

Managing Compliance with Fair Trading Obligations

Australian Competition and Consumer Commission

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Executive Director

Corporate Management Branch

Australian National Audit Office

19 National Circuit

BARTON ACT 2600

Or via email:

communication@anao.gov.au.



Canberra ACT
25 February 2016

Dear Mr President
Dear Mr Speaker

The Australian National Audit Office has undertaken an independent performance audit in the Australian Competition and Consumer Commission titled *Managing Compliance with Fair Trading Obligations*. The audit was conducted in accordance with the authority contained in the *Auditor-General Act 1997*. I present the report of this audit to the Parliament.

Following its presentation and receipt, the report will be placed on the Australian National Audit Office's website—<http://www.anao.gov.au>.

Yours sincerely



Grant Hehir
Auditor-General

The Honourable the President of the Senate
The Honourable the Speaker of the House of Representatives
Parliament House
Canberra ACT

AUDITING FOR AUSTRALIA

The Auditor-General is head of the Australian National Audit Office (ANAO). The ANAO assists the Auditor-General to carry out his duties under the *Auditor-General Act 1997* to undertake performance audits, financial statement audits and assurance reviews of Commonwealth public sector bodies and to provide independent reports and advice for the Parliament, the Australian Government and the community. The aim is to improve Commonwealth public sector administration and accountability.

For further information contact:
Australian National Audit Office
GPO Box 707
Canberra ACT 2601

Phone: (02) 6203 7300
Fax: (02) 6203 7777
Email: ag1@anao.gov.au

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<http://www.anao.gov.au>

Audit Team

Matthew Collett
Michael Dorman
Andrew Morris

Contents

Summary and recommendations.....	7
Background	7
Conclusion.....	7
Supporting findings.....	8
Recommendations.....	11
Summary of entity response.....	11
1. Background	15
Regulation of fair trading	15
Audit objective, criteria and scope.....	19
2. Managing fair trading compliance risks	20
Does the ACCC's risk management framework support the effective management of fair trading compliance risks?	20
Is there an effective compliance and enforcement strategy?	24
Are there robust processes for gathering information and analysing and using it for intelligence purposes?	26
Does the ACCC effectively monitor and report on its performance in managing fair trading compliance?	30
3. Promoting voluntary compliance	33
Do the ACCC's guidance and engagement activities effectively support voluntary compliance?	33
Does the ACCC appropriately manage its compliance projects?	39
Are consumers and businesses sufficiently aware of the ACCC's fair trading responsibilities and activities?	42
4. Managing complaints of non-compliance	44
Does the ACCC have effective arrangements for receiving and responding to complaints from consumers?	44
Does the ACCC have effective arrangements for recording and using the complaints it receives?	49
5. Case selection and escalation.....	53
Are there effective processes for identifying, prioritising and selecting cases for investigation?	53
Are there effective arrangements for escalating cases for detailed investigation and enforcement action?	59
6. Investigations into non-compliance	62
Does the ACCC conduct investigations into non-compliance in accordance with the relevant standard?	62
Does the ACCC exercise its investigative powers in a way that is proportionate to the risk presented by non-compliance?	67
7. Enforcement actions.....	72
Are enforcement actions proportionate to the identified non-compliance?	72
Are the enforcement actions taken by the ACCC effective in addressing non-compliance?	78
Appendices	83
Appendix 1 ACCC's response	85

Summary and recommendations

Background

1. Australians buy goods and services as part of their everyday activities—in 2014–15, Australian households consumed over \$900 billion in goods and services.¹
2. Consumers are provided with rights, and obligations imposed on traders, by the Australian Consumer Law. Responsibility for enforcing this legislation—and managing compliance with fair trading obligations—is shared between the federal and state and territory governments. The federal regulator responsible for managing compliance with fair trading obligations is the Australian Competition and Consumer Commission (ACCC).

Audit objective and criteria

3. The audit objective was to assess the effectiveness of the Australian Competition and Consumer Commission in managing compliance with fair trading obligations.
4. To conclude against this objective, the ANAO adopted the following high-level criteria:
 - appropriate governance arrangements are in place to support the effective management of compliance with fair trading obligations;
 - compliance risks are identified, and a strategy is in place to guide the ACCC's fair trading regulatory activities;
 - appropriate actions are taken to encourage voluntary compliance with fair trading obligations; and
 - responses to non-compliance are timely, effective and proportionate to the risks presented by the non-compliance.

Conclusion

5. The ACCC effectively carries out many of its regulatory activities relating to managing compliance with fair trading obligations. It has a sound compliance and enforcement strategy, based on an extensive consultative process for determining strategic priorities. The strategy has been implemented by providing relevant and well targeted information and advice about fair trading rights and obligations to encourage voluntary compliance, and through proportionate and graduated responses to non-compliance, where investigations and enforcement activities have led to identifiable improvements in trader behaviour.
6. In the context of sound management, there are meaningful opportunities for the ACCC to improve its performance in managing compliance with fair trading obligations. Of particular importance, the ACCC has made inadequate use of intelligence for targeting compliance and enforcement activities, focuses too narrowly on individual complaints (rather than trends and

1 Australian Bureau of Statistics, 5206.0, *Australian National Accounts: National Income, Expenditure and Product, June 2015* [Internet], Australian Bureau of Statistics, Australia, 2015, available from <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/webpages/statistics?opendocument>> [accessed 8 December 2015].

patterns) in case selection activities and does not have adequate arrangements for ensuring that complaints involving high levels of widespread consumer detriment are considered by appropriate senior officers. Improvements in these areas would provide greater assurance that the ACCC is targeting its regulatory activities at conduct involving the greatest level of widespread consumer detriment. Doing more to extend its suite of performance measures from the current focus on outputs or deliverables to outcomes would also enable the ACCC to better gauge the extent to which fair trading objectives are being achieved and the extent of its contributions to higher levels of compliance by traders with fair trading obligations.

Supporting findings

Assessing regulatory risks

7. The ACCC's arrangements for managing risks only partially accord with the Commonwealth's *Risk Management Policy*, and the ACCC does not apply the policy to its priorities. While the annual strategic review process has been effective in identifying the ACCC's key strategic compliance risks, these priorities have not been managed through a consistent risk-based approach, including arrangements for evaluating outcomes. Addressing these gaps would facilitate more consistent risk management across the ACCC.

8. The ACCC has a sound compliance and enforcement strategy that outlines a set of proportionate and graduated approaches to encouraging voluntary compliance and addressing non-compliance.

9. The ACCC has access to a wide range of information sources, which it uses to identify systemic compliance risks, target compliance activities and support investigations into non-compliance with fair trading obligations. However, in undertaking these activities the ACCC relies too heavily on its own complaints data, and could make greater use of other sources of information, including public data and the complaints data of other regulators (see Recommendation No. 1). In analysing information, the ACCC's Intelligence and Reporting team prepares a range of useful reports for intelligence purposes. To support better targeting of compliance and enforcement activities, these reports could focus more on identifying higher risk traders, industries and issues.

10. In accordance with current Commonwealth guidance, the ACCC uses a number of measures, including performance indicators, case studies and survey results, to monitor and report on its performance. While they have improved over time, most of these measures are output-based, and developing measures of outcomes would enable the ACCC to report in ways that better illustrate its effectiveness in improving trader compliance with fair trading obligations.

Promoting voluntary compliance

11. The ACCC's information and advice about fair trading rights and obligations is clear and targeted to the main areas of consumer and business concern. This information is disseminated through traditional channels and social media such as Facebook and Twitter. Of primary importance is the ACCC website, which is clearly organised and easy-to-use. Consumer and business stakeholders contacted by the ANAO consistently commented positively on the ACCC's engagement with them.

12. The ACCC's fair trading compliance projects, which generally contain elements of education and enforcement, are targeted to priority areas and often achieve good results. Of eight projects that it had evaluated, six had positive results and two had mixed results. However, more frequent evaluation and better risk management would provide greater assurance that these projects are well managed, effective and achieve value for money.

13. In the ACCC's most recent Consumer and Small Business Perceptions Survey, most consumers and many businesses felt that they did not need to know what the ACCC was doing until there was a problem that affected them personally, at which time they expected to be able to find out more about the ACCC's roles. Nevertheless, a significant proportion of respondents wanted to know more about the work of the ACCC, indicating scope for the ACCC to increase the awareness of consumers and traders about where to get advice about their fair trading rights and obligations.

Managing complaints

14. The ACCC does not have fully effective arrangements to receive and respond to complaints as it has not consistently met the service standards outlined in its Service Charter, and quality assurance checks indicate low levels of quality in answering calls. Only 48 per cent of recent calls were answered within 60 seconds (against a target of 60 per cent) and 56 per cent of web forms were responded to within the target of 15 business days.

15. There are also shortcomings in the ACCC's quality assurance processes, as assessments have not been conducted in line with internal guidelines, outsource staff are subject to different call quality criteria to in-house staff, and results from the quality assessments are at odds with largely positive responses to the most recent customer service satisfaction survey.

16. The ACCC records complaints in its client relationship management systems. The ANAO identified issues with the way complaints were recorded in this system, including duplicate trader entries and a low level of identification of vulnerable and disadvantaged consumers. These issues reduce the usefulness of complaints data for the purposes of strategic planning, case selection and targeting of voluntary compliance activities. To increase the usefulness of complaints data for these purposes, the ACCC should introduce processes for assuring data quality, and better identifying vulnerable and disadvantaged consumers at the point of contact.

Case selection and escalation

17. The ACCC has appropriate arrangements for consideration and selection of matters at its internal case selection meetings. However, these meetings only consider approximately one per cent of the 10 000 fair trading complaints that the ACCC receives each quarter and there are limitations in the arrangements for escalating complaints beyond the Infocentre, which is the initial response centre for all inquiries and complaints to the ACCC on competition and consumer issues in Australia. These limitations relate to the extent of assurance arrangements regarding the escalation of cases to the case selection meetings, which raise the possibility that the ACCC may 'miss' complaints and consequently not address instances of widespread consumer detriment.

18. More broadly, the ACCC's case selection activities focus too heavily on individual complaints and instances of non-compliance. Greater use of intelligence in the case selection process, aimed at identifying trends and patterns of conduct suggesting widespread consumer

detriment, would enable the ACCC to more effectively target its investigative and enforcement activities.

19. The ACCC's processes for escalating cases for detailed investigation and enforcement action were effective in filtering cases to those falling within an ACCC priority. However, there were issues with the way that case progressions and escalations were recorded that have implications for the accuracy of reporting about the number of cases at various stages of investigation.

Managing investigations

20. Investigations were largely carried out in accordance with the Australian Government Investigation Standards. The ACCC has clear policies on its intranet, well-qualified staff and effective arrangements for the oversight of investigations. There was room for the ACCC to improve its practices in relation to the planning of investigations, as no investigation plan was in place for 14 of 50 investigations reviewed (28 per cent) and risks were not appropriately identified as part of investigation planning.

21. The ACCC has extensive processes to ensure that its investigative powers are used in a way that is proportionate to the risk presented by non-compliance, and also having regard to the burden and cost of compliance for a recipient. There was a high level of compliance with these processes and the ACCC exercised its powers in a proportionate way. However, there is room for the ACCC to ensure it more systematically considers ways to narrow the scope of information gathering notices that it issues.

Enforcement actions

22. The ACCC consistently made decisions about the appropriate enforcement action in particular cases in accordance with its Compliance and Enforcement Policy, proportionate to the identified non-compliance, and having regard to the objectives of specific and general deterrence. The ACCC makes use of a range of actions to respond to non-compliance. The most common action taken by the ACCC was accepting an administrative resolution (23 per cent of finalised cases in the ANAO's sample).

23. Enforcement actions taken by the ACCC were effective in responding to and managing non-compliance. The ANAO identified a decline in the number of complaints about a trader in the period following an action being taken against that trader, suggesting that enforcement actions were effective in achieving specific deterrence.

24. The effect in terms of general deterrence is more difficult to measure, although particularly where the ACCC adopted an industry-wide approach, it appeared that enforcement actions did have an impact on compliance in the broader industry.

Recommendations

Recommendation No. 1

Paragraph 2.28

To improve the extent and usefulness of information obtained for intelligence purposes, the ANAO recommends that the Australian Competition and Consumer Commission examines the merit of regularly obtaining complaints data feeds from other Australian Consumer Law regulators.

The ACCC's response: *Agreed.*

Recommendation No. 2

Paragraph 4.18

To better support the use of complaints from consumers as a source of intelligence for strategic planning and targeting of compliance and enforcement activities, the ANAO recommends that the Australian Competition and Consumer Commission improves the quality of complaints data, including by:

- (a) implementing a formal data quality process; and
- (b) reviewing call scripts and data capture forms for their alignment to the business needs of the Commission.

The ACCC's response: *Agreed.*

Recommendation No. 3

Paragraph 5.13

To improve the selection of cases for investigation and enforcement, the ANAO recommends that the Australian Competition and Consumer Commission:

- (a) improves assurance arrangements for ensuring that complaints involving high levels of widespread consumer detriment are escalated to case assessment meetings; and
- (b) increases the use of intelligence activities aimed at identifying trends, patterns of conduct and other factors that can indicate the existence of widespread consumer detriment in relation to the activities of a trader and/or industry.

The ACCC's response: *Agreed.*

Summary of entity response

25. The Australian Competition and Consumer Commission's summary response to the report is provided below, while its full response is at Appendix 1.

The ACCC welcomes the report and its findings that the ACCC has a sound compliance and enforcement strategy.

The ACCC notes the ANAO's comments that there are opportunities for the ACCC to improve its use and gathering of intelligence to provide greater assurance that the ACCC is targeting its regulatory activities at conduct involving the greatest level of widespread consumer detriment.

The ACCC agrees with the three recommendations made in the report, which focus on intelligence and improvement of quality of complaints data. The ACCC response notes recent, current and possible future actions that might address the recommendations.

Audit Findings

1. Background

Regulation of fair trading

1.1 The agency responsible for consumer protection at the national level is the Australian Competition and Consumer Commission (ACCC). The ACCC is an independent agency within the Treasury portfolio, established in 1995 by the merger of the former Trade Practices Commission and Prices Surveillance Authority. The ACCC has three main responsibilities:

- **promoting competition**—by educating traders about their responsibilities, assessing proposed mergers as part of the merger review process and taking action against anti-competitive conduct;
- **protecting consumers (and small businesses)**—by educating consumers and traders about their rights and responsibilities, taking action against conduct that contravenes the fair trading obligations in the Australian Consumer Law and administering, in conjunction with state and territory agencies, product safety laws (state and territory consumer affairs agencies administer mirror legislation in their jurisdictions); and
- **regulating national infrastructure markets**—by determining the prices and access arrangements for some nationally significant infrastructure services (such as telecommunications, rail and bulk water).

