AUSTRALIA'S FINES NOT HIGH ENOUGH: THE ACCC REDOUBLES ITS FOCUS AND SETS OUT ITS PRIORITIES

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IN BRIEF

- Rod Sims, Chairman of the Australian Competition and Consumer Commission (ACCC) has said that companies must be fined more for breaching Australian competition and consumer laws. Mr Sims' statements follow a report published by the Organisation for Economic Co-operation and Development (OECD) that Australian corporations are fined 12 times lower than their OECD counterparts for cartel breaches.
- ACCC's push for higher penalties, especially for large businesses, in both competition and consumer law matters, was highlighted in the ACCC's announcements for Enforcement and Compliance Priorities, and Product Safety and Consumer Protection Priorities for 2018.
- Other key focus areas for the ACCC in relation to enforcement and compliance includes:
  - misuse of market power and concerted practices;
  - cartel enforcements, including laying criminal charges against corporations and individuals; and
  - targeted industry sectors include: agriculture, commercial construction, motor vehicles, financial services, consumer data and digital platforms, energy and broadband services.
- The ACCC's focus in relation to product safety in 2018, other than advocating for higher penalties under the consumer law, includes: Takata airbag recalls, improving safety of quad bikes, baby walkers, toppling furniture and products supplied over the internet, reducing the risk from button batteries, and improving return rates for the Infinity electrical cables.

ACCC'S FOCUS ON GREATER PENALTIES

Mr Sims has said that Australian companies must be fined more to have a deterrent effect for breaching competition law, after an OECD report found that Australian corporations are fined over 12 times lower than other developed countries, including America, Great Britain, Japan and Germany.

The average penalty imposed on Australian businesses was AUD 25.4 million, compared to an average of AUD 320 million in other countries. Mr Sims expressed concerns for this disparity.

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The ACCC has been, for a while, advocating for higher penalties. The push also applies to consumer law, and a Bill was introduced into Parliament recently to align the maximum penalties for breach of the Australia Consumer Law (ACL) with that of competition laws. If passed, consumer law penalties will increase from a maximum of AUD 200,000 to AUD 500,000 per breach for individuals and for corporations, from a maximum of AUD 1.1 million per breach to the greater of:

- AUD 10 million;
- 3 times the value obtained from the offence; or
- 10% of the annual turnover of the company.

Mr Sims has indicated that the ACCC will do all they can to increase the penalties for breach of the ACL, as there is *"no good reason"* for the discrepancy in penalties for breach of the ACL and competition conduct – both types of conduct cause detriment to consumers.

The ACCC has already been active in seeking to increase the level of penalties in both competition law and consumer law cases. In particular, in recent prosecutions:

- it appealed a fine against a manufacturer of major pharmaceutical and household products for misleading conduct of AUD 1.7 million, with the full Federal Court imposing a fine of AUD 6 million;
- it appealed a fine against one of Australia's largest domestic cement manufacturers of AUD 17.1 million for arrangements that substantially lessened competition, with the full Federal Court imposing a fine of AUD 20.6 million; and
- it appealed a fine of AUD 11 million against Australia's largest travel agent for attempted cartel conduct, with the full Federal Court imposing a fine of AUD 12.5 million.

Other than seeking higher penalties for the breach of Australian competition and consumer laws, the ACCC's announcements on Enforcement Priorities and Product Safety Priorities set out its focus for 2018. We discuss each of the priorities announcements below.

ENFORCEMENT PRIORITIES FOR 2018

In his first public address for the year, Rod Sims announced the ACCC's Enforcement and Compliance Policy for 2018 at the Committee for Economic Development of Australia (CEDA) conference which was held on 20 February 2018.

In addition to higher penalties, the ACCC identified the following areas as priorities in 2018:

- ***Competition*** – the new misuse of market power, concerted practices and cartels;
- ***Consumer*** – unfair contract terms in small business contracts, avoidance or misrepresentation of consumer guarantee rights, compliance with industry codes including the Franchising Code of Conduct (as also discussed in the ACCC's release of Small Business 2017 Snapshot);

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- ***Market studies***; and
- ***Industry priorities*** – agriculture, commercial construction, motor vehicles, financial services, consumer data and digital platforms, energy, broadband services.

Mr Sims commenced his CEDA address by reflecting on 2017 as a *"landmark year in competition law and policy"*. The Harper amendments that came into effect in November 2017 bring significant changes to many competition laws. Mr Sims indicated that the new misuse of market power and concerted practices provisions will be key enforcement priorities for the ACCC in 2018.

