

A diagonal line of white spheres, with one blue sphere in the foreground, receding into the background. The spheres are arranged in a slightly curved path from the bottom left towards the top right. The background is a light, neutral color.

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The Year Ahead

What to expect in Competition
and Consumer Law in 2022

March 2022

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New Chair, new era

Senior competition lawyer Gina Cass-Gottlieb will take over from Rod Sims AO, as Chair of the ACCC. Ms Cass-Gottlieb has been appointed for a 5 year term. We expect Ms Cass-Gottlieb to bring greater rigour and focus on evidence when making decisions, particularly in relation to commencing proceedings. This may result in increased use of compulsory s 155 notices. Ms Cass-Gottlieb may not be supportive of the wholesale merger reforms proposed by Mr Sims (see below). Other changes at the ACCC include the appointment on 1 March of competition lawyer Liza Carver as Commissioner, also for a 5 year term.

Next Steps

Ms Cass-Gottlieb will commence on 21 March 2022.

Expansion of unfair contract terms protections

The Government has introduced a Bill into Parliament seeking to prohibit unfair terms in standard form contracts with consumers and small businesses. The Bill, which proposes to amend the ACL and the ASIC Act, includes substantial penalties for contravening the prohibition consistent with other ACL/CCA penalties, i.e. the greater of \$10 million, 3 times the benefit or if that cannot be calculated, 10% of annual turnover connected to Australia (different penalties will apply under the ASIC Act). It also expands the classes of contracts that will be covered by the protections and therefore subject to potential penalties. Once passed, it is proposed that there be a 12 month transition period before the changes commence.

Next Steps

The changes will not take effect until the Bill is passed by both Houses of Parliament and the 12 month transition period has passed.

Other consumer law reform

The Government (irrespective of the outcome at the Federal election) is likely to progress other consumer law reform in 2022 including:

- i. Consumer guarantees and supplier indemnification provisions (Treasury consultation concluded in February 2022);
- ii. Product safety provisions regarding standards (Treasury consultation concluded in January 2022); and
- iii. Increasing Franchising Code penalties. (A Bill allowing an increase in penalties was passed in September 2021, but regulations specifying the parts of the Code to which increased penalties apply have not yet been made.)

Next Steps

An exposure draft of legislation is the likely next step for (i) and (ii). Amendments to the Franchising Code will be required for (iii). We expect such reform to progress after the Federal election.

Merger reforms?

In August 2021, Rod Sims proposed substantial reforms of Australia's merger control regime. Changes proposed included (i) a new mandatory and suspensory notification regime plus a call-in power for mergers below the new threshold; (ii) updating the merger factors to focus on structural changes; (iii) lowering the threshold of what constitutes "likely" to substantially lessen competition; (iv) deeming certain acquisitions to substantially lessen competition; and (v) a tailored merger review test for large digital platforms. The proposal has met with mixed responses.

Next Steps

Changes are unlikely before the next Federal election. To date, the Morrison Government has not been supportive of the proposal. It remains to be seen whether Labor has a greater appetite for change.

Reflections on criminal cartel cases

The ACCC will be reflecting on any internal changes required to ensure that its next criminal cartel prosecution is a successful one. After losing its case against Country Care and individuals in mid-2021 (the jury handed down not-guilty verdicts in relation to all eight criminal cartel charges) and after the CDPP withdrew the charges against all remaining accused in the CFMMEU case in August 2021, and then in the banking criminal cartel case in February 2022, there are clearly improvements to be made. While these cases were a failure, the ACCC has two other criminal cartel cases before the courts in which some or all participants have pleaded guilty (Vina Money Transfer and Alkaloids Australia). Sentencing hearings in those matters will take place this year, including of those individuals who have pleaded guilty. Mr Sims has also indicated that other cartel matters are currently being considered by the CDPP. We expect some of the procedural missteps we saw in the CFMMEU and banking criminal cartel cases are unlikely to happen again as the ACCC learns from and improves its approach to conducting investigations.

Next Steps

The ACCC will be keen to ensure its next criminal cartel prosecution is a “slam dunk”. We expect it to rely heavily on s155 notices in order to achieve this. There have been calls to improve the drafting of the criminal cartel offences, but there is no proposal for law reform in this area.