The Australian Consumer Law

1.2 Australian consumers are provided with rights and obligations are imposed on businesses by the Australian Consumer Law. The Australian Consumer Law is enacted as Schedule 2 of the *Competition and Consumer Act 2010*, and is a single, national law relating to consumer protection and fair trading. Key provisions of the Australian Consumer Law are shown in Figure 1.1.

Figure 1.1: Key provisions of the Australian Consumer Law

Australian Consumer Law	General Protections	Prohibits misleading or deceptive conduct .
		Prohibits unconscionable conduct .
		Voids unfair contract terms .
	Specific Protections	Prohibits specified unfair practices , including: pyramid schemes; referral selling; making false or misleading representations; and harassment and coercion.
		Provides certain guarantees when consumers buy goods and services. For example, goods purchased by consumers are to be of acceptable quality and fit for a disclosed purpose.
		Requires goods sold to comply with product safety standards and information standards (with an associated regime for banning and recall of dangerous goods).
	Enforcement & Remedies	Provides the regulator (ACCC) with enforcement powers to: issue substantiation notices; accept enforceable undertakings; and seek remedies from a court (see Chapter 7).
		Provides consumers with the right to seek remedies for breaches of the Australian Consumer Law (including monetary damages and/or injunctions).

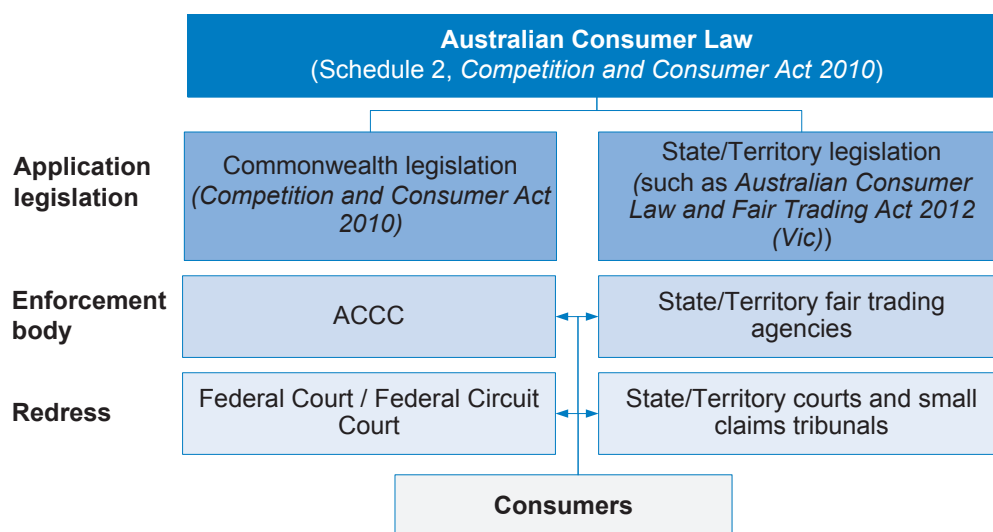
Note: The Australian Consumer Law does not cover the provision of financial products and services. Consumer protection in relation to these matters is dealt with by identical provisions (relating to misleading or deceptive conduct, unconscionable conduct and unfair practices) in the *Australian Securities and Investments Act 2001*, administered by the Australian Securities and Investments Commission.

Source: ANAO, based on Schedule 2, *Competition and Consumer Act 2010*.

Multiple regulator model

1.3 The Australian Consumer Law, when introduced in 2011, replaced a range of existing Commonwealth and state and territory fair trading laws. The Australian Consumer Law was the result of an Intergovernmental Agreement that was one of the regulatory reform programs of the Council of Australian Governments that aimed to deliver a seamless national economy.

1.4 To create a national consumer protection framework (shown in Figure 1.2), each state and territory has passed legislation applying the Australian Consumer Law as a law of its jurisdiction. The Australian Consumer Law, as passed by the Commonwealth, applies to the conduct of corporations as suppliers of goods and services, and to all transactions that occur across state borders. The legislative scheme in each state and territory governs the way in which consumers can access state courts and tribunals (for example, providing access to the state and territory-based small claims tribunals for breaches of the Australian Consumer Law). The state and territory laws also deal with specific enforcement issues and procedures (for example, providing powers to the various state and territory fair trading agencies).

Figure 1.2: Consumer protection framework

Source: ANAO analysis of the consumer protection framework.

1.5 Under the Intergovernmental Agreement, responsibility for enforcement and administration of the Australian Consumer Law is shared between the ACCC and the state and territory fair trading agencies, under an arrangement that has been referred to as a ‘multiple regulator model’. To support administration and enforcement of the Australian Consumer Law under this model, the ACCC, the Australian Securities and Investments Commission and the state and territory fair trading agencies entered into a Memorandum of Understanding in 2010. The ACCC also engages regularly with the other regulators individually, and through a range of committees of the Council of Australian Governments’ Legislative and Governance Forum on Consumer Affairs.

1.6 In practice, the ACCC is responsible for administering and enforcing the Australian Consumer Law in relation to conduct that is of a national character—that is, where the conduct is affecting, or has the potential to affect, consumers in multiple states. By contrast, the state and territory regulators have a greater focus on conduct occurring wholly within the state or territory, and especially in industries where there are specific state or territory laws applying (for example, in relation to residential tenancies). However, the nature of the consumer protection framework means that the state and territory regulators retain jurisdiction in relation to all conduct occurring within their geographic borders.

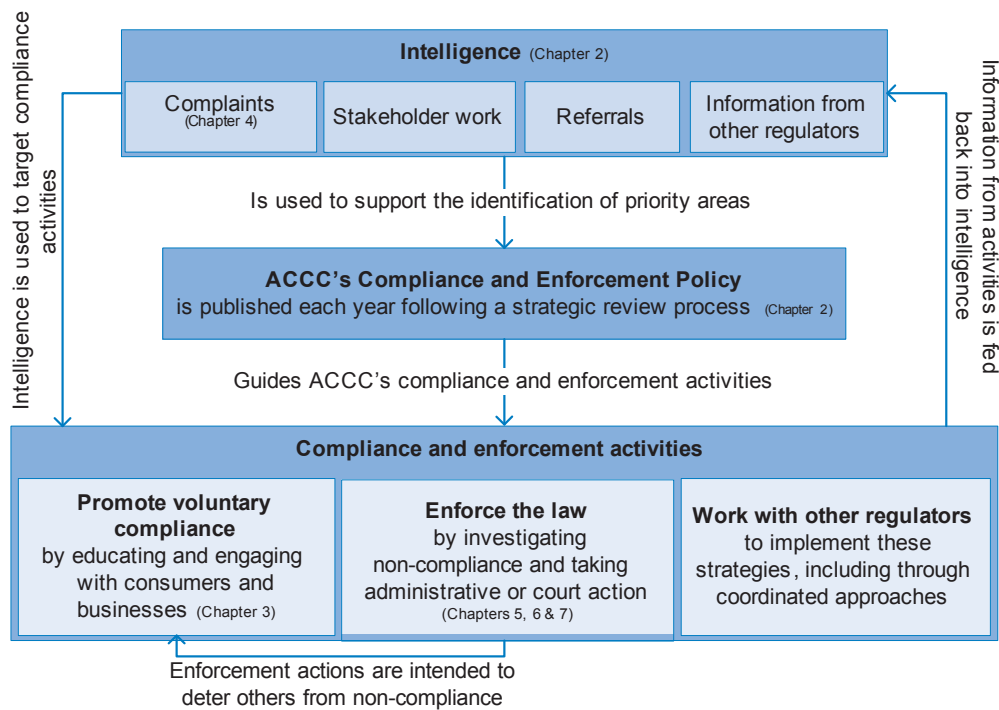
The ACCC’s regulatory approach

1.7 In its 2015–16 Corporate Plan, the ACCC stated that its budget for fair trading activities was \$51.8 million and its average staffing level was 218.1 for these activities.²

² ACCC, *ACCC and AER Corporate Plan 2015–16*, available from <<https://www.accc.gov.au/publications/corporate-plan-priorities>> [accessed 2 November 2015].

1.8 The ACCC’s approach to administering and enforcing the Australian Consumer Law (including compliance with fair trading obligations) is illustrated in Figure 1.3.

Figure 1.3: The ACCC’s fair trading regulatory approach



Source: ANAO analysis of ACCC information.

1.9 Each year, the ACCC undertakes a strategic review in which it considers information and intelligence available to identify the issues that pose the greatest risk of widespread consumer detriment, including new and emerging issues. Following the strategic review, the ACCC publishes its Compliance and Enforcement Policy, which sets out the principles adopted to achieve compliance with the law and outlines the ACCC’s enforcement powers, functions, priorities, strategies and regime.³ Importantly, the Policy identifies priority areas for a given year, which are areas where the ACCC considers there is the greatest risk of widespread consumer detriment.

1.10 In managing compliance with fair trading obligations, the Compliance and Enforcement Policy states that the ACCC takes action to stop unlawful conduct and deter future offending conduct. It does this by: enforcing the law (including by investigation and taking administrative and court action in relation to non-compliance); encouraging voluntary compliance through educating and engaging with consumers and businesses; and working with other regulators. In deciding what actions to take, the ACCC assesses non-compliance or the risk of non-compliance

3 ACCC, Compliance and Enforcement Policy 2015 [Internet], available from <<https://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy>> [accessed 26 August 2015].

(as identified through information and intelligence⁴, including complaints) against the priority areas in its Compliance and Enforcement Policy.

Audit objective, criteria and scope

1.11 The objective of the audit was to assess the effectiveness of the Australian Competition and Consumer Commission in managing compliance with fair trading obligations.

1.12 To form a conclusion against this objective, the ANAO has adopted the following high-level criteria:

- appropriate governance arrangements are in place to support the effective management of compliance with fair trading obligations;
- compliance risks are identified, and a strategy is in place to guide the ACCC's fair trading regulatory activities;
- appropriate actions are taken to encourage voluntary compliance with fair trading obligations; and
- responses to non-compliance are timely, effective and proportionate to the risks presented by the non-compliance.

1.13 The scope of the audit was the ACCC's activities in relation to fair trading. The ACCC's activities in relation to product safety, competition and infrastructure regulation were not considered as part of the audit.

Audit methodology

1.14 The ANAO considered the ACCC's processes to assess compliance risk, activities to promote voluntary compliance and its actions in responding to non-compliance.

1.15 The audit methodology included: examining relevant policy documents, guidelines and procedures; reviewing minutes of internal governance meetings; interviewing relevant ACCC staff and key stakeholders; and reviewing samples of projects, cases and enforcement outcomes from 1 July 2013 to 30 June 2015.

1.16 The audit has been conducted in accordance with ANAO auditing standards at a cost to the ANAO of approximately \$340 000.

4 Whereas information is data that is unfiltered and unanalysed, regulatory intelligence involves gathering information from multiple sources, analysing it in a relevant context and generating a meaningful output. Felgate T, *What is regulatory intelligence?* [Internet], Applied Regulatory Consulting, available from <<http://www.regulatory-intelligence.eu/2013/02/what-is-regulatory-intelligence.html>> [accessed 2 October 2015].

2. Managing fair trading compliance risks

Areas examined

The ANAO examined the ACCC's management of risk; compliance and enforcement strategy; and processes for gathering, analysing and using information and intelligence, to assess whether its approach to managing compliance with fair trading obligations is supported by sound risk management and intelligence processes.

Conclusion

The ACCC has a sound compliance and enforcement strategy and established processes for identifying and managing risks, including an extensive consultative strategic review process to determine key strategic compliance risks. However, it could improve the management of these risks by more fully evaluating their mitigation strategies, and by applying a systematic risk management approach to all of its key strategic compliance risks. The ACCC is also not systematically analysing its complaints data, and could explore the benefit of obtaining comprehensive complaints data held by state and territory fair trading regulators.

Area for improvement

The ANAO made one recommendation aimed at the ACCC improving the extent and use of information for intelligence purposes.

Does the ACCC's risk management framework support the effective management of fair trading compliance risks?

The ACCC's arrangements for managing risks only partially accord with the Commonwealth's *Risk Management Policy*. While the annual strategic review process has been effective in identifying the ACCC's key strategic compliance risks, these priorities have not been managed through a consistent risk-based approach, including arrangements for evaluating outcomes. Addressing these gaps would facilitate more consistent risk management across the ACCC.

2.1 Under the Commonwealth's *Regulator Audit Framework*, the ACCC is expected to have a risk-based and proportionate approach to ensuring that traders comply with their fair trading obligations.⁵ As the ACCC is an 'entity' for the purposes of the *Public Governance, Performance and Accountability Act 2013*, it is also required to apply the *Commonwealth Risk Management Policy* (Commonwealth Policy).⁶

5 Productivity Commission, *Regulator Audit Framework* [Internet], March 2014, available from <<http://www.pc.gov.au/research/completed/regulator-audit-framework>> [accessed 1 September 2015].

6 Department of Finance, *Commonwealth Risk Management Policy* [Internet], available from <<http://www.finance.gov.au/sites/default/files/commonwealth-risk-management-policy.pdf>> [accessed 31 August 2015].

2.2 As a Comcare fund member, the ACCC is required to participate in the annual Comcover Risk Management Benchmarking Programme. The Programme measures the risk management capability of entities using a risk maturity model, and involves completion of an online self-assessment survey. In responding to the survey in early 2015, the ACCC assessed that:

- its three greatest strengths (in descending order of importance) were establishing a risk management policy, communicating and consulting about risk and defining responsibility for managing risk; and
- its three areas requiring greatest development were developing a positive risk culture, maintaining risk management capability and understanding and managing shared risk.

2.3 The Commonwealth Policy requires an entity to define its risk appetite (the amount of risk it is willing to accept or retain in order to achieve its objectives) and risk tolerance (the levels of risk taking that are acceptable to achieve a specific objective or manage a category of risk). The ACCC risk appetite is low to medium (that is, it does not accept risks that are high following risk treatments). However, the ACCC does not have a formal risk tolerance policy.

