





2020 Australian Competition and Consumer Law Revised Outlook

PwC Legal

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Background

The ACCC moved quickly in late March 2020 to adjust its original 2020 enforcement priorities announced just a month earlier, in response to the significant disruption to Australian consumers and businesses caused by the COVID-19 pandemic. As COVID-19 restrictions now start to ease in Australia and globally, we recap on the ACCC's shifting regulatory focus since the beginning of year, and share our insights on likely developments in Australian competition and consumer law for the remainder of 2020.

Recap of ACCC's 2020 Enforcement Priorities to date

Pre COVID-19 ACCC priorities

2020 Priorities

Competition and consumer issues relating to:

- Funeral services sector
- Digital platforms
- Essential services (focus on energy and telecommunications)
- Misleading food product claims
- Commercial construction sector (focus on public & private projects, conduct impacting small business)
- Franchising Code of Conduct and other small business protections
- Dairy Code of Conduct compliance
- Consumer guarantees (focus on high value goods)
- Product safety (focus on button batteries and Takata airbags recall)

Enduring priorities

- Cartel conduct (currently 5 criminal cartel cases before Courts, at least 2 new cartel cases expected)
- Anti-competitive conduct, including misuse of market power (at least 4 new cases expected)
- Product safety
- Protecting vulnerable and disadvantaged consumers
- Conduct impacting indigenous Australians

Recap of ACCC's 2020 Enforcement Priorities

Immediate ACCC COVID-19 Crisis Priorities (from late March 2020 to date)

New ACCC COVID-19 Taskforce



New ACCC COVID-19 Taskforce established to refocus efforts to priorities most relevant to impact of COVID-19, focusing on preventing businesses from exploiting crisis, eg:

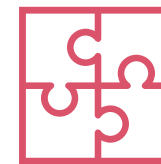
- Consumer guarantee obligations
- Obligations in relation to cancellations, refunds, suspension of services (eg travel, accommodation, subscription services, gyms, events, insurance)
- COVID-19 scams and product claims
- “Price gouging” and affordability issues (not necessarily illegal but could be if it is misleading, unconscionable, a misuse of market power or breaches other specific laws such as Biosecurity Act)
- Unfair contract terms

Interim authorisations



- ACCC has granted interim authorisations in various sectors permitting competitors to collaborate re: supply of essential goods, services, medicines, equipment, hardship relief and other matters during crisis
- Examples include banks, supermarkets, medical suppliers, energy and telecommunications suppliers, oil companies, pharmaceutical companies, hospitals, airlines, and various other retailers and franchisees

Other ACCC implications



- **Mergers** – ACCC will continue to consider closely on a case by case basis; some review timelines may be extended, others may need to occur on an urgent basis
- **Enforcement** – ACCC will seek to minimise regulatory burden, eg re: compulsory information requests
- **Infrastructure regulation** – ACCC will consider exemptions if current obligations become impractical
- **Consumer Data Right** – ACCC will continue to progress (but 3 month exemptions for certain financial service providers to share product reference data by 1 July 2020)
- **Product safety** – remains a key priority eg Takata airbags

What to expect for the remainder of 2020?

ACCC to look to competition to drive the recovery

The ACCC has focused primarily on two broad areas of work during the COVID-19 crisis so far:

- Urgent interim authorisation of crisis collaboration between competitors; and
- Establishment of the ACCC COVID-19 taskforce, focusing on immediately harmful consumer problems arising from the crisis.

While we would anticipate that the ACCC will continue to focus on these initial COVID-19 crisis priorities to support the immediate recovery in the short term, the ACCC has made clear that its overarching objective is “***maintaining competition in the long term***” and that it “... ***will want vigorous competition to drive the recovery when it comes***”.

Cartels and other anti-competitive conduct: Anticipated unwinding of short term collaboration

Since late March 2020, the ACCC has moved quickly to grant over 20 urgent interim authorisations for crisis collaboration between competitors, which may otherwise have contravened the prohibitions of cartel conduct or other anti-competitive conduct under Australian competition law. These authorisations have primarily been directed to permitting temporary behavioural measures to ensure the economy is able to function and provide essential goods, services, medicines, equipment, and hardship relief during the COVID-19 pandemic.

While there may be some limited further opportunities in the short term for additional businesses to seek authorisation to collaborate on temporary and targeted measures in relation to the supply of goods or services essential to recovery from the COVID-19 crisis, the ACCC has emphasised that: “***It is important that these short-term measures do not give rise to long-term structural damage to competition, market concentration or long-term arrangements that make it more difficult for businesses to enter and compete into the future...***”.

We expect that Australia will reach a point in its recovery where the ACCC will look to unwind these short term collaborative arrangements between competitors due to changes in the underlying market conditions, either by allowing the limited authorisation term to expire, the ACCC encouraging the parties to withdraw their respective authorisation applications, or alternatively the ACCC taking steps to revoke the authorisation.

