. In these undertakings, which are on the public record, companies or individuals generally agree to:

- remedy the harm caused by the conduct
- 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 priority factors), where there is reason to be

concerned about future behaviour or where the party involved is unwilling to provide a satisfactory resolution.

Under the 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.

Working with other agencies

The ACCC is not always the agency best placed to deal with particular consumer and small business issues, particularly when doing so creates duplication. For example, most state and territory fair trading agencies facilitate dispute resolution between consumers and traders and have enforcement responsibilities under the Australian Consumer Law. Various Ombudsmen services may also provide a more appropriate resolution through dispute resolution schemes.

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.

In addition, some business-to-business matters raised with the ACCC are more effectively dealt with under the various mediation services provided by different state and federal governments, or by Small Business Commissioners. Where this is the case, the ACCC will refer the complainant to an appropriate agency or mediation service.

The ACCC works with its international counterparts both bilaterally and through global and regional forums. As Australia's trade, business and cultural ties with Asia deepen, the ACCC is increasingly working with its regional counterparts to help address conduct which harms competition and consumers in our region.