2.4 Each year, the ACCC updates its 'risk profile', which sets out its strategic, enterprise wide and divisional risks. At all risk levels, risk owners are designated, and risks are evaluated based on likelihood and consequence. The ACCC's strategic risk profile is extensively considered by senior management committees and the Chairman prior to final endorsement by the Corporate Governance Board. The profile lists the divisional risks rated as high, enterprise-wide operational risks and strategic risks, and identifies the impact of the risk occurring, the initial risk level, any mitigation strategies, and the residual risk level. The risk registers for other risks record their likelihood, consequence and initial risk level. A comparison of the ACCC's strategic risks for 2013–14 and 2014–15 indicated that the ACCC reviewed and revised many of its risks.

2.5 The ANAO examined the minutes of the ACCC's Corporate Governance Board, which has a role to review and approve the ACCC's annual risk management plan. According to the minutes, in 2014 the Board was extensively involved in setting the ACCC's strategic risks and risk mitigation strategies. Also, the Board received briefings from the audit committee, demonstrating the committee's close involvement in overseeing the ACCC's risks. Further, divisions put significant effort into identifying their risks.

2.6 The nine essential elements of the Commonwealth Policy, and the ANAO's assessment of the ACCC's compliance with these elements, in respect of its responsibilities for fair trading, are set out in Table 2.1. As indicated in the table, the ACCC needs to undertake further work to comply with the Commonwealth Policy.

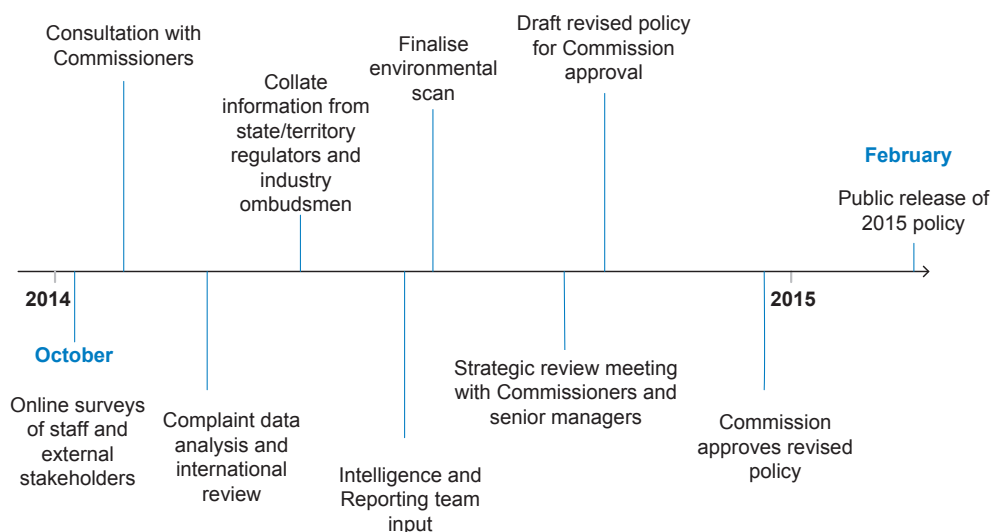
Table 2.1: The ACCC's compliance with the essential elements of the Commonwealth Risk Management Policy

Element	Level of compliance	Assessment
Establishing a risk management policy	Partially	Has a policy which is based on AS/NZS ISO 31000:2009 Risk Management—Principles and Guidelines, but which has not been fully updated in line with the Commonwealth Policy.
Establishing a risk management framework	Partially	The ACCC intranet has a 'Risk management' page with links to risk policies, tools and templates. The ACCC's key strategic compliance risks (priorities) for fair trading are not explicitly covered in the framework.
Defining responsibility for managing risk	Fully	The risk profile identifies a risk owner and manager for each level of risk.
Embedding systematic risk management into business processes	Partially	The ACCC is not systematically applying risk management approaches to its priorities. Only some priorities have had formal risk mitigation approaches by having projects created for them.
Developing a positive risk culture	Partially	The ACCC self-assessed this element as requiring development.
Communicating and consulting about risk	Fully	The ACCC consults widely with key stakeholders on its strategic compliance risks.
Understanding and managing shared risk	Partially	Shared risks arise in cross-entity arrangements. To help manage these risks, the ACCC has Memoranda of Understanding with other relevant agencies and Ombudsmen arrangements. However there is scope for improvement, for example by highlighting specific shared risks in the ACCC's risk profile.
Maintaining risk management capability	Partially	While the ACCC has structures for managing risk, including a Chief Risk Officer and an Audit Committee, it could build risk management awareness and knowledge through greater internal communication and specific training.
Reviewing and continuously improving the management of risk	Fully	The risk management policy is currently being updated. The risk management framework was last updated in December 2014.

Source: ANAO analysis of ACCC information.

Identification of the ACCC's priorities

2.7 The ACCC undertakes an annual process, called the strategic review, to determine its priorities for the following year and the risks to achieving its objectives. The result of this process is the publication of the ACCC's Compliance and Enforcement Policy, which contains a list of priority areas for the year. Figure 2.1 outlines the timeline of the strategic review process for developing the 2015 Compliance and Enforcement Policy.

Figure 2.1: Strategic review process for developing the ACCC's 2015 Compliance and Enforcement Policy

Source: ANAO analysis of ACCC information.

2.8 As part of the strategic review, to identify emerging issues the ACCC relies on information from a wide range of sources, including: internal complaints data; views of Commissioners; a survey of staff; a survey of, and meetings with, key stakeholders; and an assessment of media, research and other sources. In 2014, the ACCC sent a survey to 150 stakeholders, and received 21 responses. Stakeholders that were surveyed as part of this process included state/territory regulators, industry ombudsmen, consumer groups and business groups. A key aim of the strategic review process is to identify issues that should no longer be a priority, and new or emerging issues that warrant inclusion as a priority. Table 2.2 shows the ACCC's fair trading priorities as outlined in the Compliance and Enforcement Policy documents for 2014 and 2015. The changes to the priorities between 2014 and 2015 were more significant than the changes between other years, with the removal of four priority areas, addition of four new priority areas and refocusing of three priority areas.

Table 2.2: The ACCC's fair trading priorities, 2014 and 2015

Priority	2014	2015
Truth in advertising	No	Yes
Consumer issues in the health and medical sectors	No	Yes
Ensuring compliance with new or amended industry codes of conduct	No	Yes
Emerging systemic consumer issues in the online marketplace ^a	Yes	Yes
Consumer issues in highly concentrated sectors ^b	Yes	Yes
Disruption of scams that rely on building deceptive relationships and cause severe and widespread consumer or small business detriment	Yes	Yes
Misleading carbon pricing representations ^c	Yes	Yes

Priority	2014	2015
Consumer protection issues impacting on Indigenous consumers	Yes	Yes
Consumer protection issues impacting on vulnerable and disadvantaged consumers	No	Yes
Consumer protection in the telecommunications sector and in the energy sector, focusing on savings representations	Yes	No
Complexity and unfairness in consumer or small business contracts	Yes	No
Credence claims ^d	Yes	No
The Australian Consumer Law consumer guarantees regime	Yes	No

Note a: Refocussed in 2015 from 'drip pricing' to include issues 'associated with systemic failures by online retailers or retail sectors'.

Note b: Refocussed in 2015 to include 'issues identified through the ACCC's monitoring of the fuel sector'.

Note c: Refocussed in 2015 to 'finalising its role in ensuring that carbon tax cost savings are being passed through to consumers'.

Note d: Credence claims arise where the consumer cannot independently verify the claims themselves and must trust the seller. An example of a credence claim is a claim that a product is 'environmentally friendly'.

Source: ANAO analysis of ACCC information.

2.9 While the strategic review process provides a sound approach for identifying priorities, the ACCC does not have a systematic, risk-based approach for addressing these priorities⁷, or a clear basis for evaluating its performance in addressing existing priorities.⁸ As a result, when each subsequent strategic review is conducted, there is not as firm a basis as possible for retaining some priorities, and relegating others. To better address strategic priorities, the ACCC should more systematically apply a risk-based approach to managing mitigation treatments, and determine a basis for evaluating performance in addressing existing priorities.

Is there an effective compliance and enforcement strategy?

The ACCC has a sound compliance and enforcement strategy that outlines a set of proportionate and graduated approaches to encouraging voluntary compliance and addressing non-compliance.

2.10 A risk-based and proportionate compliance and enforcement approach assists regulators to target their limited resources appropriately. As noted previously, the result of the ACCC's strategic review process is a Compliance and Enforcement Policy, which outlines the ACCC's annual priorities and its strategies and powers to achieve compliance with the law.

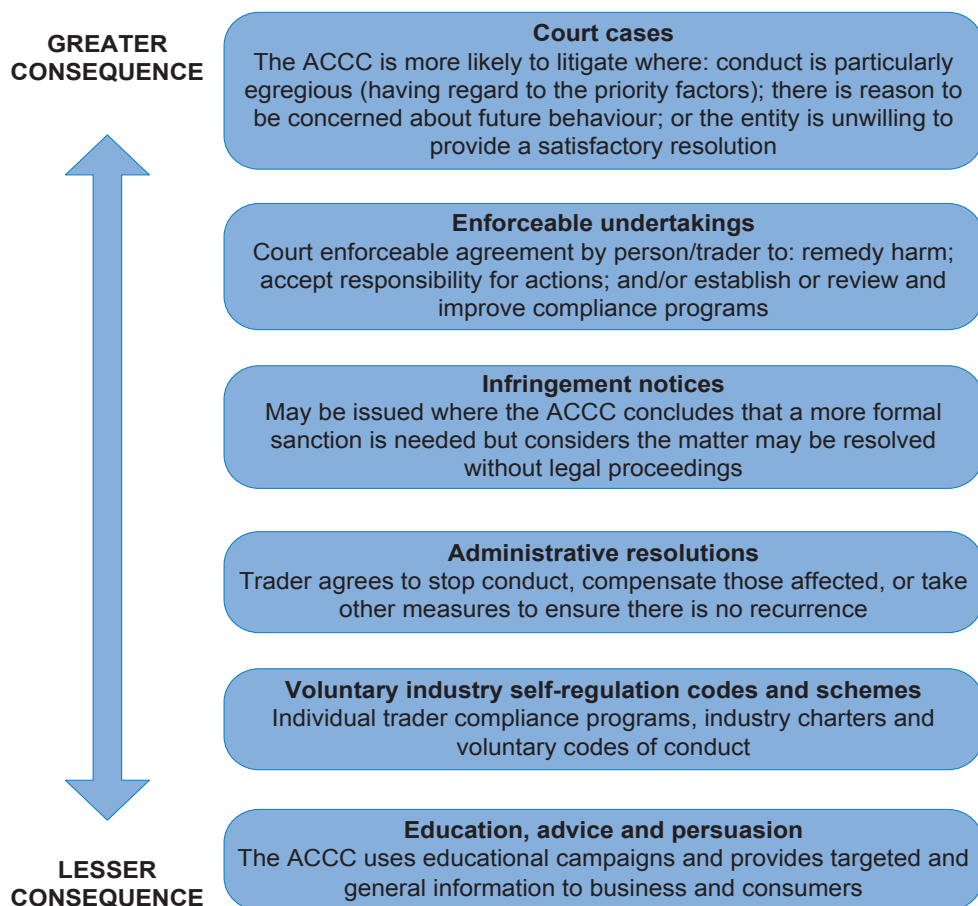
2.11 As set out in the Compliance and Enforcement Policy, to achieve its compliance objectives, the ACCC employs 'three flexible and integrated strategies': enforcement of the law; encouraging compliance with the law; and working with other regulators to implement these strategies. These

7 Although for five of the nine fair trading related priorities for 2015, there was a project associated with the priority that helped to ensure ongoing management of the risk.

8 While recognising the benefit of greater formality, depth and consistency in evaluating priorities, the ACCC advised that the strategic review process does consider whether past measures have addressed harms, including through reviewing complaints data and seeking feedback from internal and external stakeholders on its performance under existing priorities.

strategies are employed using a range of compliance and enforcement tools, outlined in Figure 2.2.

Figure 2.2: The ACCC's approach to compliance and enforcement



Source: ANAO analysis of ACCC information.

2.12 In deciding which compliance or enforcement tool to use, the ACCC states that its first priority is 'always to achieve the best possible outcome for the community.' The Compliance and Enforcement Policy makes clear that risk—in terms of detriment to consumers—is taken into account when making decisions about the appropriate compliance or enforcement action. The Policy says that an administrative resolution may be appropriate 'for example, where the ACCC assesses potential risk flowing from conduct as low'. By contrast, court action is more likely where 'the conduct is particularly egregious, where there is reason to be concerned about future behaviour, or the party involved is unwilling to provide a satisfactory resolution'.

2.13 The Compliance and Enforcement Policy is supported by other guidance, including its cooperation policy and guidance on the use of infringement notices and enforceable

undertakings. The guidance on infringement notices and enforceable undertakings sets out instances where the ACCC is relatively more or less likely to use one of these regulatory tools. Many of these factors relate to the risk to consumers posed by a particular conduct—for example, the ACCC states it is less likely to issue infringement notices where: it considers the concerns are more serious in nature; there has been significant detriment; it has concerns that the conduct may be continuing; or it has previously taken action against the person involved in the contravention.⁹

2.14 The ACCC's compliance and enforcement strategy is risk based, with lighter-touch, more persuasion-oriented actions more likely for those willing to comply and heavier-touch, enforcement-oriented actions for entities unwilling to comply, or where there is a significant level of consumer detriment or impact to competition. This approach is sound and provides a framework for the ACCC to direct its resources to those cases where the risk to consumers is greatest. The extent to which the ACCC undertakes its fair trading enforcement activities in accordance with the strategy is considered in Chapter 7.

Are there robust processes for gathering information and analysing and using it for intelligence purposes?

The ACCC has access to a wide range of information sources, which it uses to identify systemic compliance risks, target compliance activities and support investigations into non-compliance with fair trading obligations. However, in undertaking these activities the ACCC relies too heavily on its own complaints data, and could make greater use of other sources of information, including public data and the complaints data of other regulators (see Recommendation No. 1). In analysing information, the ACCC's Intelligence and Reporting team prepares a range of useful reports for intelligence purposes. To support better targeting of compliance and enforcement activities, these reports could focus more on identifying higher risk traders, industries and issues.

2.15 To enable the ACCC to appropriately identify regulatory risks and target compliance and enforcement activities, it is important that it has effective arrangements for gathering regulatory information, and analysing and using it for intelligence purposes. Regulatory intelligence can be used for three main purposes—identifying systemic compliance risks, targeting compliance and enforcement activities, and supporting investigations into non-compliance (for example, by providing leads to evidence). Chapter 4 considers the use of intelligence in case selection.

