ACCC 2021 Compliance and Enforcement Priorities

Speakers:
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In his annual address to Committee for Economic Development Australia (CEDA), ACCC Chair Rod Sims announced the ACCC’s compliance and enforcement priorities for 2021. This annual review of ACCC priorities the next 12 months has become a vital component of the ACCC’s strategic approach to compliance and enforcement work and its delivery, as well as providing transparency and accountability.

Transcript:
Check against delivery.

Introduction

Economics is in essence concerned with how we grow the ‘pie’, and how we divide the ‘pie’. The importance of the latter has for a number of economists waned in recent years, which is unfortunate.

The ACCC does not directly target economic growth or inequality, but our work has important implications for both. For example, a lack of competition will see less investment, innovation and lower productivity.

Unchallenged economic rents, of course, favour those who benefit from them at the cost of those who do not. These points are more important than ever with the continuing effect of and recovery from COVID-19.

My annual address to CEDA has become a vital component of the ACCC’s strategic approach to compliance and enforcement. This annual review of our priorities for the next twelve months helps focus our work and its delivery, as well as provide transparency and accountability.

At this event last year I highlighted that even though the ACCC sets out priorities annually we need to be responsive to emerging issues. The disruption from this global pandemic has certainly emphasised this point.

We had to refocus much of our 2020 priorities. While we were still able to deliver on many of them, there is still unfinished business, and so we are continuing to work on a number of the priorities we set out last year.

Today I will:
- mention just some of what we have before us in enforcement, compliance and infrastructure
- list our 2021 compliance and enforcement priorities
- discuss our market studies and advocacy work to round out what 2021 will look like for the ACCC.

You will see how the ACCC is aiming to help grow the ‘pie’, and better share the ‘pie’.

1. What we have before us

An important part of the ACCC’s response to COVID was to grant exemptions for businesses so they were able to cooperate in ways we wouldn’t allow in normal times. With a large diversion of our resources we quickly granted 28 authorisations, covering sectors including medical supplies, groceries, energy, telecommunications and banking.

While there was some controversy both here and internationally about us doing this, all authorisations were implemented with strong monitoring and disclosure obligations and have strict time limits. On current plans will have expired by 30 September 2021, so the businesses involved will be back to competing vigorously.

I am convinced that our authorisations helped Australia navigate COVID as well as we have so far.
Last year the ACCC established a COVID-19 Taskforce to respond to the significant rise of complaints stemming from various COVID restrictions. We saw, for example, a 500% increase in complaints and reports about the travel sector.

As a result of COVID-19 not only did we adjust our priorities, but we also changed our enforcement and compliance approach in responding to these issues.

While the ACCC is not a complaints handling authority, we did on numerous occasions facilitate the conciliation of consumer disputes with a number of businesses. We engaged early with over 100 businesses to understand to get to the bottom of complaints and quickly find a resolution. This direct engagement resulted in many businesses changing their behaviour and refunding millions of dollars to I suspect hundreds of thousands of consumers.

Notwithstanding our engagement approach to resolve issues, the ACCC is primarily a law enforcement authority and we were prepared to take action through the courts to resolve COVID-19 concerns. Enforcement investigations into Flight Centre, Qantas and Etihad, for example, saw important consumer outcomes achieved without the need for litigation.

The COVID-19 pandemic has also led to some businesses making representations about products or services that are claimed to ‘protect’ consumers from the virus. Whilst these issues also sit within the responsibility of the Therapeutic Goods Administration, the ACCC considered that there was a significant public interest in taking action against Lorna Jane for alleged false or misleading claims about its ‘Anti-virus Activewear’.

I will now very briefly cover some non-COVID issues.

The ACCC has an active list of criminal prosecutions in the pipeline for 2021. This year we have already reached an important milestone with the third and final Roll on, Roll Off Shipping cartel conviction earlier this month, with combined penalties of $83.5 million.

