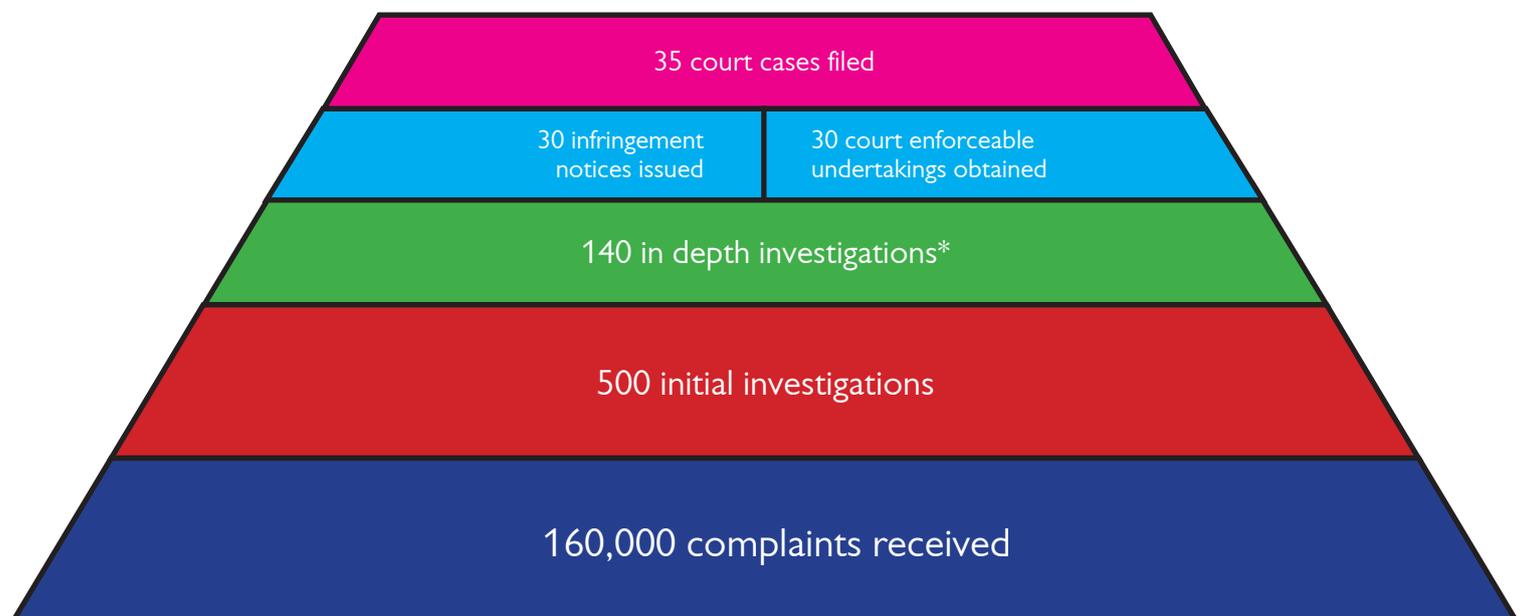


Business beware: ACCC releases 2014 policy on competition and consumer law activity

The ACCC has recently released its Compliance and Enforcement Policy for 2014. The Policy contains priorities and areas of activity which the ACCC will emphasise when undertaking compliance and enforcement. Whilst some of these priorities are continuing from 2013, there are some new areas that the ACCC will be examining. Senior Associate, Bill Fragos considers the ACCC’s priorities for 2014, and the impact on business.

Whilst the Policy provides some detail regarding what the ACCC will be emphasising in 2014, the Policy should also be considered in the context of recent statements made by Chairman Rod Sims, ACCC publications and releases, and recent court proceedings.

ACCC Statistics – Per Year



*Includes 10 relating to anti-competitive agreements, 15 relating to misuse of market power and 15 relating to cartels.
The majority of the balance are presumably ‘consumer law’ related.

Enduring priorities

There are certain specific areas that are considered “enduring priorities” for the ACCC. That is, these areas are integral to the enforcement functions of the ACCC.