Gathering regulatory information

2.16 The ACCC makes use of a range of internal and external information sources to inform its intelligence and compliance activities. The more important of these are outlined in Table 2.3. Most of the information sources are primarily used in investigating instances of non-compliance with fair trading obligations.

9 ACCC, *Infringement notices* [Internet], available from <<https://www.accc.gov.au/publications/guidelines-on-the-use-of-infringement-notices>> [accessed 10 November 2015].

Table 2.3: The ACCC's main sources of regulatory information

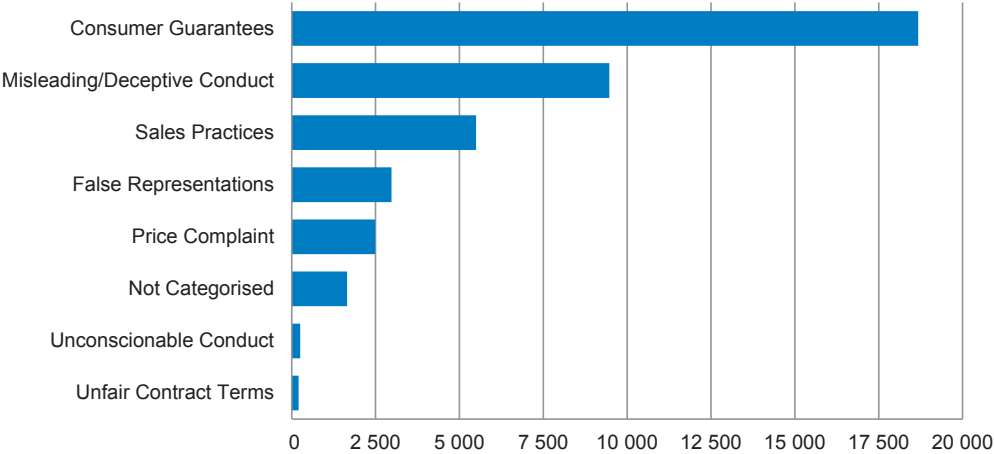
Source	Information gathering and recording
Complaints from the public	Allegations of non-compliance (contacts) are received by the ACCC Infocentre, mainly from members of the public. Information is retained in the contact management system.
Investigations	ACCC staff record the actions they undertake in their investigations. Information is retained in the case management system.
Cooperation with other regulators and industry ombudsmen ^a	The ACCC frequently communicates, and exchanges information, with the other Australian Consumer Law (ACL) regulators and industry ombudsmen. The ACLink database facilitates discussion and information sharing amongst ACL regulators (as discussed at paragraph 2.19).
Media and other public commentary	The ACCC monitors print, radio and internet news articles relevant to the ACCC's operations.
Stakeholders	The ACCC receives stakeholder complaints and input to ACCC consultative committees.
Australian Transaction Reports and Analysis Centre	Database of financial transaction information. Includes data from reports of significant cash transactions, suspect transactions and international currency transfers.
Australian Securities and Investments Commission company database	Allows users to: obtain company names, business names, key personnel and documents; and search for banned and disqualified persons.
International Consumer Protection and Enforcement Network	Shares information about cross-border commercial activities that may affect consumer interests.

Note a: Examples of industry ombudsmen are: the Telecommunications Industry Ombudsman, the NSW Energy and Water Ombudsman, the Financial Ombudsman Service and the Health Complaints Commissioner Tasmania.

Source: ANAO analysis of ACCC information.

2.17 The main source of information for the ACCC in targeting its compliance and enforcement activities (and a significant source for identifying systemic risks) is the contacts it receives from consumers. In 2014–15, approximately 165 000 contacts were recorded in the ACCC's database, of which over 41 000 were related to consumer protection. Figure 2.3 shows the number of fair trading contacts the ACCC received in 2014–15, broken down by the issue to which the contact related.

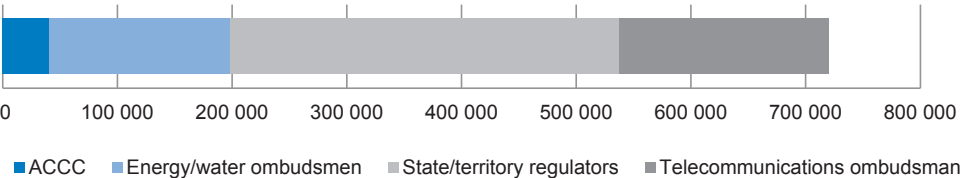
Figure 2.3: ACCC fair trading contacts by category, 2014–15



Source: ANAO analysis of ACCC data.

2.18 Despite these many contacts, the ACCC receives only a small proportion of the total number of consumer contacts relating to potential instances of non-compliance with fair trading obligations throughout Australia. Like the ACCC, other Australian Consumer Law regulators and industry ombudsmen also receive complaints from members of the public raising instances of potential non-compliance with fair trading obligations. Figure 2.4 indicates that the ACCC only received around six per cent of the approximately 720 000 fair trading related complaints received by Australian Consumer Law regulators and industry ombudsmen in 2013–14.

Figure 2.4: Fair trading contacts received by fair trading regulators and industry ombudsmen, 2013–14



Source: ANAO analysis of regulator and ombudsman data.

2.19 Notwithstanding the importance of complaints information in selecting and conducting compliance activities, the ACCC receives complaints information from the states, territories and ombudsmen only on an ad-hoc basis, and usually in an aggregated form. Information sharing between the Australian Consumer Law regulators, for example, mainly occurs through ACLink, an online collaboration website. ACLink allows Australian Consumer Law regulators to request and post information about topics of interest—such as traders, industries and conduct. While this is useful in the context of individual investigations (such as in reducing duplication of investigative efforts), it is significantly less useful than complete disaggregated complaints data for the purposes of identifying trends, patterns and issues of concern.

2.20 Recognising the potential for better targeting of compliance activities, in 2005 the ACCC proposed the establishment of a National Consumer Complaints Database, which was not

progressed due to lack of available funding. In view of advancements in processes to record and share information since that time, there is scope for the ACCC to re-examine opportunities to work with other regulators to obtain complaints data on a regular and disaggregated basis. This information could potentially be stored in a data warehouse to allow easy analysis by analysts and investigators, to support a greater understanding of non-compliance with fair trading obligations.

2.21 There is also scope for the ACCC to gather other publicly available information about potential consumer detriment in the market. Increasingly, consumers are using the internet—through social media and online review sites—to communicate and publicise difficulties they have had with traders. The ACCC could make use of this, and other information, in a systematic way to increase its understanding of issues facing consumers.

Analysis and use of information for intelligence purposes

2.22 As noted previously, the information that the ACCC collects, including from the sources listed in Table 2.3, is used for a number of intelligence purposes. These purposes include identifying priorities as part of the strategic review process and identifying potential non-compliance to target compliance and enforcement activities. At present, the main analysis and use of information to assess compliance risk is through regular and ad-hoc reports prepared by the ACCC's Intelligence and Reporting team. The main types of intelligence reports are provided at Table 2.4.

Table 2.4: Main types of ACCC intelligence reports

Type of report	Description
Brief for strategic review	Identifies emerging competition and consumer issues based on environmental scanning and external online sources.
Contact and intelligence report	Monthly report to the Enforcement Committee mainly focusing on contacts/complaints.
Trader brief	Sets out information about a particular trader, such as those that had been trending in complaints.
Industry profile	Examines an industry to identify issues of concern.
Trend analysis report	Uses a variety of filters to identify new issues, trends and matters of concern. May identify several traders across industries.

Source: ANAO analysis of ACCC information.

2.23 The reports serve a number of useful functions. For example, the brief for the strategic review helps to identify potential priorities and developments in the external environment, while the trend analysis reports identify emerging issues. The trader briefs and industry profiles are valuable in identifying traders not complying with fair trading obligations, and support the ACCC's project work.

2.24 As part of these reports, however, the ACCC does not identify traders, industries or issues of relatively greater or lesser risk. The Intelligence and Reporting team's monthly report to the Commission, for example, is mainly limited to the number of complaints received about particular traders. It does not go further to identify the level of risk (in terms of consumer detriment) associated with those complaints. Also, while the team's reports expressly refer to ACCC complaints, they less often refer to other relevant sources, such as environmental scans.

2.25 Importantly, the ACCC does not systematically assess and analyse the information that it receives to help target compliance and enforcement activities, instead relying on these to be identified through manual work of the Intelligence and Reporting team. It is noted that a number of other Commonwealth regulators have adopted a quantitative and systematic risk differentiation approach, including the Australian Taxation Office, the Australian Prudential Regulation Authority and the Australian Fisheries Management Authority. There would be value in the ACCC also adopting a quantitative and systematic approach to risk differentiation and prioritisation in order to better target its compliance and enforcement activities. There is scope for the ACCC to undertake risk scoring of information that it receives—particularly complaints.

2.26 In relation to complaints, risk scoring could work in two ways:

- matters could be scored by Infocentre staff at the time a contact is logged; and/or
- a computer-based risk scoring algorithm could be developed to provide assurance that staff are identifying and scoring matters correctly.

2.27 A computer-based risk scoring algorithm, in particular, would support a better understanding of the ACCC's risk population. As part of such an algorithm, risk scores for complaints could reflect, for example: whether the complainant was vulnerable or disadvantaged; the type of non-compliance; whether the complaint relates to an ACCC priority area; and the trader and industry involved. These risk scores could also be used to generate a risk score and profile for traders, which could be monitored over time and could prove especially helpful for targeting compliance and enforcement activities towards the areas of greatest need.

Recommendation No.1

2.28 To improve the extent and usefulness of information obtained for intelligence purposes, the ANAO recommends that the Australian Competition and Consumer Commission examines the merit of regularly obtaining complaints data feeds from other Australian Consumer Law regulators.

The ACCC's response: *Agreed.*

Does the ACCC effectively monitor and report on its performance in managing fair trading compliance?

In accordance with current Commonwealth guidance, the ACCC uses a number of measures, including performance indicators, case studies and survey results, to monitor and report on its performance. While they have improved over time, most of these measures are output-based, and developing measures of outcomes would enable the ACCC to report in ways that better illustrate its effectiveness in improving trader compliance with fair trading obligations.

2.29 As an entity subject to the *Public Governance, Performance and Accountability Act 2013*, the ACCC is required to measure, assess and report on its performance in accordance with the

Commonwealth performance framework. As a regulator, it is also required to measure and report on its performance in accordance with the Regulator Performance Framework.¹⁰

2.30 The ACCC's approach to performance measurement comprises:

- a suite of performance indicators linked to its key organisational strategies and deliverables that it will measure and report against in its annual performance statement—to be supplemented with specific examples of actions and outcomes¹¹;
- in relation to the Regulator Performance Framework, the ACCC has adopted a self-assessment methodology to assess its performance against the six Regulator Performance Framework performance indicators—with external validation to be provided by the ACCC Performance Consultative Committee¹²; and
- a biennial consumer and small business survey that aims to gauge the level of consumer understanding of the ACCC's roles and functions—and a proposed comprehensive biennial business-focussed survey measuring business views of the ACCC's performance.

2.31 A selection of the ACCC's key performance indicators for its fair trading activities, and the ANAO's assessment of these indicators, is set out in Table 2.5.¹³

Table 2.5: Analysis of selected ACCC key performance indicators for fair trading

Performance indicator	ANAO assessment
Number of in-depth ACL investigations completed	Measurable, but an output indicator or deliverable. The indicator does not address whether and how the completed investigations achieved the ACCC's objectives.
Percentage of ACL enforcement interventions in the priority areas outlined in the Compliance and Enforcement Policy	Measurable. The link to the Compliance and Enforcement Policy helps to show that the ACCC is directing its enforcement intervention towards its strategic priorities.
Number of new or revised business compliance resources (published guidance)	Measurable as a deliverable. The indicator does not address whether and how the resources were effective in promoting voluntary compliance.
Number of times online business education resources have been accessed	Measurable. Although an output indicator, can indirectly help measure effectiveness as it suggests online resources are being widely accessed.

Source: ANAO analysis of ACCC information.

2.32 As shown in Table 2.5, the ACCC's performance indicators are largely focused on measuring outputs and not on the extent to which the ACCC's activities were effective, as may be

10 Australian Government, *Regulator Performance Framework* [Internet], October 2014, available from <<https://www.cuttingredtape.gov.au/resources/rpf>> [accessed 2 November 2015].

11 ACCC, *ACCC and AER Corporate Plan 2015–16* [Internet], available from <<https://www.accc.gov.au/publications/corporate-plan-priorities>> [accessed 2 November 2015].

12 ACCC, *ACCC self-assessment methodology, measures and evidence* [Internet], available from <<https://www.accc.gov.au/publications/accc-self-assessment-methodology-measures-and-evidence>> [accessed 2 November 2015].

13 The indicators were assessed against: ANAO, *Criteria for the audit of key performance indicators* [Internet], available from <<http://www.anao.gov.au>> [accessed 27 October 2015].

shown, for example, by improved trader conduct following a compliance or enforcement action. The performance indicators taken together are not currently complete, as they do not provide an overall picture of the impact of the ACCC's activities. It is noted, however, that the ACCC has been improving its key performance indicators over time (previously, they were more general and were less qualitative), and that the inclusion of specific examples of actions and outcomes that show the impact of the ACCC's activities may go some way to presenting a more complete picture of the ACCC's performance.¹⁴

2.33 In relation to its Regulator Performance Framework self-assessment methodology, the ACCC has developed a range of measures and examples of evidence to support its key performance indicators. Several of the evidence examples are useful, as they aim to demonstrate that the ACCC has: been timely in its enforcement actions; undertaken good practice consultation; or been effective. However, some other examples involve simply confirming that the ACCC has published a document or followed a process.¹⁵ It would be more meaningful if the ACCC included evidence of business awareness and satisfaction, or data such as the number of revisions of compulsory information-gathering notices.

2.34 The ACCC reports externally on its fair trading activities through its annual report and quarterly publication, ACCCount. In its 2014–15 annual report, the ACCC provides performance information, including about successful enforcement outcomes, case studies, and survey results. While helpful, the ACCC could give greater emphasis to instances where its interventions have led to changes in compliance behaviour, and to presenting both positive and negative survey results. The ACCCount publication is also focused on deliverables, such as the number of ACCC enforcement activities undertaken, its other fair trading outputs (such as publications) and stakeholder engagement and government liaison activities in the quarter.