This week a committal proceeding is taking place in the CFMMEU prosecution in Canberra, and next week we have the Country Care matter, the first contested criminal cartel trial, which starts in the Federal Court in Melbourne. Later this year we expect another committal hearing in our Vina Money Transfer case and pre-trial hearings in the ANZ, Deutsche Bank, Citibank case.

We also expect our civil cartel case against Bluescope to be heard in September this year.

Complementing these cases, we have a full slate of investigations and anticipate two or three new civil cartel cases or criminal prosecutions to commence this year.

With competition enforcement work, we are waiting on judgement in the important NSW Ports proceedings; November 2020 we instituted proceedings against Australasian Food Group Pty Ltd, better known as Peters Ice Cream; and our case against Tasmanian Ports Corporation will be the first hearing of a case under the reformed section 46.

In December 2020 we commenced a case against the CFMMEU and a large builder, Hutchinson, in relation to alleged boycott conduct, and we expect that case to be heard mid-year.

The ACCC has a number of important consumer and fair trading cases before the courts, including franchising (Retail Food Group, Megasave), motor vehicles (Mazda and VW) and digital (Google and Facebook). Of particular significance is our case against Telstra which was commenced in November last year. Telstra has already admitted it acted unconscionably when sales staff at five licensed Telstra-branded stores signed up 108 Indigenous consumers to multiple post-paid mobile contracts which they did not understand and could not afford.

A number of decisions by the Federal Court last year highlight some of the difficulties that we face bringing cases against conduct which, on its face, appears to result in significant consumer detriment. However the Court took a different view; two such matters were the Kimberley Clark flushable wipes and the Jayco Caravans cases. Despite these setbacks we will continue to take on cases we believe are in the public interest.

Unlike our enforcement priorities, our mergers work is largely reactive. To date, the economic impact of the COVID shutdowns has not resulted in any significant increase in acquisitions of firms in financial distress, which is good news.

We are currently conducting a review of Woolworths’ move into wholesale food distribution via its proposed acquisition of PFD Food Services, and we recently commenced a review into NAB’s acquisition of the neobank 86400. With our banking sector dominated by four major banks, it would come as no surprise that we closely examine acquisitions by any one of the major banks, including those involving fintech start-ups.
During 2020 the ACCC reprioritised some of our product safety work to address concerns that emerged during pandemic. One example was the supply of hand sanitisers where the ACCC moved quickly to develop a stand requiring disclosures on hand sanitiser labels to ensure consumers are informed as whether the sanitiser has sufficient alcohol content to address COVID.

We have recently concluded our implementation of the Takata compulsory recall, with the ACCC overseeing the replacement of 4 million airbags in 3 million cars. The exercise involved trader engagement, consumer educa national coordination with states and territories, the design of deregistration initiatives, as well as compliant and enforcement activity. So far 99.9% of 3 million affected vehicles have been recalled and the small number remaining will be completed soon.

We continue to play our part in the perennial problem of scams through our Scamwatch service warning the public and working with stakeholders to disrupt the scammers’ activities. In 2020 alone, Scamwatch receiv over 200,000 reports, so there is much to do.

A priority in 2020 was improving product safety in e-commerce through enhanced compliance commitments from online platforms. In November 2020, Ali Express, Amazon Australia, Catch.com.au and eBay Australia siged the Online Marketplace Pledge, committing themselves to do much more to protect consumers from unsafe products than required by the current law.

Last year the pandemic fully tested the capability of the NBN network as so many families and businesses were forced to relocate to home for work, school and much of their social activity. Our hugely important Measuring Broadband Australia program showed the NBN met this challenge.

With current commercial arrangements in place until December 2022, a key priority this year will be to set up regulatory framework for the multi-technology NBN network that allows the very significant public investment be most efficiently utilised.

Given the importance and long-term nature of this work, we will give ample opportunity for industry and other stakeholders to discuss their views. We are aware of the strongly held but opposing views among stakeholders.

### 2. Our 2021 Compliance and Enforcement Priorities

We have many important and exciting priorities for 2021.

