
The Parliament of the Commonwealth of Australia

Review of the Australian Competition and Consumer Commission Annual Reports 2019 and 2020

House of Representatives
Standing Committee on Economics

November 2021
Canberra

© Commonwealth of Australia 2021

ISBN 978-1-76092-299-3 (Printed version)

ISBN 978-1-76092-300-6 (HTML version)

This work is licensed under the Creative Commons Attribution-NonCommercial-NoDerivs 3.0 Australia License.



<http://creativecommons.org/licenses/by-nc-nd/3.0/au/>.



Chair's foreword

Our review of the Australian Competition and Consumer Commission (ACCC) was conducted during the COVID-19 pandemic, which continues to be a time of great uncertainty for Australian consumers and businesses. The pandemic's profound impact on the economy has prompted significant changes to the regulatory work and priorities of the ACCC, which, at its core, continues to advocate for and protect consumer rights while addressing issues of competition.

In examining the ACCC's pandemic management, the committee focused on the ACCC's implementation of temporary market authorisations, its guidance for the travel industry relating to refunds and securing ACCC sanction that travel agents were able to recoup costs for refund services, and the ACCC's response to pandemic-linked scams taking advantage of Australians.

The ACCC has had to authorise what would normally be considered anti-competitive behaviour in response to the economic challenges presented by the COVID-19 pandemic. Temporary market authorisations have allowed companies to cooperate and coordinate their responses to the pandemic, such as banks being able to coordinate on deferring lending repayments and on joint-hardship policies, in the interests of consumers and the broader economy. While the committee commends the ACCC for its necessarily agile response to the COVID crisis, it will continue to examine the ACCC's role in monitoring, and adjusting the settings for, temporary authorisations to ensure that competition is protected in the longer term.

Australia's international borders have been closed since March 2020 and we are still facing domestic lockdowns and border restrictions. Consequently, the travel industry has faced the complexities of issuing refunds at a large scale, despite the upfront labour costs of its work. The committee has heard from the ACCC about the difficulties of navigating contractual disputes in the travel sector relating to travel terms and conditions, a problem that nobody had anticipated. Given these challenges, the ACCC has done well to work with the travel industry to develop

best practice guidance for the future, to ensure that consumers are more aware of how COVID-19 related interruptions will affect them.

During the pandemic there has been an increase in scams targeting Australians, such as those relating to the early release of superannuation scheme. The committee noted the ACCC's continuing work in raising consumer scam awareness, and its work with inter-agency taskforces and working groups to investigate and prevent fraud against Australians throughout the pandemic. The pandemic is not over, and the ACCC will continue to play a role in educating consumers and working with enforcement partners to build greater resilience against fraud.

Some ACCC priorities had to be put on hold due to the pandemic. However, the ACCC maintained substantial compliance and enforcement responsibilities across the competition and consumer law sector, in relation to market concentration and competition, product safety, unconscionable and unfair conduct, and the new car retailing industry.

In particular, the committee acknowledged the ACCC's important work on developing a code of conduct to address bargaining power imbalances between Australian news media businesses and digital platforms. Despite the initial threats of Facebook and Google to alter their services to bully the Australian Government in response to the introduction of the code, the ACCC has led the way internationally in developing a code that has brought about successful agreements between these big technology companies and Australian news media businesses. The code, which has now passed Parliament, will be a focus of the committee's future scrutiny of the ACCC as the ACCC's enforcement role in this area begins.

Another world-leading achievement has been the ACCC's development of regulation for button battery safety. Button batteries are incredibly dangerous to children, creating the risk of death, hospitalisation, or serious long-term injury. There had been no specific mandatory regulation in Australia or overseas to address the hazard of button batteries across the wide range of consumer products that use them – until now. The committee will examine the ACCC's implementation of the new mandatory regulation, acknowledging the complexities of such a world-first regulatory standard from an enforcement perspective.

On other matters, the committee notes the view of Professor Ian Harper AO that consumer protection on financial products should be moved from the Australian Securities and Investments Commission (ASIC) to the ACCC.

Additionally, the ACCC has been slow to recognise the emergence of considerable concentration in Australia's capital markets. This is an important area of

competition policy analysis. Much greater attention needs to be given to it, especially in this nation.

On behalf of the committee, I thank the Chair of the ACCC, Mr Rod Sims, and other ACCC and Australian Energy Regulator (AER) representatives for appearing at public hearings on 23 October 2020 and 24 February 2021.

Jason Falinski MP

Chair



Contents

Chair's foreword	iii
Membership of the Committee	ix
Terms of reference	xi
List of abbreviations	xii

THE REPORT

1 Introduction	1
Background	1
Scope and conduct of the review	2
2 Current issues in competition and consumer law	3
Overview	3
Response to COVID-19	4
Temporary market authorisations.....	4
Travel-related complaints on refunds	6
COVID-19 related scams	9
COVID-19 impact on mergers and acquisitions	11
Impact of COVID-19 on the private health insurance sector	14
Digital Platforms Inquiry.....	16
News media bargaining code	17
Financial technology sector.....	21
Unconscionable and unfair conduct	22
Common ownership.....	24
Product safety	25

Regulation of button batteries 26
Motor vehicle service and repair information..... 28
Conclusion 30

APPENDICES

Appendix A — Hearings and witnesses.....33
Appendix B — Financial performance35



Membership of the Committee

Chair

Mr Jason Falinski MP (from 25 October 2021)

Mr Tim Wilson MP (to 8 October 2021)

Deputy Chair

Hon Dr Andrew Leigh MP

Members

Mr Adam Bandt MP

Mr Jason Falinski MP (until appointed Chair on 25 October 2021)

Mr Garth Hamilton MP (from 25 October 2021)

Ms Celia Hammond MP

Mr Craig Kelly MP (to 23 February 2021)

Mr Andrew Laming MP

Dr Daniel Mulino MP

Ms Peta Murphy MP

Mr Julian Simmonds MP

Committee Secretariat

Secretary Mr Lachlan Wilson

Research Officer Ms Nicolette Cilia

Office Manager Ms Jazmine Rakic



Terms of reference

The House of Representatives Standing Committee on Economics is empowered to inquire into, and report on, the annual reports of government departments and authorities tabled in the House that stand referred to the committee for any inquiry the committee may wish to make. The reports stand referred in accordance with the schedule tabled by the Speaker to record the areas of responsibility of the committee.



List of abbreviations

ABC	Australian Broadcasting Corporation
ACCC	Australian Competition and Consumer Commission
ACL	Australian Consumer Law
ACMA	Australian Communications and Media Authority
AER	Australian Energy Regulator
ANZ	Australia and New Zealand Banking Group
APRA	Australian Prudential Regulation Authority
ASIC	Australian Securities and Investments Commission
ATO	Australian Taxation Office
NAB	National Australia Bank
SBS	Special Broadcasting Service

Introduction

Background

- 1.1 The House of Representatives Standing Committee on Economics (the committee) is empowered to inquire into, and report on, the annual reports of government departments and authorities tabled in the House that stand referred to the committee in accordance with the Speaker's schedule.
- 1.2 The Australian Competition and Consumer Commission (ACCC) Annual Report 2019 and the ACCC Annual Report 2020 stand referred to the committee in accordance with this schedule. The committee resolved to conduct an inquiry into the ACCC's 2019 Annual Report on 7 October 2020, then extended the inquiry to cover the 2020 Annual Report through a resolution on 11 August 2021.
- 1.3 The ACCC is an independent Commonwealth statutory authority whose role is to enforce the *Competition and Consumer Act 2010* (previously the *Trade Practices Act 1994*) and a range of additional legislation.¹ The ACCC has a Chair, Deputy Chairs, Commissioners and Associate Members. Appointments to the ACCC involve participation by the Commonwealth, and state and territory governments. The ACCC currently comes under the portfolio responsibilities of the Treasury.
- 1.4 The ACCC's stated aims include promoting competition and fair trade in markets to benefit consumers, businesses, and the community. It also regulates national infrastructure services. The ACCC's key goals are:

1 Part II—The Australian Competition and Consumer Commission (ACCC) of the *Competition and Consumer Act 2010* covers the establishment and functions of the ACCC.

- protecting the interests and safety of consumers and supporting fair trading in markets
 - promoting the economically efficient operation of, use of and investment in monopoly infrastructure
 - increasing its engagement with the broad range of groups affected by the ACCC's operations.²
- 1.5 The ACCC's role complements that of state and territory consumer affairs agencies which administer consumer protection legislation in their jurisdictions, and the consumer and competition policy work of the Treasury.
- 1.6 The ACCC's annual reports are joint annual reports with the Australian Energy Regulator (AER). The AER is Australia's national energy market regulator and has its functions set out in national energy market legislation and rules.
- 1.7 The ACCC and AER's financial results for 2018-2019 and 2019-20 are provided at Appendix B.

