

Unclassified

English - Or. English

5 June 2026

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Case Prioritisation and Prosecutorial Discretion – Note by Australia

25 June 2026

This document reproduces a written contribution from Australia submitted for Item 6 of the 149th OECD Competition Committee meeting on 24-26 June 2026.

Ori SCHWARTZ
Email : Ori.Schwartz@oecd.org

JT03588687

Australia

1. How an agency allocates its scarce resources is among the most significant determinants of its success. The ACCC's overarching mandate is to identify market failures and address them effectively through the most appropriate instrument. This submission focuses on one dimension of that mandate, enforcement, and examines how the ACCC approaches the exercise of its enforcement function. Specifically, it considers how the ACCC sets and publicly communicates its enforcement priorities; develops an enforcement program; engages in intelligence-led case selection; and exercises discretion across the lifecycle of a specific matter.

2. While this submission focuses on enforcement, the ACCC recognises that enforcement is not always the most effective or efficient means of addressing a market failure. The appropriate instrument – be it enforcement action, competition advocacy, a market study, consumer education, industry guidelines, or regulatory reform – will vary depending on the nature and source of the harm, the state of knowledge of the law, and the likely impact of each instrument. Frequently, the ACCC's most effective interventions combine several instruments deployed in sequence or in parallel: a market study may generate the intelligence that grounds a subsequent enforcement action, while advocacy directed at law reform may address structural conditions that no individual case could remedy. For example, the ACCC has taken a multifaceted approach in tackling concerns in the fuel sector. In addition to investigations, the ACCC has reviewed authorisation applications to coordinate fuel and related supplies to support supply chains, prepared weekly fuel monitoring reports, issued substantiation notices to businesses, worked with other consumer law regulators to respond to consumer complaints, and engaged with government departments to ensure coordination and consistency with ACCC activities and to stay abreast of government priorities.

1. The Relationship Between Case Prioritisation and Enforcement Discretion

3. Case prioritisation and enforcement discretion are closely connected. In the ACCC context, prioritisation refers to agency level decisions about how enforcement resources are allocated across conduct types, sectors or markets. Enforcement discretion refers to strategic decisions taken by the ACCC within individual matters, including investigation strategy and scope, whether to pursue litigation, or whether to resolve matters through alternative mechanisms.

4. The ACCC's compliance and enforcement policy recognises that not all potential contraventions can be pursued and that the ACCC exercises discretion to direct resources to matters that provide the greatest overall benefit - addressing harm to consumers and promoting stronger competition in our economy. Prioritisation determines the enforcement program, while enforcement discretion determines how those matters are pursued once selected.

2. Agency-Level Priority Setting and Strategic Enforcement

5. The ACCC sets annual compliance and enforcement priorities which provide a structured means of allocating enforcement resources, and ensure the ACCC's enforcement program is strategic, consistent, and impactful. The ACCC's compliance and enforcement

priorities are informed by engagement with business and consumers, with information sourced from surveys, complaints, intelligence, market inquiries and monitoring activities.

6. The ACCC's priorities are publicly available and identify areas of focus while preserving flexibility to respond to emerging issues.¹ Publishing the ACCC's compliance and enforcement priorities serves three distinct functions. First, it guides internal decision-making so staff and leadership have a consistent framework for assessing whether to open, pursue, or close investigations. Second, it signals to businesses and stakeholders which conduct and sectors the agency considers most deserving of scrutiny. Third, it provides transparency and accountability to the public, government, and stakeholders about how the ACCC is directing its efforts.

7. The ACCC's compliance and enforcement policy sets out 'priority factors' which, together with the compliance and enforcement priorities, are considered by the ACCC when deciding whether to pursue a matter. Priority factors include:

- conduct that results in substantial consumer or small business detriment
- conduct that has a significant impact on the cost of living
- conduct or practices that disproportionately target consumers experiencing vulnerability or disadvantage
- conduct that is of significant public interest or concern
- national conduct by large traders, recognising the potential for greater consumer detriment and the likelihood that conduct of large traders can influence other market participants
- conduct involving a significant new or emerging market issue or where our action is likely to have an educative or deterrent effect
- where our action will help to clarify aspects of the law, especially newer provisions of the Act.

8. In evaluating these factors to set an enforcement program, the agency recognises its critical role in shaping the direction of the law, including to take on higher risk matters to test the law. At the same time, the ACCC seeks to build a coherent doctrinal strategy through sequenced cases – recognizing that smaller cases can be important in developing doctrinal principles for larger future cases by the agency as well as for private actions.²

9. The enforcement program is not designed to accommodate matters with the highest prospect for settlement, but rather to identify matters that will best advance the agency's mission. As noted previously, the enforcement program is designed as one element within ACCC's broader toolkit that includes advocacy, market studies, infringement notices, administrative resolutions. Enforcement prioritisation is calibrated to the comparative advantages of that tool and the agency's overall resource constraints.

10. Where a sector is prioritised, the ACCC may pursue multiple enforcement actions to increase impact. For example, in the past year the ACCC has acted to address conduct that undermines competition in supermarket and retail supply chains and that weakens

¹ The ACCC's compliance and enforcement priorities are available here: <https://www.accc.gov.au/about-us/acc-strategy-and-priorities/compliance-and-enforcement-priorities>.

