

➤ ACCC 2017 Enforcement Priorities



INDUSTRIES IN FOCUS

The ACCC will focus on conduct that causes a substantial lessening of competition in a number of key areas and industries:

- > energy
- > private health insurance
- > commercial construction
- > agriculture

The ACCC will also seek to use market studies to improve its understanding of industry practices and market dynamics to identify what is not working well.



UNFAIR CONTRACTS

The ACCC will take enforcement action in relation to unfair contract terms, particularly unfair contract terms imposed on small business.

The ACCC has identified the following as potentially problematic terms:

- > unilateral variation clauses
- > clauses providing for broad indemnities or excessive limitations of liabilities at the expense of small businesses
- > automatic roll-over
- > exclusivity
- > broad termination rights in favour of the larger business

The ACCC will also enforce compliance with bans on excessive surcharges, which will extend to all businesses from 1 September 2017.



CARTELS, CRIME & ANTITRUST

> The ACCC currently has advanced investigations into alleged cartels and expects to see more criminal prosecutions in coming years.

> The ACCC will also focus on investigating conduct which leads to a substantial lessening of competition. This will include price parity deals (often associated with online sales, eg, hotels and travel).

> The government is currently proposing to amend the *Competition and Consumer Act 2010* (Cth) (**CCA**) to prohibit concerted practices which substantially lessen competition.

> The government proposes to introduce a substantial lessening of competition test to the misuse of market power provisions (in section 46, CCA).



CONSUMER RIGHTS

> The ACCC will focus on consumer guarantees applicable to more complex products, including in relation to airlines and telecommunications.

> The ACCC has said that it will 'focus on the big players' especially in relation to misleading consumers.

> The ACCC will continue to focus on new motor vehicle retailing. Its ongoing market study will examine consumer guarantees, warranties and complaint handling.

> Following the release of the ACCC's six best practice principles for marketing broadband speeds, the ACCC will work to introduce a Broadband Performance Monitoring and Reporting Programme.



HIGHER PENALTIES

> In order to deter anti-competitive and anti-consumer behaviour, the ACCC will seek higher penalties from larger businesses and the individuals who work in them.

> In the short term, the ACCC may be less likely to settle matters on the basis of agreed penalties.

> Through the current review of the Australian Consumer Law (**ACL**), the ACCC will advocate for changes to legislative penalties under the ACL to increase deterrence for larger businesses.

What happened in 2016?

- **Private health insurance:** The ACCC took action against Medibank Private for failing to notify members of limitations on benefits for in-hospital services.
- **Agriculture:** The ACCC opened two market studies into the beef and dairy industries. The ACCC appointed its first Agriculture Commissioner, Mick Keogh.

What happened in 2016?

- **Extension to small business:** In November 2016, the unfair contract terms regime was extended to apply to standard form contracts entered into with small businesses.
- **Industry review:** The ACCC published a report in November 2016. Following a review of select industries, the ACCC identified terms in standard form contracts that are likely to raise concerns under the new law. The report is intended to assist businesses to understand how the law will apply to contracts they propose to enter or renew.

What happened in 2016?

- **Criminal cartels:** The Commonwealth Director of Public Prosecutions brought the first criminal cartel case against NYK for its involvement in an alleged international shipping cartel. NYK pleaded guilty and will be sentenced in April 2017. Another corporation, K-Line, has also been indicted for being involved in a criminal cartel but has not yet entered a plea.
- **Hub-and-spoke cartel:** The ACCC alleged a hub-and-spoke cartel for the first time between laundry detergent suppliers and supermarket retailer, Woolworths. Colgate-Palmolive and Woolworths admitted their participation. PZ Cussons contested the allegations at trial with judgment expected this year.

What happened in 2016?

- **Consumer guarantees:** In 2016, the Federal Court found Valve Corporation engaged in misleading conduct by representing that consumers were not entitled to certain consumer guarantees under the ACL.
- **Product recalls:** The Productivity Commission recommended significantly increasing maximum fines for retailers who sell unsafe products.

What happened in 2016?

- The ACCC successfully appealed an original penalty of \$1.7 million imposed on Reckitt Benckiser, resulting in the Federal Court increasing the fine to \$6 million.
- ACCC appealed *ACCC v Cement Australia Pty Ltd*, seeking an increase in penalties from \$17.1 million to \$90 million for anti-competitive agreements.