Scope and conduct of the review

- 1.8 The ACCC appeared before the committee at two public hearings in Canberra on 23 October 2020 and 24 February 2021 as part of the committee's review of the ACCC 2019 and 2020 Annual Reports. The witness list for these public hearings is provided at Appendix A.
- 1.9 The proceedings were webcast through the Parliament's website, allowing interested parties to view or listen to the proceedings as they occurred. The transcripts of the hearings are available on the committee's website.³
- 1.10 The ACCC's responses to the committee's questions on notice and in writing are available on the committee's website.⁴
- 1.11 This report focuses on matters raised at the public hearings.

2 ACCC, 'About the ACCC', www.accc.gov.au/about-us/australian-competitionconsumer-commission/about-the-accc, viewed 15 October 2020.

3 House of Representatives Standing Committee on Economics, www.aph.gov.au/Parliamentary_Business/Committees/House/Economics/ACCCAnnualReport2019/Public_Hearings.

4 House of Representatives Standing Committee on Economics, www.aph.gov.au/Parliamentary_Business/Committees/House/Economics.

Current issues in competition and consumer law

Overview

- 2.1 The Australian Competition and Consumer Commission (ACCC) appeared before the House of Representatives Standing Committee on Economics (the committee) at two public hearings in Canberra, on 23 October 2020 and 24 February 2021, as part of its review of the ACCC's 2019 and 2020 Annual Reports.
- 2.2 The ACCC's response to the COVID-19 pandemic was a focus of the committee. In particular, the committee scrutinised the ACCC's pandemic response on:
 - market authorisations
 - travel and refunds
 - scam activity
 - approach to mergers and acquisitions
 - insurance.
- 2.3 Other issues raised at the hearings included:
 - the *Digital Platforms Inquiry* and the ACCC's role in the development of the News Media Bargaining Code
 - competition in the financial technology sector
 - unconscionable and unfair conduct
 - product safety
 - the new car retailing industry.

Response to COVID-19

- 2.4 The COVID-19 pandemic prompted temporary changes to the usual regulatory work and priorities of the ACCC. The committee focused on scrutinising the ACCC's protection of consumer interests in this challenging environment.
- 2.5 The ACCC outlined to the committee its primary areas of COVID-19 response:
- temporary market authorisations
 - establishing a COVID-19 taskforce to deal with a substantial increase in consumer complaints
 - ensuring that the essential elements of competition remained in place during the pandemic.¹

Temporary market authorisations

- 2.6 Australia's prohibitions against anti-competitive conduct mean collaborations between competitors will breach competition laws, even if potentially beneficial to society.
- 2.7 However, the *Competition and Consumer Act 2010* ('the Act') does give the ACCC power to grant exemptions and authorisations to businesses so that they can collaborate if the likely benefits to the public outweigh the likely detriments.² The authorisation regime is a statutory process that enables the ACCC to make a determination on an authorisation within 6 months. The ACCC can also grant 'interim authorisation' ahead of making a final determination.
- 2.8 The rapid onset and scale of the economic challenges presented by the COVID-19 pandemic, and the need for time-critical responses to them, created exceptions to the usual economic rules under competition and consumer law.
- 2.9 The ACCC received 33 applications for authorisations of collaborations linked to the pandemic. It granted authorisation to 28 of the 33, with the other 5 withdrawn by the applicants before a final determination was made.³
- 2.10 The ACCC told the committee that it had taken this 'very unusual step of authorising what would otherwise be anti-competitive behaviour' across a number of industries. It explained that, while companies were not allowed
-

1 Mr Rod Sims, Chair, ACCC, *Committee Hansard*, 23 October 2020, p. 2.

2 ACCC, *COVID-19-related authorisations*, 15 April 2021, p. 1.

3 ACCC, *COVID-19-related authorisations*, 15 April 2021, pp. 1-2.

to fix prices or bid-rig, they were allowed to cooperate and coordinate during the pandemic:

For example, the banks are able to coordinate to come up with joint hardship policies, deferring lending payments to small businesses and consumers. The supermarkets are allowed to coordinate on supply and also health measures... We had coordination for medical supplies, hospitals, telecommunications, energy and so forth. These measures are unusual, but we felt that at a time of crisis companies needed to cooperate together in the interests of our economy.⁴

2.11 The committee asked whether the ACCC monitored the impact of the authorisations on concentration in the markets. In particular, the committee highlighted concerns that Coles and Woolworths have increased their market share during the pandemic, inadvertently enabled by these authorisations. The ACCC responded that it was monitoring the authorisations 'very carefully'. Furthermore, according to its data, the market share of Coles and Woolworths had 'actually slightly gone down'.⁵

2.12 The ACCC told the committee that the supermarket industry is an example of how these arrangements have 'worked well' and enabled the industry to quickly respond to the pandemic. It explained that:

...it was initially very much about 'How do we get rid of the curfews so that we can have deliveries 24 hours a day to get the supplies in there?' Then they had very important discussions about the safety measures they put in place: how many people in the store, putting up screens at the checkouts, and there were a whole range of other things that they talked about. In my view, listening to those conversations, they moved more quickly to do that because they all took comfort in doing it together. That, I think, is just an example of how these things have worked well. So far, we haven't seen any significant negative – I can't think of any negative consequences flowing from the supermarkets one.⁶

2.13 The ACCC advised the committee that the duration of COVID-19 temporary authorisations is carefully considered and monitored, with the roll-back of the authorisations subject to health issues:

... it's very much dependent on how things get back to normal with COVID... I think it is very much health related; when we've turned that corner, that will do it. But for some of them you don't

4 Mr Rod Sims, Chair, ACCC, *Committee Hansard*, 23 October 2020, p. 2.

5 Mr Rod Sims, Chair, ACCC, *Committee Hansard*, 23 October 2020, p. 8.

6 Mr Rod Sims, Chair, ACCC, *Committee Hansard*, 23 October 2020, p. 8.

have to turn that corner very far. We've already wound back the one we gave on energy. We're winding back the one we gave on communications, because things have improved quite a lot. I think early in the new year a number of them will be wound back and it'll happen progressively through 2021 – subject again to the health issues.⁷

- 2.14 In February 2021, the ACCC advised that it expected the COVID-19 temporary authorisations to be 'all wound back by the end of September this year'. However, it acknowledged that temporary authorisations could be extended on a case-by-case basis if needed.⁸
- 2.15 The ACCC added that post-pandemic it does not seek to make temporary authorisations permanent. To do so would 'loosen the pressure that competition brings to our market economy' and that 'to remove that pressure...is to seriously undermine the effectiveness of our market economy'.⁹

Travel-related complaints on refunds

- 2.16 Due to the COVID-19 pandemic, Australia closed its borders to all non-citizens and non-residents on 20 March 2020.¹⁰ Wide-ranging international and domestic travel restrictions and cancellations of services resulted in a substantial influx of consumer complaints at the outset of the pandemic.
- 2.17 From 1 January to 31 October 2020, the ACCC received 24,210 travel-related complaints, an increase of 497 per cent from the year prior. Most related to travel agencies and airlines, reflecting the impact of domestic and international travel restrictions on both the travel industry and on consumers.¹¹
- 2.18 The ACCC observed that other travel booking issues have emerged as the COVID-19 situation has evolved, but that the 'pandemic continues to impede both domestic and international travel'.¹² Issues include local travel restrictions preventing consumers leaving their home state or

7 Mr Rod Sims, Chair, ACCC, *Committee Hansard*, 23 October 2020, p. 22.

8 Mr Rod Sims, Chair, ACCC, *Committee Hansard*, 24 February 2021, p. 8.

9 Mr Rod Sims, Chair, ACCC, *Committee Hansard*, 24 February 2021, p. 3.

10 The Hon Scott Morrison MP, Prime Minister, 'Border Restrictions', *Media Release*, 19 March 2020.

11 ACCC, *The impact of COVID-19 on consumers and fair-trading – an update on the work of the ACCC during the pandemic*, 25 November 2020, p. 8.

12 ACCC, *The impact of COVID-19 on consumers and fair-trading – an update on the work of the ACCC during the pandemic*, 25 November 2020, p. 9.

country, and the complexities of differing terms and conditions across the sector – both domestically and overseas.¹³

2.19 The committee raised concerns regarding the tension between consumers and the travel industry over appropriate refunds for booking cancellations. The committee questioned whether due consideration had been given to the costs, such as labour, incurred by travel agents when making and cancelling bookings on behalf of consumers.