Continued focus on digital platforms

The ACCC’s Digital Platform Services Inquiry is ongoing and will continue until 2025. Its next report (the fourth interim report), due by 31 March 2022, will be focused on issues in the provision of online retail marketplaces to consumers in Australia. The fifth interim report, due by 30 September 2022, will consider whether there is a need for regulatory reform to address the competition and consumer concerns identified in digital platform services markets to date, informed also by developments in other jurisdictions including the European Union, United Kingdom and the United States. This report will mark the mid-point of the Inquiry.

Next Steps

The ACCC has released a discussion paper outlining the wide range of reforms it is considering recommending in its fifth report. Submissions on the discussion paper are due by 1 April 2022.

Environmental claims

The ACCC has noted that it is increasingly concerned about businesses falsely promoting green credentials, including carbon neutrality. It has flagged that it will be examining these claims in the consumer goods, manufacturing and energy sectors. We expect significant scrutiny of these claims and likely court action this year against companies that engage in misleading conduct.

Next Steps

The ACCC will be working with ASIC and the Clean Energy Regulator to identify which regulator is most appropriate to take action.

Access

In December 2021 the Government released exposure draft legislation on reforms to “improve the timeliness of processes” under the National Access Regime. Controversially, the draft reforms include removing the ability of parties to seek merits review by the Australian Competition Tribunal of the Minister’s decision on declaration, making the Minister’s decision final except in limited circumstances. (Merits review is a re-review of the facts, law and policy of the original decision, to determine if it is correct.)

Next Steps

It is unlikely the legislation will proceed before the Federal election.

Energy

The ACCC's ongoing electricity market monitoring and east coast gas inquiries will continue through 2025, as promoting competition in energy markets and consumer protection continues to be a priority. The ACCC has found that electricity prices to households have fallen to an 8 year low, while prices for gas have been rising (although only moderately compared to expected LNG netback prices) with a gas shortfall in supply from 2P reserves currently expected to emerge in 2026 unless there is timely development of new sources and associated infrastructure.

Next Steps

The next interim electricity report is due in May 2022 (with reports typically in May and November), and in about July/August for gas.

Asia-Pacific

Competition law reform continues at pace across the Asia-Pacific in both the newer regimes and the more established competition law jurisdictions. China is contemplating the first major changes to its Anti-Monopoly law since it was introduced. A revised draft of the amendments was released in November 2021 and is due to be considered by the Standing Committee of the National People's Congress early this year. At the other end of the spectrum, Cambodia's Competition Commission is expected to commence operations in mid-2022.

Next Steps

Significant competition law reform is expected across the Asia-Pacific region in 2022.

New ACCC Compliance & Enforcement Priorities 2022-2023

In addition to its enduring priorities such as pursuing cartel conduct, the ACCC has announced the following compliance and enforcement priorities for 2022-2023.

- 1 Consumer and fair trading issues in relation to environmental claims and sustainability.
- 2 Consumer and fair trading issues relating to manipulative or deceptive advertising and marketing practices in the digital economy.
- 3 Consumer and fair trading issues arising from the COVID-19 pandemic.
- 4 Competition and consumer issues arising from the pricing and selling of essential services, with a focus on energy and telecommunications.
- 5 Empowering consumers and improving industry compliance with consumer guarantees, with a focus on high value goods including motor vehicles and caravans.
- 6 Competition and consumer issues relating to digital platforms.
- 7 Competition issues in global and domestic supply chains, particularly where they are disrupted by the COVID-19 pandemic.
- 8 Promoting competition and investigating allegations of anti-competitive conduct in the financial services sector, with a focus on payment services.
- 9 Exclusive arrangements by firms with market power that impact competition.
- 10 Ensuring that small businesses receive the protections of the competition and consumer laws and industry codes of conduct, including in agriculture and franchising.
- 11 Compliance with the button battery safety standards.
- 12 Consumer product safety issues for young children, with a focus on compliance, enforcement, and education initiatives.



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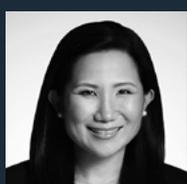
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