

ACCC'S COMPLIANCE AND ENFORCEMENT PRIORITIES: WHAT TO EXPECT IN 2024-25

The Australian Competition and Consumer Commission (ACCC) recently released its compliance and enforcement priorities. The ACCC has already started enforcement action in line with the priorities and has signalled there is more to come.

The ACCC doubles down on unfair contract terms, misleading ESG claims and the digital economy

Last month, Gina Cass-Gottlieb, the Chairperson of the ACCC announced the 2024-25 Compliance and Enforcement Priorities for the ACCC (**the 2024/25 Priorities**). The 2024/25 Priorities are focused on the economic challenges of net zero transition, cost of living pressures, and the challenges of digital transformation.

The 2024/25 Priorities continue the ACCC's recent trend of prioritising consumer protection matters and pursuing contraventions of the Australian Consumer Law (ACL), seemingly in preference to competition concerns. Key compliance and enforcement priorities relating to business practices include:

- Unfair contract terms in consumer and small business contracts.
- Consumer, product safety and fair trading concerns in relation to environmental claims and sustainability.
- Consumer and fair trading issues in the digital economy, with a focus on misleading or deceptive advertising within influencer marketing, online reviews, in-app purchases and price comparison websites.
- Improving industry compliance with consumer guarantees, with a focus on consumer electronics, and also targeting misconduct by retailers in connection with delivery timeframes.

For the second year in a row, unfair contract terms, product safety, fair trading and competition concerns in relation to sustainability and environmental claims have been listed as priorities. Unsurprisingly, the repetition of these priorities follows recent legislative changes and new guidance materials:

- In November 2023, amendments were made to the ACL to introduce penalties for proposing or making an unfair contract term, or purporting to apply or rely on an unfair contract term. Unfair contract terms are now subject to substantively the same penalty regime as substantive antitrust contraventions such as a misuse of market power (i.e., abuse of dominance).

Key issues

- The ACCC are targeting businesses which supply essential goods and services to consumers, such as food and groceries, energy and financial services.
- Unfair contract terms are still a focus and are now subject to pecuniary penalties.
- The digital economy is again within the sights of the ACCC, this time with a focus on the video game industry.
- The ACCC have already commenced a proceeding in line with the 2024/25 Priorities, alleging that fashion retailer Mosaic Brands failed to achieve the timely delivery of hundreds of thousands of products.

- In December 2023, the ACCC released their guidance Making environmental claims: A guide for business.

We anticipate the enforcement focus on these areas will look towards implementing market practices that adhere with the recent guidance.

In line with the 2024/25 Priorities, the ACCC commenced enforcement proceedings against Mosaic Brands (the owner of brands such as Noni B, Rivers, Millers and Rockmans) for failing to deliver hundreds of thousands of products within the advertised delivery timeframes. The ACCC allege that Mosaic Brands' various relevant businesses offered delivery within 2 to 17 days, however in over 26% of orders, the orders took in excess of 20 days to just leave Mosaic Brands' warehouses.

Industries in focus

Each year enforcement priorities include industry and sector focus areas. For the 2024/25 Priorities, the ACCC will focus on the digital economy, aviation sector, NDIS providers, supermarkets, telecommunication, electricity, gas and financial services. The key compliance and enforcement priorities impacting these industries and sectors are:

- Competition, consumer, fair trading and pricing concerns in the supermarket sector, with a focus on food and groceries.
- Promoting competition in essential services with a focus on telecommunications, electricity, gas and financial services.
- Misleading pricing in relation to essential services, with a particular focus on energy and telecommunications.
- Competition and consumer issues in the aviation sector.
- Improving NDIS providers' compliance with their obligations under ACL.

Cost of living pressure has been a key driver behind the enforcement focus on providers of essential services, and the encouragement of competition for telecommunication, electricity, gas and financial services. These priorities follow ACCC inquiries into the relevant sectors, notably:

- On 25 January 2024, a 12-month price inquiry commenced into Australia's Supermarket sector examining pricing practices of supermarkets and the relationship between wholesale and retail prices. As part of the inquiry, the ACCC will consider practices including the use of 'specials' and 'was/now pricing' and non-price aspects of competition including the impact of loyalty programs and discounts for future purchases.
- In December 2023, the final report of the Retail Deposits Inquiry was released. The Report found that retail deposit customer competition was often selective and opaque, and that strategic pricing strategies lead to greater complexity for consumers, and for some, poorer outcomes.