2.20 The ACCC responded by detailing the complexities of issuing refunds in the travel and accommodation sector. It explained that consumer guarantees were not applicable for travel cancellations that resulted from government lockdowns, and that therefore the ACCC's jurisdiction under Australian Consumer Law (ACL) did not apply. Rather, issuing refunds had become a contractual issue:

We have absolutely been conscious of the impact on travel agents...the issue of consumers, first, has been that the statutory remedies, the consumer guarantees, are not applicable if travel is cancelled as a result of the government shutdown. So that removes some jurisdiction for us immediately under the Australian Consumer Law – our normal remit, if you like, of dealing with consumer guarantees. In effect, this becomes a contractual issue between a consumer and their travel agent or accommodation provider – a contractual dispute that the ACCC would not normally be involved in.¹⁴

2.21 The ACCC acknowledged that a full refund is not appropriate in all circumstances and that, 'if the terms and conditions provide for, in the circumstances for cancellation, a reasonable deduction, then we don't object to that'.¹⁵ However, the ACCC explained that its 'real concern' is where the charges for administration costs are not justified by the terms and conditions:

Our real concern here has been where some companies that we have seen – some big companies – have withheld thousands of dollars: from a \$7,000 or \$8,000 luxury holiday, \$5,000 has been withheld as an administration charge, and a consumer is left significantly out of pocket, sometimes in circumstances where the

13 ACCC, *The impact of COVID-19 on consumers and fair-trading – an update on the work of the ACCC during the pandemic*, 25 November 2020, p. 9.

14 Ms Sarah Court, Commissioner, ACCC, *Committee Hansard*, 23 October 2020, p. 4.

15 Ms Sarah Court, Commissioner, ACCC, *Committee Hansard*, 23 October 2020, pp. 4-5.

terms and conditions don't justify that. So we have very definitely taken issue in those circumstances.¹⁶

- 2.22 The ACCC told the committee that there have also been examples of misrepresentations being made to consumers about their entitlement to a refund as well as examples of 'retrospective changing of terms and conditions' by some companies. However, given the substantial impact of COVID-19 on the travel industry, the ACCC had 'decided not to take [its] normal enforcement approach' when looking at these matters.¹⁷
- 2.23 In July 2020, the ACCC released best practice guidelines for the travel industry and COVID-19 related travel cancellations.¹⁸ The committee asked whether, beyond the pandemic, a standardised code for terms and conditions for travel industry contracts would be appropriate. The ACCC advised that, while it has been considering a range of suggested changes, '...we haven't turned our minds to that, because we're in the middle of a crisis with the complaints still coming'.¹⁹
- 2.24 In February 2021, the ACCC told the committee that it had conducted extensive engagement in relation to advising consumers about what to do when booking accommodation and air travel, and to be fully aware of what happens if there are COVID-related restrictions that result in cancellation. It explained that 'we are seeing businesses increasingly coming to the table with that and being very upfront with consumers about what will happen if there is a COVID-related interruption to their travel or accommodation'.²⁰
- 2.25 When asked to reflect on the organisation's response in general to consumer interests in the travel and accommodation sector, the ACCC responded that it was successful in utilising its resources to address a problem that was not anticipated. The ACCC elaborated that:
- I don't think people anticipated that consumer guarantees wouldn't apply in such a broad way. Also, of course, we were using provisions of contract law, not the Competition and Consumer Act, in terms of making sure that people lived up to their terms and conditions.²¹
-

16 Ms Sarah Court, Commissioner, ACCC, *Committee Hansard*, 23 October 2020, p. 5.

17 Ms Sarah Court, Commissioner, ACCC, *Committee Hansard*, 23 October 2020, p. 4.

18 ACCC, 'ACCC and ACL Regulators best practice guidelines for the Travel Industry for COVID-19 related travel cancellations', July 2020, www.accc.gov.au/business/covid-19-coronavirus-information-for-business, viewed 1 August 2021.

19 Mr Rod Sims, Chair, ACCC, *Committee Hansard*, 23 October 2020, p. 5.

20 Ms Sarah Court, Commissioner, ACCC, *Committee Hansard*, 24 February 2021, p. 2.

21 Mr Rod Sims, Chair, ACCC, *Committee Hansard*, 24 February 2021, p. 2.

2.26 Additionally, the ACCC noted that consumers and businesses were ‘far better placed now than they were at this time last year’ in their ability to respond to quickly changing travel restrictions.²²

COVID-19 related scams

2.27 The committee questioned the ACCC on its response to pandemic-related scams. The ACCC reported that it had ‘seen a range of new scams emerging’ that took advantage of Australians, which had been reflected in a notable increase in consumer complaints.²³

2.28 As of 26 October 2020, the ACCC’s *Scamwatch* had received 4,863 reports mentioning COVID-19 or the coronavirus in the year-to-date, with a total of \$5,827,288 in reported losses.²⁴ The ACCC outlined prominent examples of scams mentioning, or relating to, COVID-19:

- campaigns impersonating the government, requesting personal details to receive various grants and subsidies
- malicious text messages purporting to provide coronavirus guidance but linking to websites hosting malware
- impersonations of private companies, allegedly offering discounts or relief but in reality phishing for personal or financial details, including credit card information
- online shopping scams, particularly in relation to pets and personal protective equipment such as masks and gloves
- accommodation or rental scams that rely on the inability of renters to view property.²⁵

2.29 The ACCC advised that *Scamwatch* received 1,181 reports relating to superannuation scams in 2020, an increase of more than 323 per cent compared to 2019.²⁶ Not all scams involving superannuation were related to the COVID-19 early release of superannuation scheme, with the ACCC also receiving reports of:

- fake supermarket vouchers for free if personal details, including superannuation details, were provided

22 Ms Sarah Court, Commissioner, ACCC, *Committee Hansard*, 24 February 2021, p. 3.

23 Ms Sarah Court, Commissioner, ACCC, *Committee Hansard*, 23 October 2020, p. 3.

24 ACCC, *Response to question on notice*, ACCC03QON, p. 1.

25 ACCC, *Response to question on notice*, ACCC03QON, pp. 1-2.

26 ACCC, *Response to question on notice*, ACCC03QON, p. 2.

- cold calls asking for superannuation details for reasons including ensuring that victims were ‘not locked out from their super’ under new rules
 - romance scams and investment scams involving convincing the victim to transfer their superannuation, sometimes via a self-managed super fund.²⁷
- 2.30 When asked about its response to the increase in scams during the COVID-19 pandemic, the ACCC advised that it is raising consumer awareness through general media, such as the *Scamwatch* website, in addition to the ACCC’s annual scam reports.²⁸
- 2.31 The ACCC has also been involved in several taskforces and working groups investigating and preventing fraud against Australians throughout the pandemic. As part of this, the ACCC has developed and distributed a superannuation early-access scams fact sheet after consultation with the Australian Taxation Office (ATO), Services Australia, Australian Securities and Investments Commission (ASIC), Australian Prudential Regulation Authority (APRA) and several banks.²⁹
- 2.32 In response to the COVID-19 pandemic, the ACCC increased its monitoring of, and response to, *Scamwatch* reports, to quickly identify high-risk scams and take action to disrupt them, such as contacting the Australian Cyber Security Centre (ACSC) to arrange takedowns and issue public warnings and information.³⁰ The ACCC explained to the committee that it has taken an intelligence-based approach to these scams, working with both the ACSC and domestic law-enforcement counterparts:
- ...there’s a real synergy, if you like, with cyber-security, cyberattacks, identity theft and scam activity. That’s a whole-of-government, whole-of-country set of issues, so we are working very closely with other law enforcement agencies to feed in all of our intelligence so that they can then apply that to their own systems to do their own forms of disruption as well.³¹
- 2.33 The ACCC added that most scams it deals with are based overseas, which increases the enforcement challenge. In response, the ACCC is working closely with overseas counterparts:
-

27 ACCC, *Response to question on notice*, ACCC03QON, p. 2.

28 Ms Sarah Court, Commissioner, ACCC, *Committee Hansard*, 23 October 2020, pp. 3-4.

29 ACCC, ‘Superannuation early-access scams fact sheet’, 28 May 2020, www.accc.gov.au/publications/superannuation-early-access-scams-fact-sheet, viewed 16 January 2021.

30 ACCC, *Report of the ACCC on scams activity 2020*, June 2021, p. 14.

31 Ms Sarah Court, Commissioner, ACCC, *Committee Hansard*, 23 October 2020, p. 13.

Many if not all the scams we deal with are based with people overseas. They are obviously keeping a very close eye on government announcements around the world...It's not easy to go and target someone sitting in Bulgaria, Nigeria or wherever it may be on their computer sending out thousands if not millions of emails around the globe.³²

2.34 Additionally, the ACCC has shared relevant intelligence with private sector organisations, including the major banks, but also digital platforms such as Facebook, Gumtree, Western Union, Afterpay and LinkedIn.³³ The ACCC advised the committee that, over the last 12 to 18 months, it has also worked intensively with the banks and digital platforms to identify triggers to scam activity and to establish corporate responsibility for intervention:

We have a program...of trying to work with the banks at one level and the digital platforms at another to identify triggers to scam activity and trying to get some corporate responsibility in relation to disrupting and forming an intervention in relation to scams to protect consumers. So that's another part of the strategy, and one that we've been working intensively on over the last 12 to 18 months.³⁴

COVID-19 impact on mergers and acquisitions

2.35 Mergers and acquisitions can be important for the efficient functioning of the economy, facilitating efficiencies and the diversification of risk across a range of activities. However, the Act prohibits mergers that would have the effect, or likely have the effect, of substantially lessening competition in the market.³⁵