Any parties seeking authorisation for more permanent measures beyond the immediate COVID-19 crisis, or arrangements that will result in structural change, can expect close scrutiny from the ACCC, which is likely to take a longer term view of the application and will not authorise such conduct unless satisfied that the likely public benefits from the proposed conduct outweigh any likely public detriments.



We are closely monitoring when to revoke any interim authorisations, including those granted because of the COVID-19 pandemic, and we expect them to cease when they are no longer appropriate.

(ACCC media release, “ACCC authorisation for car rental companies revoked due to COVID-19”, 8 May 2020)

Cartels and anti-competitive conduct

Businesses must remain vigilant in dealings with competitors and others

Companies must remain vigilant in their dealings with competitors or other market participants, even where well intentioned (eg through participation in industry bodies seeking to navigate a way out of the COVID-19 crisis). There is no separate exemption under Australian competition law for conduct which occurs during a global pandemic or other times of national emergency or economic hardship. Collaboration between competitors (eg relating to price, output, supply or other arrangements) can contravene prohibitions of cartel conduct or anti-competitive concerted practices in the absence of an ACCC authorisation or other limited exception (eg relating to joint ventures or collective acquisitions).

For example, in December 2019, the ACCC achieved its first enforcement outcome related to anti-competitive concerted practices, in the form of enforceable undertakings provided by two Sydney roofing companies who engaged in discussions on social media about setting minimum rates for the repair of hail damages homes (albeit unrelated to the COVID-19 crisis). The roofing companies also acknowledged that the discussions were likely to constitute an attempt to fix prices.

The ACCC also commenced Federal Court proceedings in December 2019 against Tasmanian Ports Corporation Pty Ltd (**TasPorts**) in the first case taken by the ACCC under the amended misuse of market power provision. The ACCC alleged that TasPorts sought to maintain its monopoly in towage and pilotage services in Tasmania by preventing a new entrant from competing effectively with TasPort's marine pilotage and towage business. We anticipate that the ACCC will similarly pay close attention to any complaints or allegations that companies with substantial market power are engaging in conduct in the current economic environment, which has the purpose or likely effect of substantially lessening competition, for example the purpose of driving weakened rivals out of business.

As the ACCC's resources begin to return to "business as usual", we would also expect the ACCC to ramp back up its investigations and enforcement activity relating to these enduring priorities, having previously announced that it expected to commence at least 2 new cartel cases and 4 new anti-competitive conduct in 2020, in addition to progressing those cases already before the Courts (including 5 criminal cartel cases).



ACCC to closely review mergers on a case by case basis

A continued case by case approach to mergers

As temporary government support measures and loan repayment deferrals begin to fall away, increasing financial pressure on businesses can be expected to result in even more companies struggling to stay afloat, and, in some cases, to exit the market. While this will inevitably give rise to potential M&A or other restructuring opportunities for remaining players, potential acquirers should not expect a “free pass” on ACCC merger clearance during this period.

The ACCC has made clear that mergers proposals related to the concerns and uncertainty regarding the ongoing financial health of firms will continue to be assessed on a case by case basis, taking into account “... **not only the present situation but also the longer term impact on competition of any change in the structure of markets**. The case study below illustrates the ACCC’s likely strict approach to a “failing firm” type merger review in the current environment.

In addition, with the current nil monetary screening threshold under FIRB’s Temporary COVID-19 Framework and ongoing close cooperation between FIRB and the ACCC as part of FIRB’s approval process, merger parties triggering FIRB review should closely consider whether early and coordinated engagement with the ACCC may also be prudent to reduce the risk of potential delays.

The ACCC also flagged in an earlier media release responding to the crisis that it expected timelines for some merger reviews may need to be extended due to challenges in completing the necessary inquiries with merger parties and market participants, to be considered by the ACCC on a case by case basis.



... The ACCC will play its part in merger assessments. Do not expect a different, or lenient approach to merger assessments during this crisis. Our objective will be to protect the competitive structure of the economy, and not to see anti-competitive increases in market power, or the rise of so-called 'national champions'.

(ACCC Chairman Rod Sims, speech to the *Australian Financial Review Banking & Wealth Summit Crisis Briefing*, 30 March 2020)

ACCC to closely review mergers on a case by case basis (cont'd)



“Failing firm” case study

The ACCC’s Merger Guidelines provide that mere speculation that a target firm will exit in the near future, or evidence of a recent decline in profitability, is insufficient to establish that an absence of competition between the merger parties is likely if the acquisition does not proceed. To satisfy the ACCC that a merger will not substantially lessen competition due to the prospective failure of one of the merger parties, the ACCC generally requires parties to demonstrate that:

- the target is in imminent danger of failure and is unlikely to be successfully restructured without the merger;
- in the absence of the merger, the assets associated with the relevant firm, including its brands, will leave the industry; and
- the likely state of competition with the merger would not be substantially less than the likely state of competition after the target has exited and the target’s customers have moved their business to alternative sources of supply.