The additional focus on misleading pricing and claims in relation to essential services follows the ACCC commencement of proceedings against Energy Australia in September 2023 for allegedly failing to communicate price information in a simple and standardised way when notifying customers of impending price changes.

The Aviation sector focus follows high levels of consumer complaints, the ACCC's findings in the Domestic Airline Competition in Australia report and recent enforcement action commenced by the ACCC. The Report found that while revenue per passenger in December 2023 has decreased since December 2022, cancellations and delays are still above long-term industry averages. In August 2023, the ACCC commenced enforcement action against Qantas for allegedly engaging in misleading or deceptive conduct when advertising tickets for over 8,000 flights that it had cancelled but not removed from sale.

Compliance with the ACL by NDIS providers is a new compliance and enforcement priority, and the ACCC announced the commitment of resources to identify and act on consumer law matters arising from the conduct of NDIS providers. This enforcement priority follows other recommendations and commitments made by the Federal Government after the Independent Review of the NDIS and the announcement in December 2023 that the ACCC will be chairing a joint taskforce with the National Disability Insurance Agency and NDIS Quality and Safeguards Commission.

Enforcement priorities on retail practices such as delivery times, misleading and deceptive advertising in online reviews, in-app purchases and price-comparison providers, indicate a focus towards online retailers and ecommerce providers. The ACCC's priority comes in context of the market shift towards the digital economy and an increased proportion of problematic transactions being online commerce based. The ACCC has previously proposed mandatory obligations for digital platforms to address issues such as fake reviews and in November 2023 flagged an important need for regulatory reform in their seventh interim report for the Digital Platform Services Inquiry. The ACCC has separately stated that the video game industry will be of focus for in-app purchases, something that private actions brought by Epic Games against Apple and Google have highlighted to the ACCC.

Could 2024 be the year we see significant enforcement action from the ACCC targeting digital platforms?

While the 2024/25 Priorities do not focus specifically on digital platforms, there is an increased focus on the digital economy. Since the ACCC released its final report following its Digital Platform Inquiry in June 2019 (**DPI Report**), the ACCC's annual enforcement priorities have always focused on some aspect of digital markets. In the almost 5 years since June 2019, the ACCC has commenced enforcement action against numerous digital platforms, although the significance of these actions pales in comparison to actions taken by other regulators around the world, see further below.

Since June 2019, the ACCC has commenced enforcement action against a number of digital platforms, including HealthEngine, Viagogo, Booktopia, Meta, eHarmony, Airbnb, Uber, Trivago and Google. Google has been subject to the most enforcement action, with the ACCC commencing two proceedings against the US search engine giant. The ACCC's actions alleged that Google made misleading statements in respect of how it collected and used location data on Android phones and allegations that Google made misleading statements to Google Account users about how Google would collect and use personal data for advertising services. Each of these enforcement actions related to alleged misleading and deceptive conduct and breaches of the ACL and did not include any allegations about anticompetitive conduct.

By way of comparison, since releasing the DPI Report:

- the Department of Justice (**DoJ**) in the US commenced two significant proceedings against Google alleging its core businesses had engaged in anticompetitive conduct. In the first claim, heard in September and November 2023, the DoJ alleged Google entered anticompetitive deals with Apple and other companies for prime placement of the Google Search engine. In the second significant case, the DoJ alleged that through serial acquisitions and anticompetitive auction manipulation Google has monopolized key digital advertising technologies (**AdTech**).
- the European Commission (**EC**) issued two significant decisions against Google in respect of abuses of dominance with Google Android and Google Shopping. The EC is also currently investigating Google's conduct in respect of AdTech and, issued a Statement of Objections to Google in June 2023 stating its preliminary view that Google has breached EU antitrust rules by distorting competition in the AdTech Industry.

When announcing the 2024/25 Priorities, Gina Cass-Gottlieb stated that the ACCC "currently have a number of investigations into anti-competitive conduct and expect to make further announcements about this program of work throughout the year." In light of the increased scrutiny of Google's AdTech business globally and off the back of the ACCC's Digital Advertising Services Inquiry from 2021, could 2024 be the year we finally see the ACCC bring a misuse of market power action against a digital platform?

CONTACTS



Elizabeth Richmond
Partner

T +61 2 8947 8325
E Elizabeth.richmond
@cliffordchance.com



Ryan Draper
Senior Associate

T + 61 2 8922 8583
E ryan.draper
@cliffordchance.com

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www.cliffordchance.com

Clifford Chance, 10 Upper Bank Street,
London, E14 5JJ

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