The pricing and selling practices of essential services, combined with the lack of transparency in their pric continue as an area of concern for the ACCC. Unfortunately we have had to take a considerable number of enforcement action in the electricity and telecommunications sectors in the last year, and this will likely cont in 2021.

Importantly, new prohibitions in the electricity market include a requirement that electricity retailers pass or significant reductions in wholesale electricity costs we have seen over the past year. We are actively monitori costs and retailers’ price responses and asking certain retailers to justify their prices.

Consumers saw their electricity prices rise enormously over many years; now they need to see them fall considerably. This is only fair.

The long standing criticisms of funeral businesses, for their use of their significant market power to bundle services and block new entrants to the market, or to engage in unconscionable conduct, merits deeper examination this year and we will take targeted action where appropriate.

The ACCC’s specialised enforcement team focused on commercial construction will forcefully continue its activities in 2021. There have already been a number of cases; more will follow this year.

In the finance sector we will be following through on the recommendations from the ACCC’s Home Loan Price Inquiry final report which was released by the Treasurer in December 2020. They included a prompt to alert borrowers to available prevailing rates, and lowering the administrative burden on consumers who wish to switch home loan providers.

We also have some important investigations underway and we will be announcing some important enforcement outcomes over the next few months.

Given the additional support provided by the Government to businesses and individuals through this COVID period we have not seen growth in debt collection issues. As we return to more normal funding levels more people may find themselves in a vulnerable position; will watch very closely to look for signs of concerning
behaviour.

The continuing impact of the pandemic on the travel sector is well recognised. Consequently, the COVID-19 Enforcement Taskforce will be actively monitoring forward sales practices by travel businesses due to concerns about misrepresentations in advertising and marketing material, particularly given the huge uncertainty around the imposition and lifting of travel restrictions.

Further, the impacts of the pandemic are particularly evident in the aviation sector, as evidenced by the direction received from the Treasurer in 19 June 2020 for the ACCC to monitor and provide a quarterly report on prices, costs and profits of the Australian domestic aviation sector.

Competition in the aviation industry remains fragile and the ACCC is focussed on behaviours that adversely affect the competitive process. The ACCC will, for example, closely monitor the plans by the regional operator Rex to enter the major domestic routes, including those connecting Sydney, Melbourne and Brisbane, with a particular focus on Rex’s ability to access slots at Sydney Airport.

We will continue our work to ensure that small businesses receive the protections guaranteed by the competition and consumer laws, with a particular focus on the franchise sector. The ACCC continues to receive reports of misleading representations made by franchisors about franchises, in particular earnings capacity and the use of marketing funds.

Supply chain relationships in the agriculture sector continue to be a priority for the ACCC. Following the Dairy Code’s commencement in January 2020, the ACCC undertook a range of education, compliance and enforcement activities. While it is too early to assess its full impact, we have observed that the Code has brought some significant positive changes. The ACCC continues, however, to have concerns about the supply of perishable agriculture products and in 2021 we will also prioritise compliance with the Horticulture Code.

Despite the pandemic, the ACCC received a high volume of complaints about motor vehicles consumer guarantee issues in 2020. Enforcement action against a number of motor vehicle dealers and leveraging these enforcement outcomes to achieve broader industry behavioural change continues to be a key project for the ACCC.

Not surprisingly the local caravan sector has seen significant growth in 2020 as a result of the international travel restrictions. The ACCC continues to receive a number of complaints and concerns about failures by caravan manufacturers and dealers to comply with their consumer guarantee obligations.

On top of the hundreds of product recalls we assess, publish and monitor and the thousands of injury and unsafe product reports we look at, there are a number of key areas of focus in the ACCC’s product safety work. The horrific deaths and injuries to children through the ingestion of button batteries led to our work drafting a package of four mandatory standards for safety and prevention. We are very proud of this world first regulation which was signed into law by the Minister in December 2020. The standards require all consumer products to have battery compartments designed in such a way to be inaccessible to children. We will be implementing these new safety standards with a focus on promoting compliance through education during the 18 month transition period.