2.36 Section 50 of the Act requires a list of merger factors to be considered when assessing the effect on competition, for example:

- levels of import competition in the market
- barriers to entry and concentration in the market
- available substitutes
- the likelihood of the acquirer being able to substantially increase prices or profit margins

32 Ms Sarah Court, Commissioner, ACCC, *Committee Hansard*, 23 October 2020, pp. 12-13.

33 ACCC, *Targeting scams: report of the ACCC on scam activity 2020*, 7 June 2021, p. 71.

34 Ms Sarah Court, Commissioner, ACCC, *Committee Hansard*, 23 October 2020, p. 13.

35 ACCC, 'Mergers', www.accc.gov.au/business/mergers, viewed 2 August 2021.

- the likelihood of the acquisition resulting in the removal of effective competitors.
 - levels of vertical integration in the market.³⁶
- 2.37 The role of the ACCC is to assess whether a proposed acquisition is likely to substantially lessen competition in the relevant market as a whole, with the aim of ensuring that markets work well for consumers.³⁷
- 2.38 In March 2020 as the scale of COVID-19 became apparent, the ACCC's Merger and Authorisation Review Division released an update advising that it would provide guidance regarding any changes in its operations arising from the pandemic. It explained that 'the current market environment is also likely to result in additional merger proposals related to concerns and uncertainty regarding the ongoing financial health of some firms'.³⁸
- 2.39 The ACCC told the committee that it did not want to 'lose essential elements of competition during the pandemic' and that it would be keeping 'very close to the financial regulators and energy regulators' to ensure that the mergers and acquisitions process was working well.³⁹ The ACCC would be 'keeping a close eye on companies that might get into trouble and what mergers or acquisitions might come through'.⁴⁰
- 2.40 The committee asked the ACCC whether a change to the substantial lessening of competition test (lowering the bar for intervention) or a legislated temporary pause of mergers during the pandemic may be necessary, given the ACCC's recent lack of success in contested merger actions and concerns around growing market concentration.
- 2.41 The ACCC conceded that it had not 'won a contested merger for a quarter of a century'. However, over the last five years it had undertaken approximately 250 public reviews and that 'in nearly 30 per cent of cases, either they've gone away because of our opposition or there have been remedies imposed'.⁴¹
-

36 Summarised from ACCC, *Merger Guidelines*, 21 November 2008, p. 2.

37 ACCC, 'The ACCC's approach to merger reviews', 16 April 2014, www.accc.gov.au/publications/the-acccs-approach-to-merger-reviews, viewed 19 August 2021.

38 ACCC, 'COVID-19 pandemic – what it means for ACCC merger clearances, authorisations, notifications and CTMs', *Media Release*, 27 March 2020.

39 Mr Rod Sims, Chair, ACCC, *Committee Hansard*, 23 October 2020, p. 2.

40 Mr Rod Sims, Chair, ACCC, *Committee Hansard*, 23 October 2020, p. 2.

41 Mr Rod Sims, Chair, ACCC, *Committee Hansard*, 23 October 2020, p. 6.

2.42 The ACCC further advised that it had not 'seen a lot of merger and acquisition activity' due to COVID-19 yet, and therefore did not see the need for a legislative response at this stage. It stated that:

In terms of a pause, I think that's awkward. As you quite rightly said, you're going to have acquisitions and mergers that might want to occur for reasons of companies getting into trouble. So what we are doing under that heading is talking to our fellow regulators in energy and finance to see that, if companies do get into trouble – fortunately, we haven't had major issues there yet – arrangements put in place are not ones that are anti-competitive, so that there is proactive action taken there.⁴²

2.43 On changes to the substantial lessening of competition test, the ACCC commented that this was a complex legal area without an immediately obvious solution:

On its face it is quite a reasonable test, but very unfortunately we've lost some court cases – communications, energy, transport – which, in my view, have done harm to the economy... We've been working through this – admittedly, work on it was paused because of COVID. But it's a complex area, because to what extent is it an issue of the law and to what extent is it an issue of how the courts interpret the law? We will present ideas for change next year, but we don't have them now.⁴³

2.44 The ACCC added that developing more enduring mechanisms to address market concentration would be an important issue in 2021:

But the whole topic is concerning. I mentioned in my speech that you'd have Google having acquired Android, DoubleClick and YouTube; that really entrenches their position. There has been a lot of criticism of regulators around the world for allowing those acquisitions, but, at the time they occurred, I certainly don't believe our law would have allowed us to stop them. What we're trying to do with the debate is: can we just rise up a bit and just think about what regime we want, where we really want to set the dial, to make sure that we don't end up with such a concentrated economy, as we clearly have now? We agree the economy is too concentrated. When you look at it transaction by transaction, it's difficult. We're trying to rise up and see whether we can put

42 Mr Rod Sims, Chair, ACCC, *Committee Hansard*, 23 October 2020, p. 6.

43 Mr Rod Sims, Chair, ACCC, *Committee Hansard*, 23 October 2020, p. 6.

something deeper in place that can address the issue. So it is very much a 2021 issue, from our point of view.⁴⁴

Impact of COVID-19 on the private health insurance sector

- 2.45 In the private health insurance sector, the ACCC enforces statutory consumer protections which apply to relationships between consumers and health insurers, hospitals, medical facilities, health providers and practitioners. Competition laws also govern relationships between industry players and restrict anti-competitive arrangements and exclusionary conduct.⁴⁵
- 2.46 In the early stages of COVID-19, several measures were enacted to protect consumer interests in the private health insurance sector.
- 2.47 Insurers publicly committed to returning any profits gained from the pandemic to their policyholders. In particular, this would be through hardship measures (for example, premium waivers or policy suspensions to policyholders financially impacted by COVID-19) and through postponing a scheduled April 2020 premium increase for at least six months – or cancelling it altogether.⁴⁶ Additionally, the ACCC (on 15 July 2020) granted conditional interim authorisation for insurers to coordinate on providing financial relief to policy holders, and on broadening insurance cover to include COVID-19 treatment, tele-health and medical treatment provided at home.⁴⁷
- 2.48 The ACCC told the committee that it was focusing on providing guidance to insurance companies on cost increases for policies and on their obligations to be flexible with policyholders during the pandemic. It had been engaging with APRA and had put the insurance sector ‘on notice’ on these issues, advising the industry to consider the circumstances of their customers:

We’ve been advising that they need to take into account their customers’ circumstances...as I said, we’ve been speaking to other regulators and the industry about the very issues you’ve raised. We understand that a number of insurers have made provision for

44 Mr Rod Sims, Chair, ACCC, *Committee Hansard*, 23 October 2020, p. 6.

45 ACCC, *Private health insurance report 2019-20*, 8 December 2020, p. 4.

46 ACCC, ‘Private health insurers to cooperate on COVID-19 coverage and deferral of premiums’, *Media Release*, 8 April 2020.

47 ACCC, ‘Private health insurers to cooperate on COVID-19 coverage and deferral of premiums’, *Media Release*, 8 April 2020.

that reduction of service. It's an ongoing issue at the ACCC at the moment.⁴⁸

- 2.49 The committee asked whether the ACCC had conducted benchmark studies or assessments on the flexibility of private health insurers' pandemic responses. The ACCC replied that while it was not conducting any detailed studies, its *Private health insurance report 2019-20*, released in December 2020, would outline key developments in the sector and cover private health insurer responses to the pandemic.⁴⁹
- 2.50 When released, the 2019-20 report highlighted that while there were different approaches to COVID-19 across insurers, most had initially implemented financial relief in the form of policy suspensions, postponed premium increases, and expanded hospital cover to include COVID-19 related admission regardless of cover level, and expansion of extras to include tele-health services.⁵⁰
- 2.51 However, the ACCC report also observed that in practice many policyholders were unable to access services that would ordinarily be covered by their insurance policy due to COVID-19 restrictions. Additionally, most health insurers had gone on to increase their premiums in October 2020.⁵¹ The ACCC reported that it 'expects insurers to uphold public commitments to return profits gained from COVID-19 restrictions to policy holders'.⁵²
- 2.52 The ACCC told the committee that the impact of COVID-19 on the sector and on 'consumers in particular' will be looked at when it reports next year (in the *Private health insurance report 2020-21*) and that there was 'a real opportunity for us to have a deeper dive' into the issues the committee raised'.⁵³
- 2.53 In March 2021, the ACCC granted an additional interim authorisation for ongoing cooperation between private health insurers during the COVID-19 pandemic. In doing so, the ACCC noted the 'ongoing need for private health insurers to be able, in limited circumstances, to engage in

48 Mr Rami Greiss, Executive General Manager, Enforcement Division, ACCC, *Committee Hansard*, 23 October 2020, p. 3.

49 Ms Sarah Court, Commissioner, ACCC, *Committee Hansard*, 23 October 2020, p. 3.

50 ACCC, *Private health insurance report 2019-20*, 8 December 2020, p. 15.

51 ACCC, *Private health insurance report 2019-20*, 8 December 2020, p. 16.

52 ACCC, *Private health insurance report 2019-20*, 8 December 2020, p. 18.

53 ACCC, 'ACCC grants interim authorisation for ongoing cooperation between Private Health Insurers during the COVID-19 pandemic', *Media Release*, 31 March 2021.