For example, in September 2019 the ACCC opposed B&J City Kitchen’s proposed acquisition of Jewel Fine Foods (in administration) (**Jewel**) notwithstanding its financial difficulties, as the ACCC considered that it was likely to substantially lessen competition in the supply of chilled ready meals, and that an alternate purchaser was likely to buy Jewel and compete strongly with B&J City Kitchen if the proposed acquisition did not proceed.

In March 2020, the ACCC subsequently approved the alternate acquisition of Jewel by Chef Fresh Pty Ltd (a subsidiary of Coles Group), noting that this ensured there would still be two major suppliers of chilled ready meals. The ACCC was also satisfied that without a going concern sale to Coles, the next best alternative for Jewel’s administrator was likely to be liquidation of the assets, which would result in a less favourable outcome for competition than the continuation of Jewel’s production of chilled ready meals.

Australian Consumer Law issues

Australian Consumer Law (**ACL**) issues have been at the heart of the ACCC's new COVID-19 Taskforce's activities, focusing on immediate consumer harm during the epidemic, such as obligations in relation to cancellations, refunds and suspension of services, COVID-19 scams and misleading product claims, price gouging and affordability issues. We anticipate that the Taskforce will continue to respond to new complaints and consumer concerns, and to **“address any behaviour by businesses which seek to exploit the crisis”** or any subsequent recovery to unduly enhance their commercial position or harm consumers, including by reference to the following ACL provisions:



Unconscionable conduct

Companies need to remain conscious not only of conduct their conduct in dealing with vulnerable or disadvantaged consumers but also in a business to business context. For example, ACCC Chairman Rod Sims has indicated that the ACCC is **“... already engaging with some large businesses about allegations they are deliberately choosing not to pay their suppliers, or demanding large discounts off goods already delivered, and also delaying payments significantly, and that they should cease the conduct immediately”**.



Misleading or deceptive conduct

In addition to the more obvious examples such as scams or companies making false product claims in relation to COVID-19, businesses will need to continue to ensure that other statements or claims remain accurate (eg any claim to the effect that prices have risen or delivery has been delayed due to COVID-19 must be factually accurate, and kept up to date as the situation develops). We also anticipate that the ACCC will start to refocus on its pre-COVID-19 priority of misleading claims in food marketing, including health or nutritional claims, credence claims, and country of origin.



Product safety

This will remain a key priority throughout 2020, eg Takata airbag recall and button battery safety (including new mandatory standards recently put forward for consultation by the ACCC).



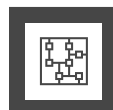
Consumer guarantee obligations

With cancellations, suspensions of services and requested refunds continuing to occur across many sectors, it will remain important for businesses to keep across their consumer guarantee obligations, and when they are entitled to rely on their terms and conditions (see also unfair contract terms below). Consumer guarantees were already a pre-COVID 19 enforcement priority for the ACCC, with a focus on high value goods such as motor vehicles, electrical and whitegoods. On 3 May 2020, the ACCC reported that Flight Centre will stop charging customers cancellation fees in order to get a refund for travel cancelled during the COVID-19 pandemic, with the ACCC stating that **its “... next step would have been Court action if Flight Centre did not change its position”**.



Unfair contract terms

As parties seek to enforce strict contractual protections against consumers and small businesses in the current environment, there is likely to be increased scrutiny as to whether some of those clauses contained in standard form contracts are unfair contract terms for the purposes of the ACL, and consequently void and unenforceable. We are also likely see a renewed push by the ACCC to have the Government introduce pecuniary penalties for unfair contract terms, with both major political parties having previously expressed support for reforms to these laws.



Franchising Code of Conduct

This is a specific 2020 priority (see table above), together with other competition and consumer law protections for small business.

Refocus on pre-existing 2020 priorities and reforms

Digital Platforms

Building upon the Australian Government's response to its Digital Platforms Inquiry Report in 2019 and the subsequent establishment of a permanent ACCC Digital Platforms Branch, the ACCC has stated that it is "**advancing many investigations**" in this area. In addition to its currently on foot Federal Court proceedings against Google (summarised in our earlier 2020 Privacy Outlook [publication](#)), the ACCC has indicated that its "**digital platform inquiry work will continue, albeit with a more flexible approach given that this crisis will affect the ability of industry to respond and contribute**".