Cartel Conduct

The ACCC currently has over 15 in depth cartel investigations underway, and expects at least 2 to 3 of these to be filed this year. The ACCC recently commenced proceedings against Cussons, Colgate and Woolworths in relation to alleged cartel conduct with respect to ultra-concentrate detergent products.

Anti-competitive agreements

During the course of 2013, a number of anti-competitive matters received attention. There were proceedings concerning Cement Australia as well as those relating to Flight Centre.

On the topic of secondary boycotts, whilst the ACCC is proactive, there is apparently continued reluctance by some businesses to cooperate with respect to investigations.

The ACCC has approximately 10 in depth investigations under way in relation to anti-competitive agreements, and anticipates that there will be further proceedings issued this year.

Misuse of market power

In the last 12 months, the ACCC has commenced proceedings alleging a misuse of market power. One set of proceedings is against Visa in relation to dynamic currency conversion and the processes involved in paying for specific transactions. There are also proceedings against Pfizer in relation to agreements it entered into with pharmacies, which relate to one of Pfizer’s highly prescribed drugs at the time its patent protection was being removed.

The ACCC acknowledges that misuse of market power cases are difficult, given the resources they require to litigate and because the businesses involved are very well-resourced. There are approximately 15 in depth investigations underway into alleged misuse of market power.

Priorities - Competition

In 2014, as in 2013, the ACCC will be seeking compliance and enforcing competition and consumer issues in highly concentrated sectors, in particular the supermarkets and fuel sectors. During the course of 2013, the ACCC was quite active in examining issues in these sectors and commenced proceedings with respect to businesses in these sectors.

Supermarkets

In 2013, the market share of the Major Supermarket Chains was a prominent topic, with some politicians calling for specific legislation to effect divestiture within the sector.

The ACCC’s 2014 priority for this sector was flagged in 2013. In his appearance before Senate Estimates on 13 February 2013, Mr Sims indicated that there were investigations underway, which flowed largely from an imbalance of bargaining power and which have potentially considerable economic and financial impact on suppliers. This includes:

- Failure to pay suppliers in accordance with agreements.
- Unreasonable demands including additional payments from suppliers not otherwise chargeable or agreed.
- Seeking to impose penalties on suppliers not otherwise chargeable or agreed.
- Unreasonable demands and conditions being put on suppliers by threat of product removal.
- Favouring home-brand products to the detriment of suppliers.

At that time Mr Sims indicated that proceedings were likely to follow.



Fuel

Recently the ACCC commenced proceedings in relation to undertakings given with respect to the use of fuel dockets. As such, it is unsurprising that this area is considered a priority for 2014.

In addition, the ACCC is also considering the issue of price sharing in the fuel sector. When price signaling legislation was introduced in 2012 with respect to the banking sector, the ACCC also wanted to extend it to the fuel sector. It will be interesting to see whether that happens in 2014.

Priorities - Consumer

Telecommunication and Energy Sectors

Previous activity in this area had the ACCC focussing on door to door sales, and unsolicited calls generally regarding energy and telephone services. The ACCC also had success in the High Court in relation to TPG. The litigation, which lasted over 3 years, concerned the manner of advertising, representations and prominent aspects of pricing and fine print conditions.

In 2014, the ACCC is looking at misleading discount claims in the energy sector. In particular, there is increasing concern about the promotion of energy plans, apparent savings and/or supply charges – if a discount is represented, the ACCC is concerned as to “discounts off what?” Recently, proceedings were instituted against AGL (SA) alleging such conduct.

Online

The ACCC is aware that an increasing number of transactions for the purchase of consumer goods and services are occurring online. The ACCC has taken particular interest with comparator websites and drip pricing.

Comparator websites promote a comparison of pricing, and are often used in travel and energy sectors, amongst others. However, the ACCC is concerned that comparator websites may contain misleading information and not provide an accurate comparison of pricing.

Drip advertising is where a price is represented – in advertising or after a simple insertion of details – only for additional charges to be added as the transaction progresses through to the processing of payment. This conduct is of concern as it involves a business obtaining an unfair advantage over complying businesses that are transparent with respect to their pricing.

This was recently an issue in the ACCC’s successful proceedings against Air Asia Berhad, which involved the inclusion of additional charges after the initial promoted price when purchasing airfares through its website.