coordinated activities to respond to the COVID-19 pandemic, at least in the short term'.⁵⁴

Digital Platforms Inquiry

- 2.54 In July 2019, the ACCC released the final report for its *Digital Platforms Inquiry*. The inquiry examined the impact of online search engines, social media and digital content aggregators (digital platforms) on competition in the media and advertising services markets. The report focused on Facebook and Google, reflecting their influence, size, and significance.⁵⁵
- 2.55 Google and Facebook are gateways for businesses seeking to access Australian consumers online. In the ACCC's view, this gives them substantial market power, which in combination with the complexity and opacity of digital markets, 'creates significant risks to the efficient and effective operation of these markets'.⁵⁶ Further, the 'inability of news media businesses to individually negotiate terms over the use of their content by digital platforms', was 'likely indicative of the imbalance in bargaining power'.⁵⁷
- 2.56 The ACCC report made 23 recommendations relating to the operation of digital platforms in Australia. These included:
- amendments to the *Competition and Consumer Act 2010* relating to unfair contract terms, mergers, and unfair trading practices
 - proactive investigation, monitoring, and enforcement of issues in markets in which digital platforms operate
 - inquiry into ad tech services and advertising agencies
 - development of a process to implement a harmonised media regulatory framework
 - a mandatory Australian Communications and Media Authority (ACMA) code to assist copyright enforcement on digital platforms
 - establishment of an ombudsman scheme to resolve complaints and disputes with digital platform providers.⁵⁸

54 ACCC, 'ACCC grants interim authorisation for ongoing cooperation between Private Health Insurers during the COVID-19 pandemic', *Media Release*, 31 March 2021.

55 ACCC, *Digital Platforms Inquiry – Final Report*, June 2019, p. 4.

56 ACCC, *Digital Platforms Inquiry – Final Report*, June 2019, p. 13.

57 ACCC, *Digital Platforms Inquiry – Final Report*, June 2019, p. 16.

58 ACCC, *Digital Platforms Inquiry – Final Report*, June 2019, pp. 30-37.

- 2.57 In its response, the Australian Government accepted the ACCC's conclusion that there is a need for reform 'to better protect consumers, improve transparency, recognise power imbalances and ensure that substantial market power is not used to lessen competition in media and advertising services markets'.⁵⁹
- 2.58 The Australian Government further announced a commitment to:
- establish a special unit in the ACCC to monitor and report on the state of competition and consumer protections in digital platform markets, take enforcement action, and undertake inquiries as directed by the Treasurer
 - address bargaining power concerns between digital platforms and media businesses by tasking the ACCC to facilitate the development of a voluntary code of conduct
 - commence a staged process to reform media regulation
 - ensure privacy settings empower consumers, their data, and best serve the Australian economy by increasing penalties and introducing a binding online privacy code.⁶⁰

News media bargaining code

- 2.59 In April 2020, the Australian Government tasked the ACCC with developing a mandatory code of conduct to address bargaining power imbalances between Australian news media businesses and digital platforms, specifically Facebook and Google. The code would allow news media businesses to bargain individually or collectively with digital platforms over payment for the inclusion of news content on their services.⁶¹ The code also includes a set of 'minimum standards' for:
- providing advance notice of changes to algorithmic ranking and presentation of news
 - appropriately recognising original news content

59 The Hon Josh Frydenberg MP, Treasurer, 'Release of the ACCC Digital Platforms Report', *Media Release*, 26 July 2019.

60 Treasury, *Government Response and Implementation Roadmap for the Digital Platforms Inquiry*, 12 December 2019, p. 3.

61 ACCC, 'Draft news media bargaining code', www.accc.gov.au/focus-areas/digital-platforms/draft-news-media-bargaining-code, viewed 15 June 2021.

- providing information about how and when Google and Facebook makes available user data collected through users' interactions with news content.⁶²
- 2.60 Google publicly disputed the workability and fairness of the code. Google's view was that the code would 'undermine the benefits of the internet for millions of Australians' adding that 'our objections aren't about complying with the code or the principle of paying to support journalists – but how we do that matters'.⁶³
- 2.61 Like Google, Facebook expressed concerns about the code, commenting that the proposed legislation 'misunderstands the dynamics of the internet and ignored important facts about the value publishers receive from Facebook'.⁶⁴
- 2.62 Facebook added that in the event the draft legislation became law, it would 'reluctantly stop allowing publishers and people in Australia from sharing local and international news on Facebook and Instagram. This is not our first choice – it is our last'.⁶⁵
- 2.63 In a media statement at the time, the ACCC stated that Facebook's threat was 'ill-timed and misconceived' and that:
- The draft media bargaining code aims to ensure all Australian news businesses, including independent, community and regional media, can get a seat at the table for fair negotiations with Facebook and Google.⁶⁶
- 2.64 The committee asked the ACCC whether it had prepared for the possibility of big tech companies ceasing parts of their operations in Australia as a response to the proposed media code.

62 ACCC, 'Draft news media bargaining code', www.accc.gov.au/focus-areas/digital-platforms/draft-news-media-bargaining-code, viewed 15 June 2021.

63 Google, 'Update on the News Media Bargaining Code and Google in Australia', 6 January 2020, <https://about.google/google-in-australia/jan-6-letter/>, viewed 25 May 2021.

64 Facebook, 'Facebook's response to Australia's proposed News Media and Digital Platforms Mandatory Bargaining Code', September 2020, <https://about.fb.com/wp-content/uploads/2020/08/Facebooks-response-to-Australias-proposed-News-Media-and-Digital-Platforms-Mandatory-Bargaining-Code.pdf>, viewed 3 August 2021.

65 Facebook, 'Facebook's response to Australia's proposed News Media and Digital Platforms Mandatory Bargaining Code', September 2020, <https://about.fb.com/wp-content/uploads/2020/08/Facebooks-response-to-Australias-proposed-News-Media-and-Digital-Platforms-Mandatory-Bargaining-Code.pdf>, viewed 1 August 2021.

66 ACCC, 'Statement on Facebook', *Media Release*, 1 September 2020.

2.65 The ACCC emphasised that its focus had been on refining the code, rather than anticipating the reaction of big tech companies, and that the policy underpinning the code was a matter for the government:

We went out and consulted with everybody. We had extensive consultations, numerous meetings, with so many people. But, clearly, when we've seen the feedback from both the media companies and the platforms, there will be some things there where adjustments can be made and will be made. So our focus, completely, is on getting this code as appropriate as we possibly can. Of course, it's up to the government what they introduce into Parliament, because, as you know, it's legislation. This is very much a policy issue, rather than an enforcement issue. It's then up to Google and Facebook to decide what they want to do. So we haven't prepared for any eventuality; our focus has been on getting the code right.⁶⁷

2.66 After the House of Representatives passed legislation on the draft media bargaining code through to the Senate, Facebook acted on its threat on 18 February 2021 by temporarily blocking Australians from sharing news stories, including some government communications, emergency services, community services and commercial pages.

2.67 At the committee's public hearing several days later, on 24 February 2021, the committee sought the ACCC's view on the actions of Facebook, which by then had restored content to the Australian market. In response the ACCC Chair stated:

I wasn't surprised that those threats were made because this is a high-stakes game. Obviously Google and Facebook want to be in control. They want to do deals on a take it or leave it basis. This requires them to actually negotiate deals. They didn't want to do that, so the law needed to be very close.⁶⁸

2.68 The ACCC also told the committee that it had conducted wide consultations with overseas counterparts on the international implications of the code and that 'there is momentum building around this topic' overseas.⁶⁹

2.69 The committee questioned the economic rationale for initially excluding Australia's public broadcasters from the remuneration aspect of the code. Both the ABC and SBS were excluded from the code in the exposure draft

67 Mr Rod Sims, Chair, ACCC, *Committee Hansard*, 23 October 2020, p. 8.

68 Mr Rod Sims, Chair, ACCC, *Committee Hansard*, 24 February 2021, p. 6.

69 Mr Rod Sims, Chair, ACCC, *Committee Hansard*, 23 October 2020, p. 8.

of the Bill, released in July 2020. The ACCC responded that this was a matter for government, explaining that:

We provided advice to government on all aspects of the code except that one. We had a discussion where we said this is an issue for government. In our own internal conversations, we said that, on the one hand, you can see why the ABC and SBS would be in; on the other hand you can see why some may judge it inappropriate that the ABC is getting a good chunk of its revenue through commercial arrangements given that it is publicly funded. So we felt that was a debate best left to the funder of the ABC, which is the government.⁷⁰

- 2.70 The committee raised concerns that funds received by news media companies as a result of the code will go to shareholders rather than being used to employ journalists and increase the amount of news. The ACCC assured the committee that the aim of the code is to ‘promote journalism’ and that the ACCC ‘will certainly be watching to make sure that journalism benefits from the code’.⁷¹
- 2.71 Prior to the introduction of the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2021 into the Australian Parliament, the Australian Government announced amendments to the draft code, including:
- the ABC and SBS would now be included in the code
 - the value to news media companies of referral traffic would now be included in the assessment of value
 - the period of notice that platform companies would be required to give to news media companies about changes to their algorithms would be reduced from 28 days to 14 days.⁷²
- 2.72 The Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2021 passed the Australian Parliament on 25 February 2021. The code ‘will ensure that news media businesses are fairly remunerated for the content they generate, helping to sustain public

70 Mr Rod Sims, Chair, ACCC, *Committee Hansard*, 23 October 2020, pp. 8-9.

71 Mr Rod Sims, Chair, ACCC, *Committee Hansard*, 24 February 2021, pp. 6-7.

72 The Hon Josh Frydenberg MP, Treasurer and the Hon Paul Fletcher MP, Minister for Communications, Urban Infrastructure, Cities and the Arts, *Press Conference*, Parliament House, Canberra, 8 December 2020.

interest journalism in Australia'.⁷³ The code will be reviewed by Treasury within one year of its commencement.