2.35 Overall, there is scope for the ACCC to improve its performance measurement and reporting, to better demonstrate how its activities lead to an improvement in trader compliance with fair trading obligations. The surveys that the ACCC undertakes (and is planning to undertake) of consumers and businesses position it well to do this, as survey results can be proxies for the effectiveness of regulatory activities. There is also an opportunity for the ACCC to make greater use of data, ranging from complaints data to stakeholder feedback, to gain a better understanding of how its activities are influencing the level of consumer detriment within Australia. This variety of data, when used in systematic evaluations, would provide the basis for case studies and other examples of actions and outcomes in annual performance statements.

14 Department of Finance, *Resource Management Guide No. 131, Developing good performance information*, available from <<http://www.finance.gov.au/sites/default/files/RMG%20131%20Developing%20good%20performance%20information.pdf>> [accessed 27 October 2015].

15 A good example of evidence is 'at least 75% of positive responses received from businesses ... about compliance guidance'. Examples of 'confirmations' include that diagrams showing processes (and indicative timeframes) have been published on the ACCC website, or that the ACCC has set out in a protocol enhanced practices for engagement with complainants relating to the status of investigations.

3. Promoting voluntary compliance

Areas examined

The ANAO examined the ACCC's arrangements to encourage voluntary compliance with fair trading obligations, including guidance and engagement activities and specific projects that have addressed priority compliance issues.

Conclusion

The ACCC's voluntary compliance activities are well targeted, have often achieved good results, and are viewed positively by key stakeholders. However, its projects are infrequently evaluated, so there is limited evidence of their effectiveness. There is also scope for the ACCC to increase the awareness of consumers and traders about where to get advice about their fair trading rights and obligations.

Area for improvement

The ANAO suggested that the ACCC better manage risks in conducting compliance projects (paragraph 3.18).

Do the ACCC's guidance and engagement activities effectively support voluntary compliance?

The ACCC's information and advice about fair trading rights and obligations is clear and targeted to the main areas of consumer and business concern. This information is disseminated through traditional channels and social media such as Facebook and Twitter. Of primary importance is the ACCC website, which is clearly organised and easy-to-use. Consumer and business stakeholders contacted by the ANAO consistently commented positively on the ACCC's engagement with them.

3.1 Effective promotion of voluntary compliance, such as by informing consumers and traders about their fair trading rights and obligations, is an important component of regulators' compliance strategies, as it minimises the need to apply more costly enforcement measures.

3.2 The ACCC's Compliance and Enforcement Policy states that the ACCC seeks to strike the right balance between voluntary compliance and enforcement.¹⁶ The ACCC provides a range of information and advice to encourage compliance with fair trading obligations, which is disseminated through the ACCC's website and other channels, including social media.

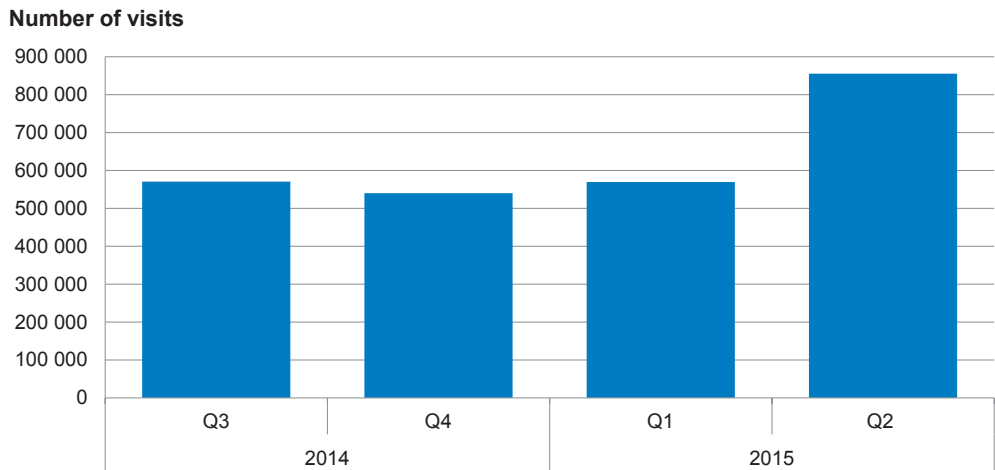
16 ACCC, *Compliance & enforcement policy*, available from <<https://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy>> [accessed 8 July 2015].

Providing guidance through the ACCC’s website and social media

The ACCC’s website

3.3 Between June 2014 and June 2015, the ACCC’s website had 2.5 million recorded visits. The website typically received around 550 000 visits per quarter over this period, as indicated in Figure 3.1.¹⁷

Figure 3.1: Visits to the ACCC’s website by quarter, June 2014 to June 2015



Source: ANAO analysis of ACCC data.

3.4 The ACCC’s website is clearly organised and easy-to-use, being structured around three main sections—consumers, business and regulated infrastructure. Relevant to fair trading, the business section provides information for traders on their rights in relation to business-to-business transactions and on their obligations to consumers under sections titled ‘treating customers fairly’, ‘advertising and promoting your business’ and ‘pricing’.

3.5 The consumer section provides information on a range of issues (such as consumer guarantees and misleading advertising) and industries (such as motor vehicles and telecommunications). There was a clear alignment between the topics listed in the consumer section of the ACCC’s website and the issues and industries that are an ACCC priority, and/or the subject of a large volume of consumer complaints (Table 3.1).

17 A notable exception was the second quarter of 2015, when there were over 850 000 visits, partly owing to a large scale recall of vehicle airbags.

Table 3.1: Information on fair trading issues provided in the consumer section of the ACCC's website

Topics listed	Relation to ACCC priority or source of contacts
Consumer rights and guarantees	Consumer guarantees are the ACCC's single largest source of fair trading complaints and were recently an ACCC priority.
Consumer protection	Provides information on product safety (an ACCC priority), scams (an ACCC priority) and how consumers can seek help.
Misleading claims and advertising	Misleading and deceptive conduct is the ACCC's second largest source of fair trading complaints. Truth in advertising is also an ACCC priority.
Prices and receipts	Drip pricing ^a was recently an ACCC priority and a compliance project.
Sales and delivery	Door-to-door sales were recently an ACCC priority and an ACCC compliance project.
Contracts and agreements	Complexity and unfairness in consumer contracts were recently an ACCC priority and the subject of a compliance project.
Debt and debt collection	Debt collection has been an ACCC compliance project.
Groceries	The ACCC has an ongoing project regarding claims that eggs are 'free range'. Grocery items generate a large number of complaints concerning credence claims (which was recently an ACCC priority) and truth in advertising (a current priority).
Health, home and car	Consumer issues in the health and medical sectors are an ACCC priority.
Online shopping	Emerging systemic consumer issues in the online marketplace are an ACCC priority.
Internet and phone; National Broadband Network	Consumer protection in the telecommunications sector was recently an ACCC priority and conduct involving essential services is a current priority factor. Mobile networks and in-app purchases ^b have been ACCC projects.
Petrol, diesel and liquid petroleum gas	Consumer issues in highly concentrated industry sectors are an ACCC priority.

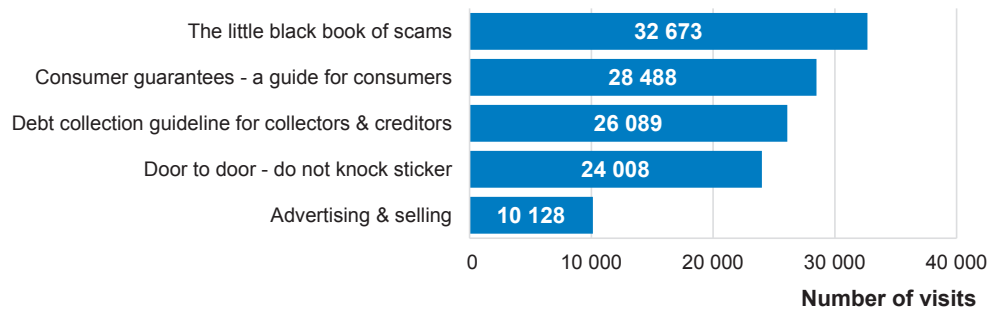
Note a: Drip pricing is where a headline price is advertised at the beginning of an online purchasing process and additional fees and charges that may be unavoidable are then incrementally disclosed.

Note b: The purchase of goods and services from an application on a mobile device, such as a smartphone or tablet.

Source: ANAO analysis of ACCC information.

3.6 In addition to the information available on web pages on its website, the ACCC makes a range of publications available via its website and in hard copy. In relation to fair trading, these cover a number of issues including providing detailed guidance to businesses on how they can comply with their obligations and to consumers on their rights. The publications that had the most web visits between January 2014 and June 2015 are set out in Figure 3.2.

Figure 3.2: Top five accessed publications relating to fair trading, 1 January 2014 to 30 June 2015



Source: ANAO analysis of ACCC data.

3.7 The ANAO examined the ACCC’s five most popular publications relating to fair trading for consumers and business. The consumer publications were accessible, easy to understand and sufficiently detailed. In line with the Government’s Regulator Audit Framework, the business publications were written in plain language, included pertinent examples, and contained consistent information.¹⁸ The ACCC’s publications were also well targeted, as shown in Table 3.2, which outlines that guidance was in place for issues that prompted the greatest number of consumer contacts.

Table 3.2: Targeting of ACCC publications

Issues with greatest number of contacts	Publications	Webpages
Consumer guarantees	For consumers: Consumer guarantees—a guide for consumers; Repair, replace, refund. For business: Consumer guarantees: a guide for businesses and legal practitioners; business snapshot, training videos.	Consumer rights and guarantees; Consumers' rights and obligations
Misleading and deceptive conduct	Advertising and selling guide.	For consumers: Misleading claims & advertising. For business: False or misleading statements.
Sales practices	Fair sales practices (business snapshot).	For business: Unfair business practices.
Price complaints	Carbon tax price reduction obligation.	For consumers: Prices & receipts. For business: Pricing.

Source: ANAO analysis of ACCC information.

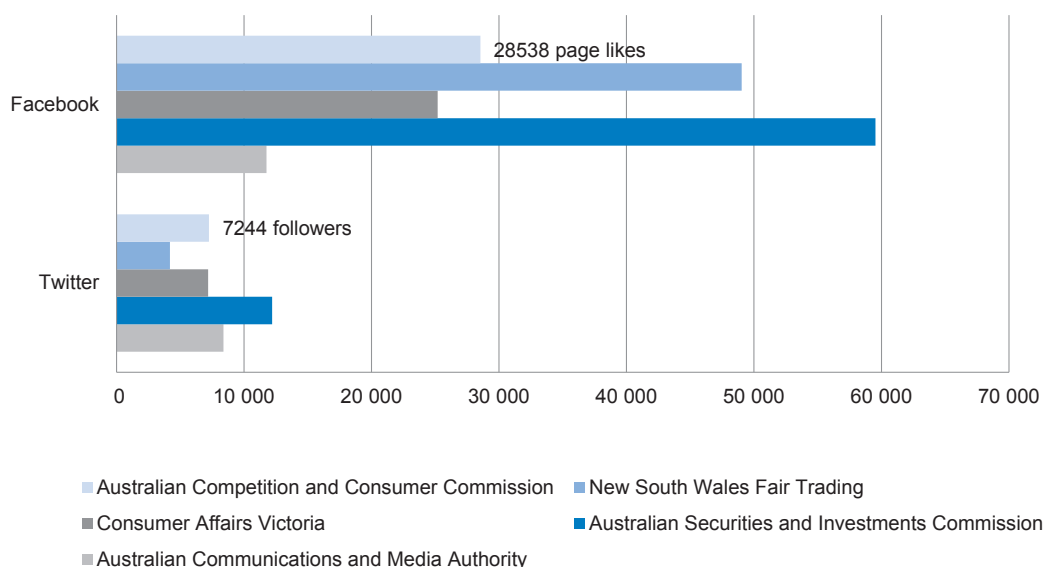
18 Productivity Commission, *Regulator Audit Framework*, March 2014, available from <<http://www.pc.gov.au/research/completed/regulator-audit-framework>> [accessed 1 September 2015].

Social media

3.8 Social media provides regulators with the opportunity to communicate with a large audience quickly and at a low cost.¹⁹ While consumers still prefer to obtain their information about fair trading from the traditional media and the ACCC's website, social media is becoming more important.

3.9 The ACCC has a social media strategy and currently manages three Facebook pages, three Twitter accounts and two YouTube channels.²⁰ Figure 3.3 shows the number of page likes/followers to the ACCC's main fair trading (Consumer Rights) Facebook page and Twitter account in comparison to other selected regulators. The figure shows that the ACCC's social media reach is comparable to the other regulators and that the ACCC's most popular media channel is its main fair trading Facebook page, with 28 500 page likes as at September 2015.

Figure 3.3: Number of page likes/followers on the ACCC's Twitter account and main Facebook page, compared to selected regulators, as at September 2015



Source: ANAO analysis of data from the ACCC's and comparator regulators' Twitter accounts and Facebook page.

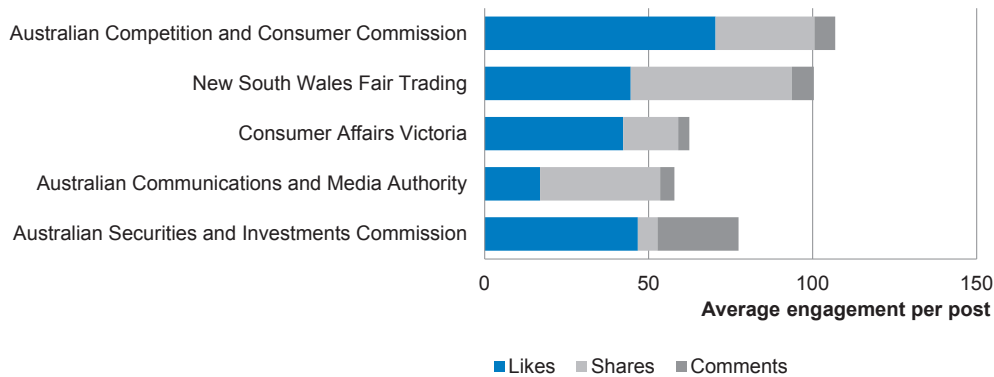
3.10 The ACCC uses its Facebook pages and Twitter accounts for a variety of purposes, including to: build awareness of consumer rights; disseminate media releases and speeches; and promote ACCC activities and events. At 15 September 2015, the ACCC had made 559 posts to its Facebook page and sent 1696 tweets from its Twitter account.