Complexity and unfairness in consumer or small business contracts

Having conducted a review and a period of education, in mid-2013 the ACCC moved towards enforcement of unfair terms in standard form consumer contracts. In one sense, this priority appears to be a continuation of the enforcement initiative, which commenced with proceedings against Bytecard. The inclusion of a reference to “small business contracts” is interesting, and perhaps anticipates legislative change.

“ In 2014, as in 2013, the ACCC will be seeking compliance and enforcing competition and consumer issues in highly concentrated sectors... ”

Credence claims

In the area of credence claims, the last 18 months were big for the ACCC. There were a number of successful outcomes and several proceedings commenced in relation to credence claims, particularly in the food sector. For example, the ACCC alleged misleading credence claims relating to “free range”, “open range”, “free to roam” and “freshly baked”, in addition to place of origin and other specifications represented in relation goods.

The ACCC suggests that it will now broaden its focus to include marketing and labelling that portrays large manufacturers as small niche businesses. The concern is that innovation and competition will be undermined if misleading claims are made in relation to goods. The ACCC wants consumers to be reassured with respect to the accuracy of claims made by business.

Consumer guarantees

Since the introduction of the ACL there have been a number of cases involving representations made in relation to a consumer’s statutory guarantee rights. This culminated in a \$3 million penalty imposed against Hewlett Packard in June 2013. The ACCC has indicated that it will continue to enforce such matters, with emphasis on extended warranty claims.

In November 2013, the ACCC commenced proceedings against Fisher & Paykel. It is alleged that Fisher & Paykel sent letters to its customers that contained a number of false or misleading representations about statutory guarantees. One alleged example was that the consumer would not be protected against repair costs after the expiry of the manufacturer’s warranty unless the consumer purchased an extended warranty.

Scams

This is a “new” priority, and the ACCC has indicated its intention to collaborate with other regulators to disrupt scams.

Vulnerable consumers

The ACCC has flagged that it will continue to be vigilant with respect to vulnerable consumers.

Carbon Tax

Given the intention to repeal the carbon tax, the ACCC will monitor pricing and any cost consequences to consumers. Presumably it will consider whether previous price increases, for example, with respect to transport and refrigeration, will be wound back.

Product safety

Whilst product safety is a continuing priority for the ACCC, apparently there will be focus on low cost imported goods sold in major stores.

Mergers & Acquisitions

In the area of mergers, Mr Sims acknowledged speculation in the media regarding the expectation that 2014 would feature a number of mergers and acquisitions. This in turn would raise challenging issues for the ACCC. It also coincides with the Federal Government’s “Root and Branch Review” of competition policy.

Root and Branch Review

The ACCC sees opportunities for removing barriers to competition and opening new sectors up to competition, and cites examples in transport, energy and communications. This, in turn, fosters innovation and the creation of opportunities for the Australian economy.

The ACCC has been vocal about the need to emphasise small business in the Review, given that small businesses are an important driver of competition, innovation and economic growth.

Regulation

With respect to regulatory issues, the ACCC will continue its roles relating to the various infrastructure sectors. Of particular focus is the telecommunications industry, with the roll out of the NBN and relationships between NBN Co and access seekers, and participating in the Vertigan Review.

In relation to energy, the ACCC sees building consumer confidence in retail energy markets as a priority.

Summary

The ACCC's Compliance and Enforcement Policy for 2014 provides some valuable insight to business. Whilst the ACCC will continue to evaluate specific types of anticompetitive conduct and misleading conduct, the Policy informs business as to areas of activity for compliance and enforcement. Whilst some priorities are industry specific, there are a number of areas that businesses should be vigilant in ensuring compliance.

In particular, businesses should be careful with respect to advertising and product labelling, to ensure that consumers are not misled. Online websites and portals are also under scrutiny, both in relation to representations made as well as pricing. The ACCC is also continuing to focus on the fairness of contract terms as well as the issues of consumer guarantees. These are issues that impact on most businesses, whether they supply goods or services. Businesses should be proactive and obtain advice in order to ensure compliance with relevant laws.

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