Financial technology sector

2.73 Australia has a rapidly developing financial technology or 'fintech' sector with nearly 700 fintech companies operating in Australia since 2018.⁷⁴ Fintechs offer products and services such as money transfers and payments, savings and investments, borrowing, challenger and neobanks, and personal finance management.⁷⁵

2.74 The ACCC recognises the important role fintechs play in the financial sector, and the benefits that competition from fintechs brings for consumers by 'challenging the established banks, leading to more innovative and cheaper banking'.⁷⁶ Further, the ACCC has 'seen several banks and non-bank lenders outside the big four invest heavily in their technology and service offering to improve user experience'.⁷⁷

2.75 However, the ACCC has stated that as the Australian banking landscape is 'dominated by four major banks', it will continue to closely examine major bank acquisitions, including those involving fintech start-ups, from a competition perspective.⁷⁸

If we are concerned from a competition point of view, we will seek to block the acquisition. Much depends on whether we think that fintech or neobank has a proposition that could actually be a challenge and could actually be innovative and we would be worried about that being lost.⁷⁹

2.76 In its discussions with the committee, the ACCC cited the example of its review of NAB's acquisition of 86 400; a digital bank, offering online

73 The Hon Josh Frydenberg MP, Treasurer, and the Hon Paul Fletcher MP, Minister for Communications, Urban Infrastructure, Cities and the Arts, 'Parliament passes News Media and Digital Platforms Mandatory Bargaining Code', *Media Release*, 25 February 2021.

74 Mr Rod Sims, Chair, ACCC, 'Will competition survive the current crises?', *Speech*, Australian Financial Review Banking and Wealth Summit Crisis Briefing, 30 March 2020.

75 Senate Select Committee on Financial Technology and Regulatory Technology, *Interim Report*, September 2020, pp. 3-4.

76 ACCC, 'NAB's acquisition of 86400 not opposed', *Media Release*, 30 March 2021.

77 ACCC, 'NAB's acquisition of 86400 not opposed', *Media Release*, 30 March 2021.

78 Mr Rod Sims, Chair, ACCC, 'ACCC's 2021 Compliance and Enforcement Priorities', *Speech*, Committee for Economic Development Australia, 23 February 2021.

79 Mr Rod Sims, Chair, ACCC, *Committee Hansard*, 24 February 2021, p. 13.

transaction and savings accounts, and a home loan product. NAB sought to combine 86 400 with its existing digital brand, UBank.

- 2.77 The ACCC commenced its review into NAB's proposed acquisition of 86 400 on 29 January 2021. On 30 March 2021, the ACCC, having completed its review, announced that it would not oppose NAB's acquisition of 86 400 as it was 'unlikely to substantially lessen competition in any relevant markets'.⁸⁰
- 2.78 Further, while 'the ACCC found that 86 400's product and service offering is in some ways different to some of the large banks, it is not unique in the market. There are a number of other competitors, including other neobanks, non-bank lenders, and second-tier banks, who are replicating or providing a similar offering.'⁸¹
- 2.79 The committee asked the ACCC about the broader issue of the big four banks acquiring innovative fintech and neobank rivals, and whether it would move beyond monitoring the situation and view it as anti-competitive conduct.
- 2.80 The ACCC told the committee that that it was not against fintechs being acquired by major banks, but rather aims to ensure that the market is not consolidated:

...you wouldn't want all the fintechs being bought by the big four banks; that would just consolidate it. So it is not as if we are against any big four bank buying a fintech: it is just making sure that we don't lose this golden opportunity for more innovation. We're just going to do it case by case and look at these things.⁸²

Unconscionable and unfair conduct

- 2.81 Unconscionable conduct is generally understood to be conduct 'which is so harsh that it goes against good conscience'.⁸³ Under Australian Consumer Law (ACL) businesses must not engage in unconscionable

80 ACCC, 'National Australia Bank Limited – 86 400 Holdings Ltd', www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/national-australia-bank-limited-86-400-holdings-ltd, viewed 4 August 2021.

81 ACCC, 'National Australia Bank Limited – 86 400 Holdings Ltd', www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/national-australia-bank-limited-86-400-holdings-ltd, viewed 4 August 2021.

82 Mr Rod Sims, Chair, ACCC, *Committee Hansard*, 24 February 2021, p. 13.

83 ACCC, 'Unconscionable conduct', www.accc.gov.au/business/anti-competitive-behaviour/unconscionable-conduct, viewed 4 May 2021.

conduct when dealing with other businesses or their customers. ACL sets out matters the court may consider in determining whether conduct in connection with the supply of goods and services is unconscionable.⁸⁴

- 2.82 In a 21 October 2020 speech, the ACCC Chair commented on the limited effectiveness of current laws dealing with unfair contract terms and unconscionable conduct. To deal with this, the ACCC Chair supported the introduction of an unfair practices prohibition, to handle, for example, business to business dealings where a company includes unfair clauses in standard form contracts, which allow a large business to change pricing unilaterally at cost to the other party. Making unfair contract terms illegal and subject to penalties 'would be an enormous boost to small business'.⁸⁵
- 2.83 Elaborating further on unconscionable conduct at its 23 October 2020 committee hearing, the ACCC said that it and ASIC had 'done well up until a few years ago' in enforcing statutory unconscionable conduct as set out in the Act.⁸⁶
- 2.84 However, the ACCC explained that recent court decisions on statutory unconscionability had challenged its approach. It cited the dismissal of the ACCC's appeal against a decision involving Medibank Private in December 2018 where the Federal Court had found that while Medibank had acted harshly and unfairly, its behaviour was not sufficient to establish statutory unconscionability. Such cases had led the ACCC to re-evaluate and more actively advocate for legal reform:

...we have, though, in the last few years had a series of unfortunate legal decisions in relation to statutory unconscionability...one that caused alarm bells for us was a full court decision in Medibank Private, where the court concluded that conduct that we were very concerned about was harsh conduct was unfair conduct but that it didn't meet the hurdle of unconscionability.

That, along with some other examples, like the ones Mr Sims has given, really prompted us to think, 'If the courts are going to interpret unconscionable conduct in this way, do we need this broader prohibition in relation to unfair trading?' That's what's

84 ACCC, *Avoiding unfair businesses practices – a guide for businesses and legal practitioners*, 22 April 2016, p. 16.

85 Mr Rod Sims, Chair, ACCC, 'Tackling market power in the COVID-19 era', *Speech*, National Press Club, Canberra, 21 October 2020.

86 Ms Sarah Court, Commissioner, ACCC, *Committee Hansard*, 23 October 2020, p. 21.

currently being worked through a number of processes, including the CAMs process – the consumer affairs ministerial forum.⁸⁷

Common ownership

- 2.85 The ownership of shares in competing firms by institutional investors, a phenomenon referred to as ‘common ownership’, is becoming increasingly common in some markets. This is in part due to the ‘increasing popularity of passively managed investment funds’, allowing investors to diversify their holdings and reduce exposure to individual firm risks.⁸⁸
- 2.86 Common ownership may give rise to competition law concerns, where institutional investors own shares in competing firms. This is because the voting decisions of these common owners may have the potential to dampen competition between the firms in which they have invested.⁸⁹
- 2.87 The committee asked the ACCC whether it believed that the notion of common ownership posed a threat to competition in Australia.⁹⁰
- 2.88 The ACCC responded that it viewed common ownership as a ‘potential threat to competition’.⁹¹ However, the ACCC had not seen common ownership ‘translate into control’, noting that it is continuing to monitor the issue:
- ...when we looked at it, it was hard to see how particular funds, with all their investments, would still have any more than about 10 per cent of a major company, and it’s hard to see how that is big enough to translate into control. Those funds might have shareholdings in all the competitors in a market but it’s still low...but we do monitor it though.⁹²
- 2.89 The ACCC commented that its concern with common ownership relates to issues of trade or commerce, rather than issues of policy:

87 Ms Sarah Court, Commissioner, ACCC, *Committee Hansard*, 23 October 2020, p. 21.

88 Directorate for Financial and Enterprise Affairs Competition Committee, *Common Ownership by Institutional Investors and its Impact on Competition*, 29 November 2017, p. 2, [https://one.oecd.org/document/DAF/COMP\(2017\)10/en/pdf](https://one.oecd.org/document/DAF/COMP(2017)10/en/pdf).