19 ANAO, Better Practice Guide, *Administering Regulation*, June 2014, p. 17, available from <<http://www.anao.gov.au/Publications/Better-Practice-Guides/2013-2014/Administering-Regulation>> [accessed 9 November 2015].

20 The ACCC's three Facebook pages are: Consumer Rights, Product Safety and Your Rights Mob. The three ACCC Twitter accounts are: @ACCCgovau, @ACCCProdSafety and @SCAMwatch_gov. The two ACCC YouTube channels are: ACCCVideos and ACCCProductSafety.

3.11 Overall, there was a relatively high level of engagement with content posted on the ACCC’s social media channels—and the ACCC was a leader compared to the other selected regulators in terms of engagement with its Facebook page. This is shown in Figure 3.54, which presents the average number of times that posts were liked, shared and commented on at the ACCC’s Consumer Rights Facebook page compared to the other regulators. This high level of engagement (particularly shares and likes) makes it more likely that the ACCC’s posts are seen by a wider audience.

Figure 3.4: User engagement with the ACCC’s Facebook page, compared to other selected regulators



Source: ANAO analysis of posts from the ACCC’s and comparator regulators’ Facebook pages.

Stakeholder engagement

3.12 It is important for regulators to have a coordinated approach to engaging with regulated entities, consumers and other regulators with complementary responsibilities. When regulated entities have a clear understanding of their compliance requirements they are better able, and may be more willing, to comply. Also, coordinated engagement can help regulators to gain valuable insights into the behaviour of regulated entities that can be used to guide future compliance activity.

3.13 To support effective consultation with regulated entities and consumers, the ACCC has established a number of consultative forums²¹ with key stakeholder groups, particularly consumer and industry peak bodies. The ACCC also engages in other ways: for example, it has a team of Education and Engagement Managers who educate the small business sector across Australia about its rights and obligations.

3.14 As part of the audit, the ANAO met with a range of consumer, business and regulatory agency stakeholders. During these meetings, stakeholders mainly commented positively on the ACCC’s engagement with them. A selection of the more representative comments is set out in Table 3.3.

21 These consultative forums are the: Consumer Consultative Committee; Franchising Consultative Committee; Fuel Consultative Committee; Infrastructure Consultative Committee; Small Business Consultative Committee; ACCC Performance Consultative Committee; Utility Regulators Forum; and Wholesale Telecommunications Consultative Forum.

Table 3.3: Stakeholder views about the ACCC

Stakeholder category	Typical views expressed in interviews
Consumer peak bodies	<p>The ACCC is highly consultative, both through the Consumer Consultative Committee and on an individual basis.</p> <p>The publication of the ACCC's enforcement priorities has been very effective in encouraging compliance.</p> <p>The ACCC plays an important role in testing the law.</p>
Industry peak bodies	<p>The ACCC has shown itself to be a body prepared to take action especially with larger businesses. With smaller businesses it is more light-handed.</p> <p>The ACCC has improved its communication and performance over the last four or five years.</p>
Other Australian Consumer Law regulators	<p>ACCC cooperates well with other Australian Consumer Law regulators on joint projects. Where the ACCC has lead regulator responsibility, including in emergency situations, it acts promptly.</p>

Source: ANAO interviews with ACCC stakeholders.

Does the ACCC appropriately manage its compliance projects?

The ACCC's fair trading compliance projects, which generally contain elements of education and enforcement, are targeted to priority areas and often achieve good results. Of eight projects that it had evaluated, six had positive results and two had mixed results. However, more frequent evaluation and better risk management would provide greater assurance that these projects are well managed, effective and achieved value for money.

3.15 In industries or areas where the ACCC identifies a particular fair trading risk, it often initiates a compliance project aimed at reducing the level of consumer detriment. The most common type of activity undertaken as part of the projects was consumer education. Other activities undertaken included enforcement, media campaigns (including social media), engaging other regulators and strategies involving trader engagement and disadvantaged or vulnerable consumers.

3.16 The following case study provides an example of a project where the main activities were trader engagement and consumer education.

Case study 1. Mobile networks coverage and performance issues

This project was initiated in late 2012 in light of growing evidence of consumer detriment arising from network performance related issues, to ensure that providers made accurate representations about mobile coverage and congestion. The Consumer, Small Business and Product Safety Division developed a strategy that included: escalating Australian Consumer Law issues; putting industry on notice; engaging with the Australian Communications and Media Authority about broader network performance issues; and exploring opportunities for consumer education. For example, on World Consumer Rights Day 2014, the ACCC issued a media release and social media posts to remind consumers of their consumer rights in relation to mobile phones and hints and tips for selecting a mobile plan.^a

The evaluation measures for the project included:

- reduction in consumer complaints to the Telecommunications Industry Ombudsman and the ACCC about network performance issues, in particular misleading representations and consumer guarantees; and
- industry providing accurate, comparable and clear information to consumers about network performance.

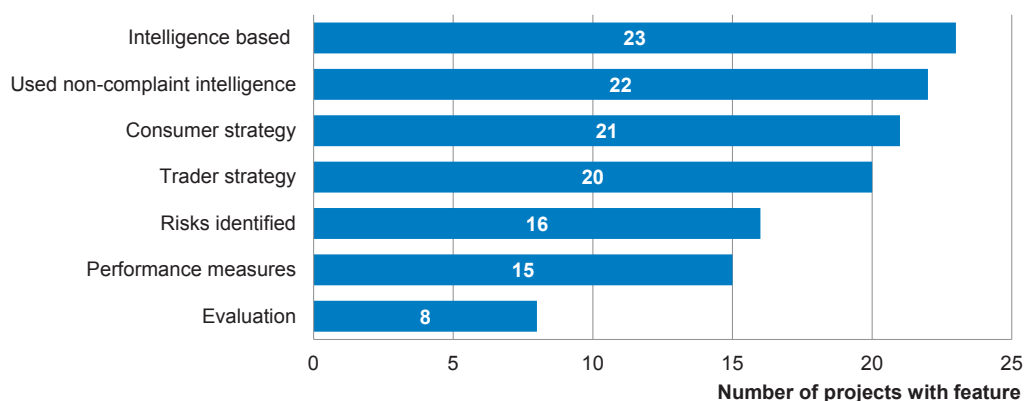
As at April 2014, the ACCC's evaluations had indicated that:

- since the project began, complaints to the ACCC and the Telecommunications Industry Ombudsman about mobile coverage and performance issues had fallen significantly. The Telecommunications Industry Ombudsman complaints in relation to mobile coverage fell 14 per cent in 2012–13, followed by a 24 per cent reduction in the number of Telecommunications Industry Ombudsman complaints about network coverage and performance in the December 2013 quarter; and
- complaints to the ACCC about mobile network and performance issues declined in the second half of 2013 and early 2014.

In September 2013, the ACCC wrote to the three major Australian providers outlining its concerns about the industry. The ACCC received responses from all three providers outlining their activities and improvements relating to mobile network performance and complaints handling. Two of the networks now refer to mobile coverage in their critical information summaries and one network advised that it is committed to additional staff training to emphasise the importance of coverage representations at the point of sale. In October 2014, the ACCC undertook a project debrief that identified key outcomes and lessons learned.

Note a: ACCC, *Get to know your phone rights: World Consumer Rights Day 2014* [Internet], available from <<https://www.accc.gov.au/media-release/get-to-know-your-phone-rights-world-consumer-rights-day-2014>> [accessed 7 October 2015].

3.17 The ANAO examined all 26 projects that the ACCC commenced in 2012–13, 2013–14 and 2014–15. The ANAO examined whether they contained features that would be expected in such compliance projects, including if the projects: were based on information and intelligence (including from sources other than complaints); contained consumer and trader strategies; identified risks; contained performance indicators; and were subject to formal evaluation. The results are set out in Figure 3.5.

Figure 3.5: Key features of ACCC compliance projects, 2012–13 to 2014–15

Source: ANAO analysis of ACCC data regarding 26 compliance projects.

3.18 Figure 3.5 indicates that project teams were consistent in: outlining what intelligence was used (88 per cent), drawing on information sources other than ACCC complaints (85 per cent), and proposing a consumer strategy (81 per cent). However, only 62 per cent of projects identified risks. To better manage project risks, the project teams should identify risks more consistently, and also advise management whether or not risks had materialised and if so how they were addressed.

3.19 It was less common for projects to specify performance measures (58 per cent) or to be subject to formal evaluation (31 per cent). Including performance measures and undertaking evaluations are important for determining whether projects have achieved their objectives. The results of the eight evaluations undertaken for compliance projects are outlined in Table 3.4 and show that six projects had positive results and two projects had mixed results. While some projects and strategies, such as the mobile networks project, contributed to a reduction in complaints and an improvement in information provided by traders to consumers, others had outcomes that were more difficult to measure, although providing some ‘lessons learnt’ for ACCC staff.

Table 3.4: Projects subject to evaluation, 2012–13 to 2014–15

Project	Results	Evaluation findings
Consumer guarantees	Mixed	<ul style="list-style-type: none"> While the overall campaign recall was relatively low (4 per cent); consumers’ knowledge of their rights increased by 17 per cent. More funding would have enabled a larger sample and better statistics about the effectiveness of the ACCC’s advertising.
Door-to-door energy	Positive	<ul style="list-style-type: none"> Door-to-door contacts to the Ombudsmen and the ACCC have dropped. Enforcement outcomes have collectively provided specific and general deterrence and reduced detriment. The three largest energy retailers have ceased door-to-door marketing.
Fake online reviews	Positive	<ul style="list-style-type: none"> Some key review platforms changed their business practices. The ACCC published consumer tips that received extensive media coverage.

Project	Results	Evaluation findings
Mobile networks: coverage and performance issues	Positive	<ul style="list-style-type: none"> • A reduction in consumer complaints to the Telecommunications Industry Ombudsman and the ACCC about network performance issues, in particular misleading representations and consumer guarantees. • Industry providing accurate, comparable and clear information to consumers about network performance.
Carbon tax repeal	Positive	<ul style="list-style-type: none"> • As at December 2014, the ACCC observed electricity and gas price decreases across all states and territories. • Complaints continued to be low, and were significantly less than the number received in the September 2014 quarter and the number received in the same period when the tax was introduced.
Indigenous consumers	Mixed	<ul style="list-style-type: none"> • ACCC's Darwin office has strong connections with a number of agencies that provide free advice to low income consumers. • Data comparison in 2014 and 2015 shows unconscionable conduct is increasing and fewer respondents are aware that this is against the law. • ACCC should consider a targeted rather than blanket campaign in relation to door-to-door sales if any outreach is conducted.
Fraud Week 2014 and 2015	Positive	<ul style="list-style-type: none"> • The 2014 campaign achieved a reach of 680 205 and 489 150 Twitter users (from the two ACCC accounts) and 20 774 Facebook users. • The 2015 campaign received wide coverage in mainstream media, for example with over 72 television and radio news reports and interviews on major metropolitan stations.
Small business education campaign	Positive	<ul style="list-style-type: none"> • All three campaigns met their objectives to varying extents. • The reports contain lessons learnt.

Note: The first six projects were a combination of education and enforcement, while the last two projects were solely educational campaigns.

Source: ANAO analysis of ACCC information.

3.20 In April 2015, the Consumer, Small Business and Product Safety Division undertook a Program Evaluation Model Project. The Division noted that it had identified an emerging business need to have objective tools for better understanding the effectiveness and impact of its business compliance and consumer education work, and to evaluate and report on its programs. While evaluations can be resource intensive, the development of evaluation tools and their regular use should help the ACCC better understand the impact of its activities.

Are consumers and businesses sufficiently aware of the ACCC's fair trading responsibilities and activities?

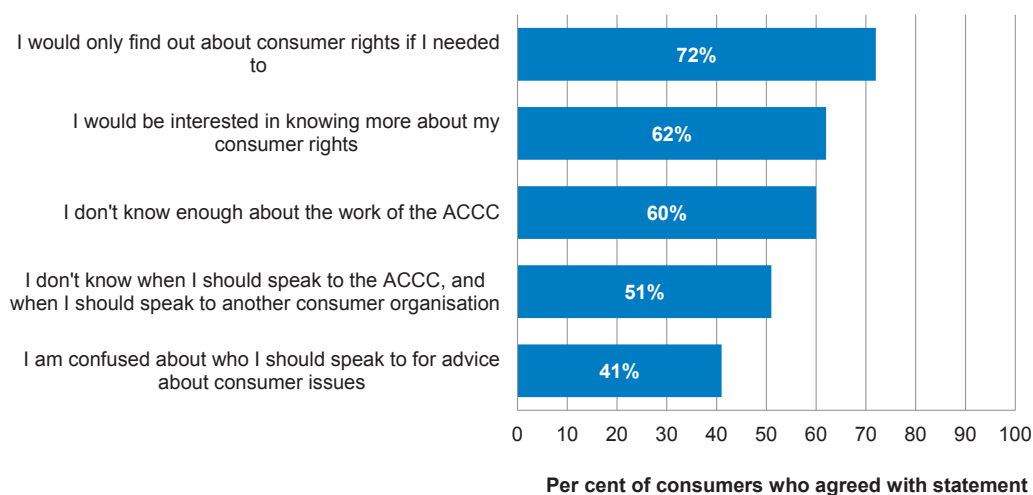
In the ACCC's most recent Consumer and Small Business Perceptions Survey, most consumers and many businesses felt that they did not need to know what the ACCC was doing until there was a problem that affected them personally, at which time they expected to be able to find out more about the ACCC's roles. Nevertheless, a significant proportion of respondents wanted to know more about the work of the ACCC, indicating scope for the ACCC to increase the awareness of consumers and traders about where to get advice about their fair trading rights and obligations.

3.21 For the ACCC to effectively promote voluntary compliance, it is important that consumers and businesses: are aware of the ACCC and its role; know where to access detailed information about their fair trading rights and obligations; and have a general understanding of those rights and obligations.

3.22 To inform understanding of its performance, the ACCC commissions periodic surveys of the perceptions of consumers and small businesses. The most recent survey was conducted in 2014–15, with results relating to overall knowledge of the ACCC's responsibilities. The survey indicated that 86 per cent of consumers surveyed had some knowledge of the ACCC, with 69 per cent knowing a little and 17 per cent knowing a lot. In this regard, most consumers and many businesses felt that they did not have an in-depth understanding of the ACCC's roles. However, for many participants, this was not of particular concern, so long as the ACCC was operating and doing as it should 'in the background'. That is, participants felt that they largely did not need to know what the ACCC was doing, until there was a problem that affected them personally. Then, there was an expectation that they would be able to find out more about the ACCC's roles should they require it.