² While the ACCC has traditionally pursued the majority of competition cases, the enforcement program also acknowledges that private litigation has increased, including with respect to misuse of market power.

consumers' ability to make informed choices. The ACCC initiated civil cartel proceedings against four fresh food suppliers – and three senior executives – for alleged price fixing in the supply of staple fruit and vegetables to ALDI stores across multiple states. The ACCC also took action to address restrictions on price competition in retail supply chains through several resale price maintenance matters, where suppliers sought to control the prices at which retailers could sell products. By accepting court enforceable undertakings from these suppliers, our actions focused not only on enforcement, but on restoring competitive freedom and embedding compliance to prevent recurrence.

11. Together, the ACCC's compliance and enforcement policy and its priority factors contribute to the design of the agency's competition enforcement program. Translating that program into action requires careful case selection.

3. Individual Case Selection

12. Individual case selection at the ACCC is intelligence-led and proactive. Rather than simply reacting to complaints, the ACCC draws on its market monitoring activities, price inquiries, and market studies to identify sectors where competitive harm may be occurring and where enforcement action is likely to yield systemic benefit through individual action and deterrence. This intelligence function allows the ACCC to build an evidentiary foundation before commencing litigation, and to assess whether a matter is better addressed through a court enforceable undertaking, an infringement notice, or another instrument short of contested proceedings.

13. An example of intelligence-led case selection is the ACCC's proceeding against Google Asia Pacific Pty Ltd about pre-installation of Google Search on Android mobile phones.³ This case was informed by the ACCC's Digital Platform Services Inquiry, a five-year study of digital platform services that examined competition and consumer protection issues in these markets. Another example is the ACCC's current proceedings against Mastercard alleging anticompetitive conduct in the supply of debit card acceptance services, which arose from the agency's monitoring of payment system dynamics.⁴

14. The course of each individual case is guided by factors that form a framework for determining the appropriate outcome for the matter.

4. Matter-Level Discretion: Investigation and Resolution Choices

15. Once a matter is prioritised, discretion is exercised across the lifecycle of the matter - from the initial assessment of allegations, through the investigation and to how the matter is resolved.

16. Enforcement discretion includes decisions about whether to commence or discontinue investigations, the scope of the investigation, enforcement strategy, and decisions about litigation strategy or settlement.

³ *Australian Competition and Consumer Commission v Google Asia Pacific Pte Ltd*, Federal Court of Australia, originating application filed 18 August 2025. The penalty judgment was delivered on 2 December 2025.

⁴ *ACCC v Mastercard Asia/Pacific Pte Ltd* (Federal Court of Australia, NSD 484/2022)

17. The ACCC recognises that effective enforcement requires a range of responses, depending on the circumstances of the individual matter. Guiding factors for the exercise of enforcement discretion are set out in ACCC publications including:

- Compliance and Enforcement Policy and Priorities
- Co-operation Policy which sets out that cooperation by parties, corrective conduct, and compliance initiatives are relevant considerations in determining appropriate outcomes
- Cartels publication and the ACCC's MOU with the Commonwealth Department of Public Prosecutions which set out factors of serious cartel conduct and the pathway for matters to be referred for criminal prosecution
- ACCC's Immunity and Cooperation Policy for Cartel Conduct establishes clear criteria for immunity and leniency

18. This framework provides structured discretion for decision making on individual matters, guided by clear and public criteria, supporting both enforcement effectiveness and procedural fairness.

This framework informed recent ACCC actions. For example:

- the outcome in relation to Google's distribution of search services on Android devices, where Google admitted to breaching competition law and agreed to jointly submit to the Court that it should pay a penalty of A\$55 million, which was then ordered by the Court. In other matters competition has been strengthened without litigation.
- the ACCC's investigation into Equifax for exclusivity arrangements uncovered conduct that risked restricting entry and hindering existing competition and innovation in a developing market, where access to data is critical. As a result of the ACCC's investigation, Equifax stopped relying on the exclusivity and revenue sharing provisions in its agreement with SuperChoice, one of the largest holders of payroll and superannuation data in Australia. Equifax also later amended the agreement to remove these clauses. In addition, the ACCC also secured a court-enforceable undertaking from Equifax not to enter into future agreements preventing competitors from accessing this data.

5. Transparency, Accountability and Governance

19. The ACCC ensures that its discretionary decision-making remains transparent, consistent and accountable. The ACCC places significant emphasis on governance mechanisms designed to support these objectives.

20. The ACCC's Accountability Framework for Investigations sets out expectations for internal decision-making, documentation and oversight in enforcement matters. It seeks to ensure that discretionary decisions are reasoned, documented and subject to internal review, even where outcomes are not publicly visible.

21. Prioritisation decisions necessarily mean that some potential contraventions will not be pursued. Managing expectations in this context is essential to maintaining trust in enforcement institutions.

22. Clear communication about enforcement priorities and discretion helps mitigate perceptions of arbitrariness and supports industry compliance. Transparency also

contributes to broader regulatory legitimacy, particularly where it is important to justify why resources are directed to certain matters over others.

23. External transparency is supported through the publication of enforcement policies and reporting on enforcement outcomes. While transparency cannot extend to all aspects of enforcement decision-making, including where it may compromise investigation, these mechanisms assist in explaining enforcement approaches and maintaining public confidence. Where the ACCC has filed proceedings and discontinues them, the agency publishes its decision through a media release. However, if the ACCC had not made public its investigation and decides not to proceed, in the interests of confidentiality the agency generally will not make any public announcement.

6. Conclusion

24. Case prioritisation and enforcement discretion are central to effective competition enforcement in a resource-constrained environment.

25. The ACCC's approach illustrates how these functions can operate together within a structured framework that directs resources to matters of greatest public benefit, while preserving flexibility to respond to the circumstances of individual cases. Anchored in published priorities, clear decision-making criteria and strong governance arrangements, this approach supports strategic, transparent and accountable enforcement.