89 ACCC, *Response to question on notice*, ACCC09QON, p. 2.

90 The House of Representatives Standing Committee on Economics resolved to undertake an inquiry into common ownership and capital concentration on 29 July 2021. The ACCC appeared at the public hearing on 10 September 2021. For further information see: aph.gov.au/Parliamentary_Business/Committees/House/Economics/Commonownership.

91 Mr Rod Sims, Chair, ACCC, *Committee Hansard*, 23 October 2020, p. 10.

92 Mr Rod Sims, Chair, ACCC, *Committee Hansard*, 23 October 2020, p. 10.

When we have seen what could be described as coordinated behaviour, often the issues are not necessarily ones of trade or commerce. They are often policy issues. So our concern would be if the proxy advice was – as a silly example – ‘We really think we are underpricing the goods here’ – that would very much be a concern. But it’s more that they are often getting together on social issues, which arguably may not be in trade or commerce. But I think the bigger point is the 10 per cent and the lack of control.⁹³

- 2.90 The ACCC noted that ‘there probably isn’t a consensus view on the extent to which common ownership is a problem’ and that ‘we’re very interested at looking at the research...it’s very contentious amongst a number of big fund managers’.⁹⁴ Further, the ACCC would ‘certainly take the case’ if it found anti-competitive activity.⁹⁵

Product safety

- 2.91 Product safety regulation in Australia is a shared responsibility between the ACCC and the states and territories. The ACCC’s role is to identify and address the risk of serious injury and death from safety hazards in consumer products. This includes:
- negotiating the recall of goods
 - educating industry and consumers
 - negotiating voluntary changes to packaging labelling or product design
 - working to introduce changes to voluntary or mandatory requirements
 - introducing and/or working to implement changes to product safety mandatory standards and bans.⁹⁶
- 2.92 In addition to these core functions, the ACCC sets out its Product Safety Priorities annually.⁹⁷
- 2.93 The committee noted that some of the 2019 Product Safety Priorities had simply been rolled over from 2019 to 2020. While acknowledging the pressures of COVID-19 on the ACCC, the committee asked whether the

93 Mr Rod Sims, Chair, ACCC, *Committee Hansard*, 23 October 2020, p. 10.

94 Mr Marcus Bezzi, Executive General Manager, Specialised Enforcement and Advocacy, *Committee Hansard*, 24 February 2021, p. 10.

95 Mr Rod Sims, Chair, ACCC, *Committee Hansard*, 24 February 2021, p. 10.

96 Product Safety Australia, ‘ACCC Role’, www.productsafety.gov.au/about-us/accc-role, viewed 7 April 2021.

97 ACCC, ‘Product Safety Priorities’, www.accc.gov.au/about-us/australian-competition-consumer-commission/product-safety-priorities-2020, viewed 25 May 2021.

ACCC faced any barriers to its work on product safety and whether its work could be accelerated.

- 2.94 The ACCC explained that prioritising work on button batteries, quad bikes and the finalisation of the Takata airbag recall had ‘taken a really significant number of our resources’. Accordingly, issues such as infant sleeping products were unable to be progressed in line with the ACCC’s expectations.⁹⁸
- 2.95 The ACCC advised that it had received an increase in funding in the 2020-21 Budget partially targeted towards product safety issues, and that the funding will ‘absolutely increase our staffing’ and ‘increase what we can do’. Still, the ACCC added, it was ‘the broadest regulator in the world’ with significantly lower staffing levels than its international equivalents.⁹⁹

Regulation of button batteries

- 2.96 Button batteries are single cell batteries used in a wide variety of general consumer products and common household items, such as toys, remote controls, watches, digital kitchen scales, thermometers, promotional novelty products and other items attractive to children. They are ‘incredibly dangerous, especially for children five years of age and under’ due to risk of serious injury and death if the batteries are swallowed.¹⁰⁰
- 2.97 The ACCC has long recognised button battery safety as a serious concern and has worked to address the issue. In 2016 it coordinated the *National strategy for improving the safety of button battery consumer products 2016-18*. The strategy focused on developing evidence to inform regulatory and other approaches to improve button battery safety.¹⁰¹
- 2.98 In March 2019, then Assistant Treasurer, the Hon Stuart Robert MP, issued a Safety Warning Notice about the dangers of button batteries and asked the ACCC to expedite the regulatory impact assessment process for developing regulation to address button battery safety.¹⁰²
- 2.99 In July 2019, the ACCC established a Button Battery Taskforce, and in August 2019, released a Button Battery Safety issues paper, which sought

98 Ms Sarah Court, Commissioner, ACCC, *Committee Hansard*, 23 October 2020, p. 23.

99 Mr Rod Sims, Chair, ACCC, *Committee Hansard*, 23 October 2020, p. 23.

100 ACCC, ‘Button batteries – tiny batteries, big danger’, *Media Release*, 26 October 2020.

101 ACCC, ‘National strategy for improving the safety of button battery consumer products’, 19 September 2016, www.accc.gov.au/publications/national-strategy-for-improving-the-safety-of-button-battery-consumer-products, viewed 15 June 2021.

102 Product Safety Australia, ‘Safety warning notice (button batteries)’, 30 March 2019, www.productsafety.gov.au/publication/safety-warning-notice-button-batteries, viewed 15 June 2021.

stakeholder feedback.¹⁰³ In March 2020, the ACCC released the *Button battery safety – assessment of regulatory options – consultation paper* for public consultation.¹⁰⁴

2.100 The ACCC told the committee that button batteries had been ‘one of the biggest issues, if not the biggest issue, for the ACCC’. It advised that the number of products that will be covered by the mandated standard is ‘enormous’. The ACCC further emphasised that ‘no country in the world has mandated a standard on button batteries...we’ll be the first to do it’.¹⁰⁵

2.101 In December 2020, the Australian Government introduced new safety regulations to improve the safety of button batteries, which apply to all consumer products sold in Australia.¹⁰⁶ The ACCC described these as a ‘world-first mandatory horizontal set of standards addressing these issues across the economy and all consumer product categories’.¹⁰⁷

2.102 The ACCC noted that it recognised the industry concerns regarding the regulatory cost of the ACCC’s proposed solutions. The ACCC advised the committee that it aimed to balance these concerns with the safety interests of consumers:

...I wouldn’t, though, want to downplay the concern from some sectors in the industry about the regulatory cost of some of the issues we have proposed. We have tried to be responsive to that and come to a series of recommendations that recommend that regulatory impact but, appropriately, will significantly improve the consumer issues.¹⁰⁸

2.103 The ACCC told the committee that it is not anticipating significant pushback from industry, and that there will be an 18-month transition period from June 2022. It explained that it will be ‘working hard’ to ensure that ‘industry across the economy understand the new requirements of the standard’.¹⁰⁹ However, the most likely non-

103 See: ACCC, *Button battery safety – Issues Paper*, August 2019.

104 See: ACCC, *Button battery safety – Assessment of regulatory options – Consultation paper*, 19 March 2020.

105 Mr Rod Sims, Chair, ACCC, *Committee Hansard*, 23 October 2020, p. 23.

106 ACCC, ‘ACCC welcomes safety and information standards for button batteries’, *Media Release*, 21 December 2020.

107 Ms Sarah Court, Commissioner, ACCC, *Committee Hansard*, 24 February 2021, p. 14.

108 Ms Sarah Court, Commissioner, ACCC, *Committee Hansard*, 23 October 2020, p. 23.

109 Ms Sarah Court, Commissioner, ACCC, *Committee Hansard*, 24 February 2021, p. 14.

compliance could be expected from suppliers of cheaper-end novelty products.¹¹⁰

- 2.104 The ACCC noted that other issues still needed to be addressed in relation to button batteries. The ACCC would explore education on safe storage and disposal, issues which ‘couldn’t be dealt with by a standard’.¹¹¹

Motor vehicle service and repair information

- 2.105 In 2016, the ACCC undertook a market study into the new car retailing industry in Australia. The study focused on issues such as consumer guarantees and warranties, access to technical information for servicing and repairing new cars, and representations by manufacturers and dealers to consumers about vehicle fuel consumption and emissions.¹¹²
- 2.106 The ACCC found that independent repairers (that is, not manufacturer-affiliated repairers) experienced continual problems accessing information needed to repair and service new cars. The ACCC discovered problems with the breadth, depth and timeliness of information offered by car manufacturers to independent repairers, including a lack of transparency and consistency across manufacturers about safety and security information.¹¹³
- 2.107 In response, the ACCC recommended regulatory intervention to ensure that technical information is made available on commercially fair and reasonable grounds. This would be in the form of a mandatory code of conduct on modern car-related data for independent auto-dealers.¹¹⁴
- 2.108 The scheme will require motor vehicle service and repair information to be made available for purchase by Australian repairers at a fair market price. It will allow independent Australian motor vehicle repairers to have access to information needed to service and repair cars. It will also enable motorists to shop around for the best price, service, and convenience in a fairer market.¹¹⁵

110 Mr Tim Grimwade, Executive General Manager, Compliance and Product Safety, ACCC, *Committee Hansard*, 24 February 2021, p. 14.