3.23 Nevertheless, as shown in Figure 3.6, a significant proportion of respondents either wanted to know more about their consumer rights, did not know enough about the work of the ACCC, or were unsure when they should speak to the ACCC or to another consumer organisation.

Figure 3.6: Awareness of consumer rights and how to get help with consumer issues



Source: ACCC Consumer and Small Business Perceptions Survey 2014–15: Full Report, June 2015.

3.24 Consistent with these latter findings, the survey report made 12 recommendations aimed at improving perceptions of the ACCC. These included further promoting its roles and responsibilities (and its enforcement 'wins'), and providing clearer guidance to businesses and consumers about which organisation to approach in particular circumstances (in conjunction with other state and territory regulators). Implementing these recommendations may help to increase the awareness of consumers and traders about where to get advice about their rights and obligations.

4. Managing complaints of non-compliance

Areas examined

The ANAO examined the ACCC's arrangements for managing complaints from consumers about non-compliance by traders with fair trading obligations. As part of this assessment the ANAO reviewed data and records from the ACCC's Infocentre and the ACCC's complaints database.

Conclusion

Although consumer complaints are one of the ACCC's main sources of information for the purpose of planning and targeting regulatory activities, there is scope to improve the speed and quality of receiving and responding to complaints, and the accuracy of recording the subject and nature of the complaint. There is also considerable scope to improve call handling quality assurance processes, including the consistency of their application to in-house and outsource staff.

Areas for improvement

The ANAO made one recommendation aimed at improving the quality of complaints data, including the identification of vulnerable and disadvantaged complainants. The ANAO has also suggested that the ACCC review the current practices for undertaking quality assurance assessments (paragraph 4.10).

Does the ACCC have effective arrangements for receiving and responding to complaints from consumers?

The ACCC does not have fully effective arrangements to receive and respond to complaints as it has not consistently met the service standards outlined in its Service Charter, and quality assurance checks indicate low levels of quality in answering calls. Only 48 per cent of recent calls were answered within 60 seconds (against a target of 60 per cent) and 56 per cent of web forms were responded to within the target of 15 business days.

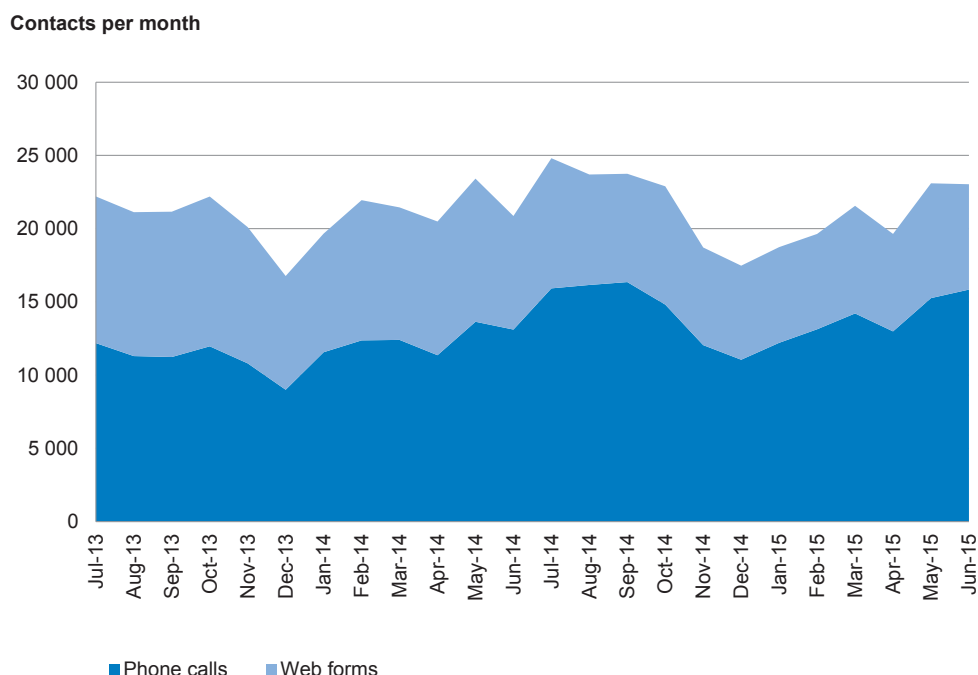
There are also shortcomings in the ACCC's quality assurance processes, as assessments have not been conducted in line with internal guidelines, outsource staff are subject to different call quality criteria to in-house staff, and results from the quality assessments are at odds with largely positive responses to the most recent customer service satisfaction survey.

4.1 As noted in Chapter 2, the ACCC's main source of information and intelligence for identifying cases, traders and issues posing the greatest risk to the wellbeing of consumers are the complaints that it receives from the public. The ACCC receives these complaints from three channels: calls to its Infocentre; contacts submitted through a form on its website; and letters. The ACCC's Infocentre team, within the Compliance, Small Business and Product Safety Group, is responsible for receiving and managing contacts from all of these channels. Calls for less complex matters (such as scams and consumer guarantees) are handled by an outsource provider.

4.2 The number of contacts (including complaints) is broken down by channel at Figure 4.1, which shows that the majority of contacts are by phone (around 13 500 on average per month), with a substantial proportion also coming through web forms (around 8 400 on average per month). On average, 86 per cent of the contacts that the ACCC receives in a given month are

recorded as complaints, with the remaining 14 per cent recorded as enquiries. Of the contacts the ACCC receives, on average 3500 per month of these relate to fair trading related matters.

Figure 4.1: Number of contacts to the ACCC, by channel, July 2013 to June 2015



Note: The number of letter contacts was too small to be represented on this chart, averaging around 118 per month.

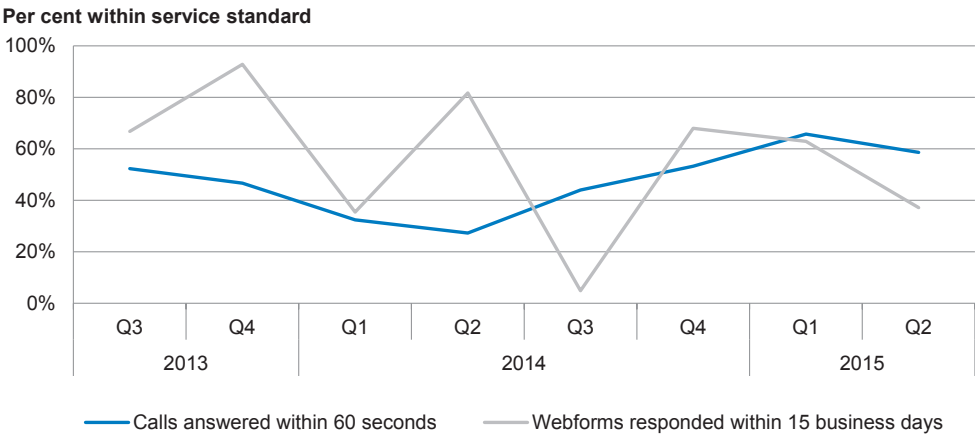
Source: ANAO analysis of ACCC Infocentre contact data.

Service standards

4.3 According to the ACCC's Service Charter, the ACCC aims to answer 60 per cent of telephone calls within 60 seconds and to respond to letters and web forms within 15 business days of receiving them. The target duration for answering calls is relatively short compared to other Australian government departments, while the target for responding to written correspondence is broadly similar.²² As shown in Figure 4.2, in 2013–14 and 2014–15, the ACCC was consistently unable to meet its targets, with, on average, only 48 per cent of calls being answered within 60 seconds and 56 per cent of web forms being responded to within 15 business days.

22 The Department of Human Services' target for answering Medicare calls from the public is seven minutes, the Australian Taxation Office's target for general enquiries is 80 per cent of calls answered within five minutes, and the Department of Immigration and Border Protection's target is 85 per cent of calls answered within 10 minutes.

Figure 4.2: The ACCC’s performance in meeting Infocentre service standards, July 2013 to June 2015



Source: ANAO analysis of ACCC Infocentre contact information.

4.4 In assessing performance against the service standards, the ACCC could consider whether the targets are appropriately calibrated, including in respect of encouraging a greater share of online complaints through an expectation of more rapid responses to webforms.

4.5 As discussed in Chapter 2, complaints data is a key source of information and intelligence and plays a vital role in the ACCC’s targeting of compliance and enforcement activities. Where a call is not answered in a timely manner, it may be abandoned, depriving the ACCC of potentially useful intelligence. Further, where a caller has an unsatisfactory experience (because their call was not answered promptly or their webform was not responded to in a timely manner), this may make them less likely to contact the ACCC in the future, with longer term implications for the ACCC’s ability to gather information. Table 4.1 sets out the proportion of calls abandoned over the period July 2013 to June 2015 along with the average call wait time and webform response time.

Table 4.1: Service level indicators, half-yearly from July 2013 to June 2015

Indicator	2013	2014	2014	2015	Monthly Trend
	2nd half	1st half	2nd half	1st half	
Calls abandoned Percentage of calls that were received by the ACCC, but not answered (generally because the caller hung up).	18%	33%	21%	26%	
Call wait time The average number of minutes a caller had to wait in queue before speaking to a staff member.	03:13	05:53	06:39	03:17	
Webform response time The average number of days taken to respond to webforms.	15	16	18	19	

Source: ANAO analysis of ACCC Infocentre contact data.

Quality assurance

4.6 To manage the quality of services provided by the Infocentre, the ACCC has a quality assurance manual that sets out the procedure for the quality assessment of calls and written correspondence (web forms and letters) handled. The quality assurance procedures applicable depend on the type of contact, and whether the operator is an in-house or outsource staff member, and are outlined in Table 4.2.

Table 4.2: ACCC Infocentre quality assurance targets

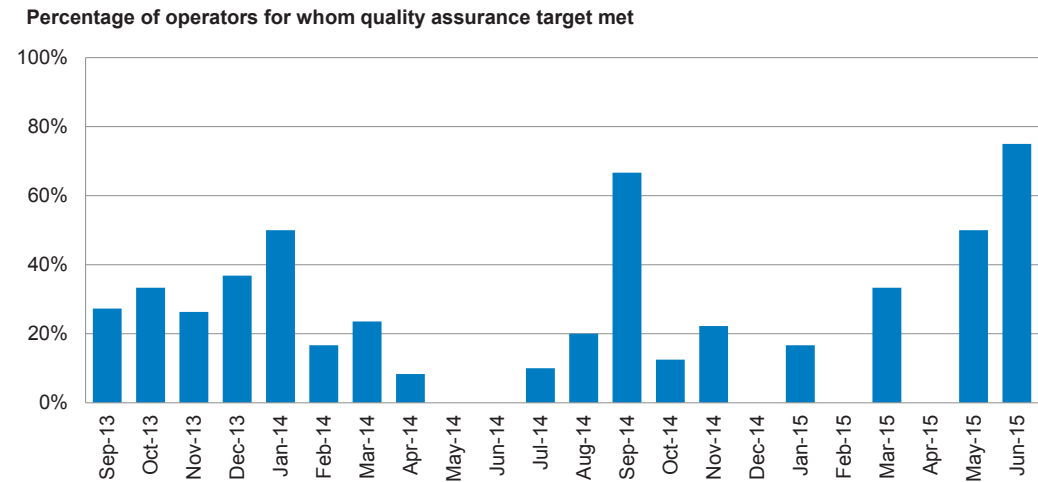
Contact type	Staff type	Target
Phone	In-house	The ACCC aims to undertake three assessments of calls per operator per month.
	Outsource	The ACCC aims to complete two assessments of calls per operator per month. In addition, the outsource operator undertakes its own quality assessment, with the number of calls assessed depending on their experience and performance (new hires have at least four calls assessed per month). The ACCC undertakes regular calibrations with the outsource provider. The ACCC is also undertaking three rounds of mystery shopping in 2015–16 to supplement these quality assessments.
Written	In-house	A sliding scale, depending on the proficiency level of the operator, is used to determine the proportion of correspondence to be quality assessed. For learners, all work is checked prior to sending; beginners, 50 per cent; intermediate, 25 per cent; and proficient, 10 per cent.
	Outsource	Outsource operators do not handle written correspondence.

Source: ANAO, based on ACCC information.

4.7 It is noted that compared to other call centres, the target number of calls to be quality assessed is relatively low.²³ Despite having a relatively low target, the ACCC has not undertaken quality assessments in accordance with its quality assurance manual. Figure 4.3 shows the performance of the ACCC in undertaking the target number of quality assessments for staff.

²³ In Dimension Data's 2013/14 *Global Contact Centre Benchmarking Report*, the average calls quality assessed in the contact centre industry was reported as 10.2 calls for experienced operators and 18.7 for new operators.

Figure 4.3: Percentage of in-house operators for whom the target number of quality assessments were undertaken, September 2013 to June 2015



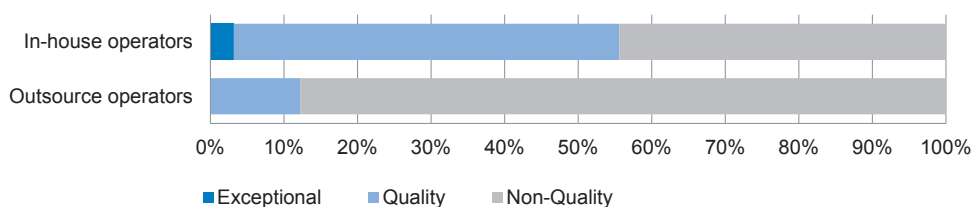
Source: ANAO analysis of ACCC Infocentre quality assurance records.

4.8 On average, the target number of quality assessments was only undertaken for 24 per cent of in-house operators in a given month, from September 2013 to June 2015. In the case of outsource operators, data was only available for the period September 2014 to June 2015. For these operators, the target number of ACCC quality assessments was undertaken, on average, for approximately 38 per cent of operators in a given month. In both cases, there was an increase in the number of quality assessments undertaken in May and June 2015.

4.9 In undertaking quality assessments, the ACCC assesses calls as either quality, non-quality or exceptional, with the overall assessment depending on each call meeting specified call quality elements (for example, whether the operator provided accurate information and whether they advised the caller of the role of the ACCC).²⁴ Different quality assessment matrices apply to in-house and outsource operators, with the matrix applying to outsource operators more stringent as it contains a greater number of critical call quality elements that must be met to receive an overall assessment of quality (as opposed to non-quality). As Figure 4.4 shows, only a relatively low proportion (55 per cent) of in-house calls, and a very low proportion (12 per cent) of outsource provider handled calls received a rating of quality (or exceptional). To allow for greater comparability in the performance of in-house operators with outsource operators, there would be value in the ACCC applying a consistent set of criteria to the assessment of both types of operators.