Misuse of Market Power

The amended misuse of market power provision removes the requirement for companies to 'take advantage' of their market power and introduces an 'effects test' meaning that companies may fall afoul of the provisions regardless of what the purpose of the conduct is. From 2018, companies with a significant market position will need to give consideration to the likely effect of their conduct on competition before the conduct is engaged in.

Concerted Practices

Given the uncertainty around how the concerted practices laws will operate, it is no surprise that the ACCC is keen to test this provision in 2018. Arguably the most significant of the Harper reforms, the concerted practices provision was designed to capture cartel-like conduct that falls short of the level of mutual commitment needed to establish an 'arrangement or understanding'.

Cartels

2018 is set to continue the ACCC's recent activities of cartel enforcement. The first criminal charges on individuals for alleged cartel conduct in Australia have been laid in the matter against The Country Care Group Pty Ltd, its Managing Director and a former employee. Also, Kawasaki Kisen Kaisha (K-line), who was prosecuted under the criminal cartel provisions, entered into a guilty plea in the Federal Court earlier this month.

Industry sectors

Mr Sims has identified the following industry sectors as targets for the ACCC's enforcement efforts in 2018.

Agriculture

In addition to the ACCC's continuing inquiries in the dairy, beef and cattle industries, 2018 will turn to enforcing the recently revised horticulture code and unfair contract terms. We expect that the ACCC's online tool for reporting agricultural issues that was introduced in 2017 will invite greater scrutiny of the agricultural industry in 2018.

Motor Vehicles

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The ACCC will continue to tackle one of the largest ever product recalls – Takata airbags. The ACCC has already established a dedicated team to handle the recall and resolve issues arising from the recall as quickly as possible.

The ACCC will also progress the recommendations given in the report on new car retailing industry, including working with car manufacturers to better respond to customer's consumer guarantee claims. It would not be surprising for the ACCC to take enforcement actions against car manufacturers and/or retailers if they do not abide by Australian consumer guarantees protections.

Financial Services

The ACCC is currently conducting an inquiry into residential mortgage products with a focus on pricing, and expects to report by June 2018. Also relevantly, the Productivity Commission has recently released a draft report on competition in the Australian financial system. We predict that the ACCC will further consider the competition issues identified in the report for possible action.

Commercial Construction

Mr Sims flagged that the ACCC is actively assessing allegations of cartel conduct, anticompetitive arrangements, undue coercion, unconscionable conduct and unfair contract terms in this industry, with enforcement action likely to be taken this year.

Consumer Data and Digital Platforms

With the Australian government recognising that access to consumer data is a critical competition and consumer issue, it is expected that the ACCC will further consider and progress the 'right to data' regimes, which gives consumers access to the data that is held about them by the business. An inquiry report on digital platforms, which will broadly explore the competition and consumer implications of digital media on consumers, is expected to be released by June 2019.

Energy

The ACCC is conducting inquiries into retail electricity pricing and gas, both of which have a strong focus on affordability. With the information gathered from the two inquiries, due in 2018 and 2020 respectively, the ACCC will no doubt focus on making recommendations that will improve energy affordability across the nation.

Broadband Services

The ACCC has been active in the broadband space, including preparing a report on Measuring Broadband Australia which will be released shortly, and accepting court enforceable undertakings from several providers of National Broadband Network (NBN) for engaging in misleading and deceptive conduct in relation to broadband speeds. The ACCC will continue to take enforcement actions against NBN service providers for misleading claims and statements.

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PRODUCT SAFETY PRIORITIES FOR 2018

Mr Sims has announced the ACCC's Product Safety Priorities for 2018 at the National Consumer Congress on 15 March 2018.

In the opening of his address, Mr Sims thanked the media and advocates for assisting the ACCC raise awareness of the critical safety issues relating to the Takata airbags. He remarked on the 4.2 million views of the Takata airbag page on the Product Safety website within one week of the compulsory recall announcement.

Due to the severity of injury the defect may cause and the wide-reaching set of vehicles, it is unsurprising that the Takata airbag recall is on the top of the ACCC's priorities in 2018.

Other than the Takata airbag recall, other safety issues that the ACCC will focus on in 2018 include:

- improving the safety of quad bikes, baby walkers and toppling furniture;
- improving the return rates of the Infinity electrical cables recall;
- reducing the risk from button batteries to children;
- improving safety of products supplied over the internet; and
- reviewing 66 compulsory safety standards and bans to ensure that they are working and checking business compliance.

For more information about the content of this Insight, please contact a member of the K&L Gates Competition and Consumer Law team.

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