111 Mr Tim Grimwade, Executive General Manager, Compliance and Product Safety, ACCC, *Committee Hansard*, 24 February 2021, p. 14.

112 ACCC, *New car retailing industry market study – Final report*, 14 December 2017, p. iii.

113 ACCC, *New car retailing industry market study – Final report*, 14 December 2017, p. 3.

114 ACCC, *New car retailing industry market study – Final report*, 14 December 2017, p. 12.

115 ACCC, ‘ACCC welcomes new law on motor vehicle service and repair information’, *Media Release*, 18 June 2021.

- 2.109 The committee asked the ACCC to explain why finalising the mandatory code of conduct scheme, which will provide independent repairers with fair access to the information they need to do their job, was taking so long.
- 2.110 The ACCC told the committee that the scheme was nearing the ‘end process’ and was expected to be ‘up and running’ in 2021. It explained that the consultation process was complex:
- ...there are two processes: one is the regulatory impact statement process and the other is the complexity of how you determine what is required by dealers – what they need to protect for safety reasons. In a sense, we did the easy bit; we said, ‘Look, here’s the problem; you need to fix it.’ The complex bit is exactly how you frame that code so that you are not compelling dealers to do things that might be unsafe. So there’s a lot of complexity. Again, I’m reasonably hopeful that it’s coming towards the end process. These things do take time. I can get as impatient as you are, but they do take time. So let’s hope that in 2021 we can get these things up and running.¹¹⁶
- 2.111 The ACCC told the committee that it was engaging with Treasury ‘almost on a weekly basis’ regarding the proposed legislation for the scheme as well as engaging with overseas authorities. The ACCC added that it was ‘preparing a team to take responsibility for any enforcement of the proposed legislation’.¹¹⁷
- 2.112 On 17 June 2021, the Competition and Consumer Amendment (Motor Vehicle Service and Repair Information Sharing Scheme) Bill 2021 was passed in the Australian Parliament, adopting recommendations from the ACCC’s new car retailing industry market study. The scheme is scheduled to come into effect on 1 July 2022.¹¹⁸
- 2.113 The ACCC welcomed the passage of the Bill, commenting that ‘we believe the scheme provides a much fairer opportunity for independent motor vehicles to compete and will improve outcomes for consumers’.¹¹⁹

116 Mr Rod Sims, Chair, ACCC, *Committee Hansard*, 23 October 2021, p. 7.

117 Mr Tim Grimwade, Executive General Manager, Compliance and Product Safety, ACCC, *Committee Hansard*, 24 February 2021, p. 8.

118 ACCC, ‘ACCC welcomes new law on motor vehicle service and repair information’, *Media Release*, 18 June 2021.

119 ACCC, ‘ACCC welcomes new law on motor vehicle service and repair information’, *Media Release*, 18 June 2021.

Conclusion

- 2.114 The committee acknowledges the ACCC's important role in monitoring and holding individuals and groups to account for anti-competitive behaviour and breaches of Australia's consumer law.
- 2.115 The COVID-19 pandemic has caused unprecedented levels of disruption and uncertainty across the ACCC's areas of responsibility. The committee notes that overall, the ACCC has responded well to the challenges of the pandemic and to the needs of consumers. It introduced temporary market authorisations to improve market efficiencies and ensure supply chains at a difficult time, navigated a rapid surge in consumer complaints, and created a COVID-19 taskforce to address the immediate harm to consumers and small businesses – in addition to its existing work and priorities.
- 2.116 The committee credits the ACCC for the important role it played in developing the mandatory code of conduct to address bargaining power imbalances between Australian news media businesses and digital platforms, specifically Google and Facebook. The achievement of the code, which sets an international precedent, saw the ACCC grapple with scale and complexity, and consult extensively with stakeholders. The outcome reflects well on the organisation's capability.
- 2.117 The committee notes the ACCC's important work in keeping Australian consumers safe through its product safety priorities. In particular, the committee commends the ACCC for its significant work on button battery regulation and the resulting new standards that have now been implemented in Australia. The committee will continue to scrutinise the ACCC's work in managing competing product safety priorities.
- 2.118 In addition, the committee notes the ACCC's continual work on issues of competition in the financial sector, unconscionable and unfair conduct, and issues relating to market concentration. The committee expects the ACCC to hold private health insurers to account and looks forward to understanding the ACCC's approach to consumer protection in this sector in its *Private health insurance report 2020–21*.
- 2.119 The committee will continue to monitor and scrutinise the ACCC's performance closely. In particular, the committee will follow the ACCC's approach to regulating markets emerging from the pandemic, its ongoing role under the new media bargaining legislation, and its work on product safety.
- 2.120 The committee also looks forward to hearing the ACCC's views on the rising trend of common ownership of public companies and capital

concentration, and any risks this poses to competition and consumer interests.

Jason Falinski MP
Chair
18 November 2021



Appendix A — Hearings and witnesses

Public hearings

Friday, 23 October 2020 – Canberra

Australian Competition and Consumer Commission

Mr Rod Sims, Chair

Mr Marcus Bezzi, Executive General Manager, Specialised Enforcement and Advocacy

Mr Michael Cosgrave, Chief Infrastructure Adviser

Ms Sarah Court, Commissioner

Mr Scott Gregson, Chief Operating Officer

Mr Rami Greiss, Executive General Manager, Enforcement

Mr Tim Grimwade, Executive General Manager, Compliance and Product Safety

Mr Paul Franklin, Executive General Manager, Consumer and Data Right

Mr Tom Leuner, Acting Executive Manager, Merger and Authorisation Review

Ms Sarah Proudfoot, Acting Executive General Manager, Infrastructure Regulation

Australian Energy Regulator

Ms Clare Savage, Chair

Mr Peter Adams, General Manager Market Performance

Mr Warwick Anderson, General Manager Finance and Reporting Branch

Mr Jim Cox, Deputy Chair

Ms Liz Develin, Chief Executive Officer

Mr Mark Feather, General Manager Policy and Performance

Mr Arek Gulbenkoglul, Acting General Manager Consumer and Markets

Wednesday, 24 February 2021 – Canberra

Australian Competition and Consumer Commission

Mr Rod Sims, Chair

Mr Marcus Bezzi, Executive General Manager, Specialised Enforcement and Advocacy

Ms Sarah Court, Commissioner

Mr Scott Gregson, Chief Operating Officer

Mr Rami Greiss, Executive General Manager, Enforcement

Mr Tim Grimwade, Executive General Manager, Compliance and Product Safety

Ms Sarah Proudfoot, Executive General Manager, Infrastructure Regulation



Appendix B — Financial performance

1.1 Financial Performance	2020 (\$'000)	2019 (\$'000)
1.1A: Employee benefits		
Wages and salaries	121,287	102,364
Superannuation		
<i>Defined contribution plans</i>	13,856	11,334
<i>Defined benefit plans</i>	7,294	6,979
Leave and other entitlements	17,147	15,537
Separation and redundancies	169	1,041
Other employee benefits	685	574
Total employee benefits	160,438	137,829
1.1B: Suppliers	2020 (\$'000)	2019 (\$'000)
Goods and services supplied or rendered		
Legal expenses	31,600	25,939
Consultants and contracted services	32,003	23,358
Information technology and communications	12,243	10,568
Property operating expenses	4,953	4,331
Travel expenses	4,219	5,759
Employee related expenses	2,226	2,344
Information management expenses	2,695	2,995
Other administration expenses	2,618	3,448
Total goods and services supplied or rendered	92,557	78,742
Other suppliers		
Operating lease rentals	-	9,867
Short-term leases	468	-
Workers compensation premiums	375	288
Total other suppliers	843	10,155
1.2 Own-Source Revenue	2020 (\$'000)	2020 (\$'000)
Own-Source Revenue		
International development funding	1,388	1,561
Reimbursement of legal costs	766	1,070
Secretariat Services – National Competition Council	851	850

Seminars	424	444
Sublease rental income	193	1,003
Finance income	84	-
Resources received free of charge (Remuneration of auditors)	115	115
Other revenue	1,111	385
Total sale of goods and services and rendering of services	4,932	5,428

Source ACCC and AER Annual Report 2019-20, pp.232-233.