In 2020, 23 people died in Quad bike accidents, where deficiency in design leads to instability and creates hazards even for the most experienced operators. The government’s first stage of new mandatory safety standards for quad bikes came into effect from 11 October 2020, and the important second stage will start from October 2021. We are working closely with the States and Territories to conduct surveillance of compliance of Stage 1 obligations. As well we are conducting education and outreach activities to prepare suppliers for Stage 2, which includes obligations to improve safe design by fitting operation protection devices and improving lateral stability.

The establishment of the ACCC’s permanent Digital Platforms Branch in 2020 has led to a number of high profile court actions against the better known digital platforms. We will continue to advance our investigations into practices of the digital platforms in 2021, and some more cases will follow.

Also in progress are studies looking at the ‘Adtech’ and ‘apps’ markets, which address fundamentally important and controversial issues. We are working closely with our overseas counterparts and consulting widely with stakeholders.

3. Market studies and advocacy
The Government in recent years has directed the ACCC to undertake many Inquiries.

We have recently concluded major Inquiries into the cost of insurance in northern Australia, home loan interest rates, perishable agricultural goods and will shortly conclude our huge Inquiry into the water market in the Murray Darling basin.

We also have important continuing studies relating to the Electricity and Gas sectors.

One of the legislated objectives of the National Access Regime is to promote the economically efficient opera use and investment in infrastructure by which monopoly services are provided. Our current regime is not met that objective in relation to stand-alone monopoly infrastructure. Given the economic damage to the business using such infrastructure, this is not consistent with the objective of efficiency and is an unnecessary drag on economy.

We will continue to advocate in 2021 to have these issues addressed.

The ACCC continues to advocate for reforms to address key issues impacting consumers and small businesses Compliance and enforcement action in relation to the Consumer Guarantee Regime and the Unfair Contract Terms provisions have identified, in our view, important deficiencies in the law that we believe need to be addressed.

It is also our view that Australia’s consumer law framework needs an unfair trading practice prohibition. This issue that Australian governments and agencies are already discussing following the review of the Australian Consumer Law in 2018 and it was a key recommendation that we have made following our Digital Platform and Perishable Goods inquiries.

The ACCC analysts have directly supported the improvement of global product safety policies through the OEI and UNCTAD, and the ACCC is committed to seeing these improvements flow into Australia’s consumer product safety framework with a national safety provision.

Merger control plays a critical role in ensuring that competition is not eroded via mergers. However in recent years we have become increasingly concerned as to whether Australia’s merger control regime remains fit for purpose and, in particular, whether it is achieving the balance required to ensure good outcomes for consumers and the economy.

Increasingly the uncertainty inherent in the forward looking merger test has become a reason for clearing mergers. Merger parties and the courts are focused on what is likely to happen in the future without the acquisition, which is challenging to ‘prove’ in court. While this is a relevant issue to be considered, it is also quite to manipulation, and the focus on the counterfactual in many cases risks overlooking the likely anticompetitive effects of the merger itself. This is compounded by many of the merger factors listed in s50(3), which can be used to support a merger being cleared.

It appears that insufficient weight is placed on the risks to competition, such as potential competition being barriers to entry being raised or competitors being foreclosed. The net result is that our merger control regime skewed towards clearance, which presents real challenges for the ACCC in seeking to prevent anticompetitive mergers. As the goal of any merger control regime must be to prevent anti-competitive mergers in order to preserve or promote competition which will ultimately benefit consumers, we consider that the approach to merger control needs to be rebalanced. We are therefore currently exploring merger law reform options in 2021 to bring about this change.

**Conclusion**

The ACCC’s work is not limited to what I have spoken about today. I have not, for example, discussed our work on transport, netback gas prices and, I am sure to the disappointment of many, the media bargaining code, as just three examples.

Our market economy needs a growing ‘pie’, but world events show that it also needs an equitable sharing of the ‘pie’. Our current focus and advocacy will, in my view, help us to achieve both.

Thank you for your time today.