Key 2020 reforms emanating from the Digital Platforms Inquiry

Ad Tech Inquiry	In March 2020, the ACCC kicked off an 18 month inquiry into the digital advertising technology supply chain and advertising agency services in Australia seeking feedback on the competitiveness, efficiency, transparency and effectiveness of such services. With submissions now closed, the ACCC expects to provide a preliminary report in December 2020 with a final report by 31 August 2021.
Digital platform services inquiry (2020-2025)	In February 2020, the Australian Government also directed the ACCC to conduct an inquiry into the supply of digital platform services including internet search engine services, social media services, online private messaging services, and digital advertising services supplied by digital platform service providers. Areas of focus include intensity of competition, practices that may result in consumer harm, market trends and overseas developments in markets for the supply of digital platform services. The ACCC is to provide an interim report by 30 September 2020, every 6 months thereafter, with a final report due 31 March 2025.
Code of Conduct for digital platforms and news media businesses	The original recommendation was for the ACCC to facilitate the establishment of a voluntary code of conduct by November 2020 to address imbalances in bargaining power between digital platforms and news media businesses. However in April 2020 and in response to the sharp decline in advertising revenue driven by COVID-19, the Federal Government has now directed the ACCC to develop a mandatory code of conduct with a draft expected to be released for comment in July 2020. The code is expected to address the sharing of data, early notification of changes to ranking and display of news content, enabling news media businesses to monetise their content, and ensure fair negotiations over revenue shares.

Refocus on pre-existing 2020 priorities and reforms (cont'd)

Other pre-existing 2020 priorities

The ACCC has indicated that it intends to continue to deliver on pre-existing priorities and essential work to protect pre-crisis economic structure. As we begin to move through the next phase of the recovery, we can therefore expect the spotlight to shift more squarely back on other key sectors and areas initially identified as 2020 priorities, including those set out below.



Other Pre-existing 2020 Priority Sectors

Funeral services

Focusing on potential anti-competitive conduct as well misleading, deceptive or unconscionable practices by funeral service providers.

Essential Services

Focusing on pricing and selling practices by energy and telecommunications providers, with **“anti-competitive conduct and failures to pass through cost reductions [to] also be targeted through the Federal Government’s new energy market misconduct laws”**. On 11 May 2020, the ACCC published new guidelines to assist electricity retailers and generators to comply with these new laws, which come into effect on 10 June 2020

Commercial Construction

Focusing on large public and private projects and conduct impacting small business, including through the ACCC’s dedicated ACCC Commercial Construction Unit.

Dairy Industry

Ensuring compliance with Dairy Code of Conduct.

Other potential reforms

ACCC Chairman Rod Sims has stated that the ACCC is contributing to advanced Government processes underway to consider laws covering unfair contract terms (see also above) and a national safety provision, and that **“the debate has just started on having Australia follow the US, the UK, Europe and others, and introduce a law against unfair practices by large businesses against consumers and small businesses, where significant detriment is involved”**.

However, with many other more immediate priorities in the Government’s agenda in the wake of COVID-19, it remains to be seen if or when these potential reforms may progress in 2020.

Refocus on pre-existing 2020 priorities and reforms (cont'd)

Ongoing reforms: The Consumer Data Right (CDR)

The ACCC has stated that it will be “... *advancing reforms to set Australian up for recovery post crisis*”, to “...*ensure economic recovery once the pandemic subsides*”. The ACCC has identified the continued rollout of the Government’s CDR initiative as “*a key driver of reform, and greatly improved competition in financial services*”.



ACCC to continue to progress the Consumer Data Right

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. The banking industry is the first sector to be bound by the regime, with the energy and telecommunications sectors to follow respectively.

The ACCC has continued to progress the CDR in consultation with the Department of Treasury and Industry, recently pressing ahead with consultation on some further proposed amendments to the *Competition and Consumer (CDR) Rules 2020*, to come into effect from July 2020.

However, due to the impact of COVID-19, the ACCC announced on 24 April 2020 that 3 month exemptions had been granted to certain financial services providers (non-major ADIs) required to share product reference data by 1 July 2020.



Compliance and Enforcement Policy for the CDR

On 8 May 2020, the ACCC and Office of the Australian Information Commissioner jointly released their Compliance and Enforcement Policy for the CDR.

Likely focus areas of regulatory enforcement action relate to the following types of priority conduct:

- repeated refusals by data holders to disclose consumer data in response to valid consumer request;
- misleading or deceptive conduct in relation to the CDR;
- Invalid consent when collecting CDR data;
- misuse or improper disclosure of CDR consumer data; and
- insufficient security controls.

Key Australian competition and consumer law contacts

For a deeper discussion of how these competition and consumer law issues might affect your business in 2020, please contact:



Tony O'Malley

Partner, Legal

+61 (2) 8266 3015

tony.omalley@pwc.com



David Fleming

Director, Legal

+61 (2) 8266 5257

david.a.fleming@pwc.com



Sylvia Ng

Director, Legal

+61 (2) 8266 0338

sylvia.ng@pwc.com

www.pwc.com.au

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