24 According to the ACCC’s *Quality Assurance Manual*, a non-quality call is one that does not meet the quality standard. A non-quality call is distinct from an ineffective call.

Figure 4.4: Call quality results for in-house operators (from September 2013) and outsource operators (from September 2014) to June 2015



Source: ANAO analysis of ACCC Infocentre quality assurance records.

4.10 In addition to quality assurance assessments, the ACCC undertakes periodic Infocentre customer service satisfaction surveys. The most recent survey was conducted between November 2013 and 20 January 2014. When asked to rate their overall satisfaction with the service of the ACCC, 92.1 per cent of respondents gave a rating of ‘very satisfied’ or ‘satisfied’. It is noted, however, given that there has been a significant increase in the number of calls handled by the outsource provider since the last survey, the survey results should be treated with some caution. Nevertheless, the inconsistency between this result and the call quality results at Figure 4.4 suggests that the quality assessments of operators may not be a good reflection of the expectations of callers.

Does the ACCC have effective arrangements for recording and using the complaints it receives?

The ACCC records complaints in its client relationship management systems. The ANAO identified issues with the way complaints were recorded in this system, including duplicate trader entries and a low level of identification of disadvantaged and vulnerable consumers. These issues reduce the usefulness of complaints data for the purposes of strategic planning, case selection and targeting of voluntary compliance activities. To increase the usefulness of complaints data for these purposes, the ACCC should introduce processes for assuring data quality, and better identifying disadvantaged and vulnerable consumers at the point of contact.

4.11 The ACCC records contacts that it receives in its client relationship management system, Dynamics CRM, and assesses complaints against its Compliance and Enforcement Policy. Where an Infocentre operator assesses that a complaint falls within one of the ACCC’s current priorities, the operator may escalate the complaint to the Infocentre round table meeting for assessment and potential escalation (the ACCC’s case selection process is considered in Chapter 5). The volume of contacts that the ACCC receives means that most are not escalated to the round table meeting or the under assessment meeting (see Chapter 5).

4.12 The ANAO identified issues with the recording of complaints that reduce the ACCC’s ability to draw meaningful insights from the complaints that it receives. These issues are outlined in Table 4.3 and have implications for the ACCC’s strategic planning and case selection processes.

Table 4.3: Issues identified with the quality of ACCC complaints data

Issue	Comment
Duplicate trader entries	<p>Of the top 500 most complained about traders in the ACCC's complaints data for 2013–14 and 2014–15, 24 per cent had 10 per cent or more of their cases linked to an incorrect or duplicate trader. In the worst case, 72 per cent of the contacts for an organisation were linked to an incorrect or duplicate trader.</p> <p>Generally, complaints were better linked for larger (more prolific) traders than smaller traders. This is of concern, as each complaint relating to a smaller trader is of greater marginal utility than each complaint relating to a larger trader (whose behaviour and trading profile is likely well understood).</p>
'Not Applicable' incorrectly recorded as trader	'Not Applicable' was recorded as the trader for 48 698 non-scam contacts (32 per cent). In 4082 of these cases (8.3 per cent), there was an identifiable trader based on other fields, and accordingly the classification of the trader as 'Not Applicable' was inappropriate.
Case categorisation	<p>The ANAO sampled 383 consumer protection contacts to see whether the appropriate case category (for example, Misleading or Deceptive Conduct and Consumer Guarantees) was recorded. There were 21 cases (six per cent) where a clearly inappropriate case category was selected.</p> <p>In addition, there were 31 instances where a case categorisation checkbox (such as online, small business and telecommunications) should have been selected, but was not.</p>
Recording as complaints/enquiries	Of the 383 contacts in the ANAO's sample above, 58 (15 per cent) were recorded as a complaint, when they were better characterised as an enquiry. Four cases (one per cent) were recorded as an enquiry, despite being a complaint.

Note: ANAO examined all non-scam contacts.

Source: ANAO analysis of ACCC data.

Identification of disadvantaged and vulnerable consumers

4.13 As noted in Chapter 2, two priority areas for the ACCC are consumer protection issues impacting on Indigenous consumers, and disadvantaged and vulnerable consumers.²⁵ These are long standing priorities for the ACCC, given these groups' greater susceptibility to information asymmetries and the likelihood that misconduct will have a greater impact on these consumers compared to non-disadvantaged/vulnerable consumers. In order to be positioned to target traders who may be targeting disadvantaged or vulnerable consumers, it is important that the ACCC accurately captures information relating to whether a complainant is Indigenous or falls within a category of disadvantage or vulnerability.

4.14 Despite this, the ANAO found that only a small proportion of complaints received by the ACCC were correctly recorded as involving an Indigenous complainant, or a complainant with some form of disadvantage or vulnerability. Demonstrating this, Table 4.4 compares the proportion of the ACCC's consumer protection complaints where a disadvantage/vulnerability checkbox was checked to the proportion of the Australian population that exhibits a disadvantage/vulnerability category. It shows that a much smaller proportion of the ACCC's

25 The ACCC has four categories of disadvantage and vulnerability: youth, elderly, remote community, and English language difficulties.

complaints report disadvantage/vulnerability compared to the share of the main disadvantaged/vulnerable groups in the Australian population.

Table 4.4: Proportion of ACCC complaints from disadvantaged/vulnerable complainants compared to Australian population

Category of disadvantage /vulnerability	Proportion of ACCC complaints (per cent)	Proportion of Australian population (per cent)	Variance (percentage points)
Elderly (65 years and over)	0.7	14.7	14.0
Youth (15 to 24 years of age)	0.1	13.3	13.2
English language skills (language other than English spoken at home)	1.0	18.2	17.2
Indigenous	0.3	3.0	2.7
Remote community	0.1	2.3	2.2

Source: ANAO analysis of ACCC complaints data and Australian Bureau of Statistics data.

4.15 While some level of variance is expected (because disadvantaged or vulnerable consumers may be relatively less likely to complain, for example because of lack of familiarity with government processes), a significant contributor to these variances is likely to be that the ACCC does not routinely identify disadvantaged or vulnerable consumers. An indicator of this is shown in Table 4.5, which classifies the remoteness of complaints based on the postcode of the complainant and for each classification, the number of complaints for which the remoteness box was checked. Only a small proportion (14 of 854 or two per cent) of people reporting postcodes in Remote Australia or Very Remote Australia was correctly identified as remote disadvantaged.

Table 4.5: Complaints by remoteness and whether remoteness was correctly identified

Remoteness	Remoteness Disadvantage Box Checked		Total
	No	Yes	
Major Cities of Australia	61 837	8	61 845
Inner Regional Australia	11 121	6	11 127
Outer Regional Australia	4 965	16	4 981
Remote Australia	650	7	657
Very Remote Australia	204	7	211
N/A – no postcode recorded, or recorded incorrectly	2 272	3	2 275
Total	81 049	47	81 096

Source: ANAO analysis of ACCC complaints data and *Australian Statistical Geography Standard*.

4.16 The low level of identification of disadvantage/vulnerability factors in complaints makes it more difficult to: draw meaningful conclusions about the type of misconduct most affecting disadvantaged/vulnerable consumers; and identify potential patterns of conduct that may be disproportionately affecting disadvantaged/vulnerable consumers. This, in addition to the data

quality issues identified in Table 4.3, has important consequences for the ACCC's strategic review process, and its targeting of compliance and enforcement activities.

4.17 To manage the issues identified with the quality of the ACCC's complaints (including the identification of disadvantaged/vulnerable consumers), the ACCC should:

- improve existing data where possible (by identifying duplicate entries and making better use of internal and external data);
- implement formal data quality processes and procedures—while the Intelligence and Reporting team undertakes some ad-hoc work in relation to data quality, this should be formalised and appropriate reporting arrangements put in place;
- subject to resourcing, consider whether more extensive quality assurance processes in the Infocentre would better support data quality; and
- review call scripts and data capture forms to ensure that the capturing of the most important information for planning and intelligence is prioritised.

Recommendation No.2

4.18 To better support the use of complaints from consumers as a source of information and intelligence for strategic planning and targeting of compliance and enforcement activities, the ANAO recommends that the Australian Competition and Consumer Commission improves the quality of complaints data, including by:

- (a) implementing a formal data quality process; and
- (b) reviewing call scripts and data capture forms for their alignment to the business needs of the Commission.

The ACCC's response: *Agreed.*

5. Case selection and escalation

Areas examined

The ANAO examined the ACCC's processes for selecting and escalating instances of potential non-compliance with fair trading obligations for investigation and enforcement action to identify whether cases were selected in accordance with a risk-based approach to regulation as set out in its Compliance and Enforcement Policy. As part of this assessment, the ANAO reviewed 200 cases conducted in 2013–14 and 2014–15, and the minutes of the ACCC's main case selection body.

Conclusion

In undertaking case selection activities, the ACCC focuses heavily on specific complaints, rather than using intelligence to focus on broader trends in the market. However, there are shortcomings in arrangements for escalating complaints, which raise the possibility that conduct involving high levels of widespread consumer detriment is not addressed. There is substantial scope for the ACCC to improve its case selection activities by providing greater assurance over the 99 per cent of complaints that do not progress beyond the Infocentre point of contact and by making greater use of intelligence.

Areas for improvement

The ANAO made one recommendation, aimed at increasing the use of intelligence to improve the targeting of investigative and enforcement activities. The ANAO also suggested that the ACCC improve its recording of case outcomes (paragraph 5.22).

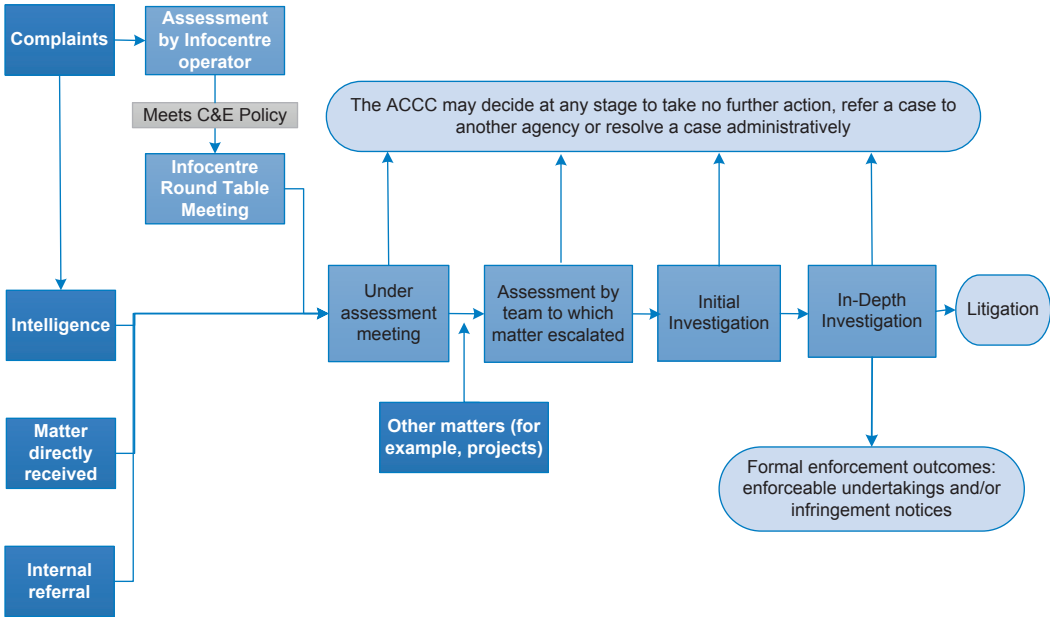
Are there effective processes for identifying, prioritising and selecting cases for investigation?

The ACCC has appropriate arrangements for consideration and selection of matters at its internal case selection meetings. However, these meetings only consider approximately one per cent of the 10 000 fair trading complaints that the ACCC receives each quarter and there are limitations in the arrangements for escalating complaints beyond the Infocentre. These limitations relate to the extent of assurance arrangements regarding the escalation of cases to the case selection meetings, which raise the possibility that the ACCC may 'miss' complaints and consequently not address instances of widespread consumer detriment.

More broadly, the ACCC's case selection activities focus too heavily on individual complaints and instances of non-compliance. Greater use of intelligence in the case selection process, aimed at identifying trends and patterns of conduct suggesting widespread consumer detriment, would enable the ACCC to more effectively target its investigative and enforcement activities.

5.1 The ACCC identifies instances of potential non-compliance with fair trading obligations from a number of sources (shown in Figure 5.1). Like most regulators, the number of identified instances of potential non-compliance far exceeds the ACCC's investigative and enforcement capacity. Given this, it is imperative that the ACCC has a robust process for escalating and selecting for enforcement action, instances of non-compliance that pose the greatest risk to the wellbeing of consumers.

Figure 5.1: ACCC case selection and escalation process



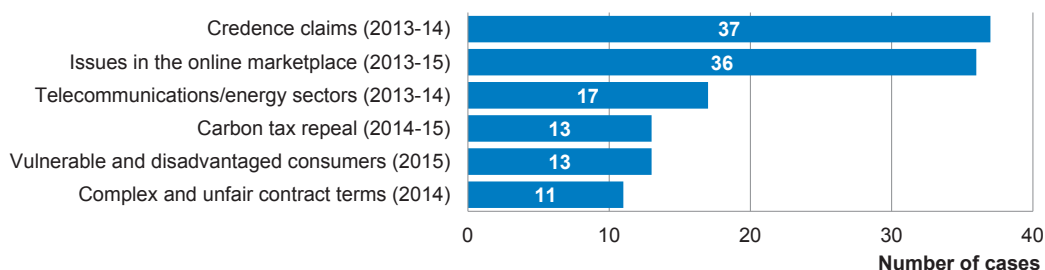
Note: C&E Policy refers to ACCC's Compliance and Enforcement Policy. Contacts received by the ACCC are assessed by Infocentre for whether they fall within a priority area or exhibit priority factors.

Source: ANAO analysis of ACCC information.

5.2 The ACCC's Compliance and Enforcement Policy (discussed in Chapter 2) guides its decisions in respect of the selection and escalation of cases. The Policy sets out a number of priority areas where the ACCC will focus its activities. Cases are generally assessed to determine whether they fall within one or more of these priorities. There are also a number of priority factors²⁶ that the ACCC will consider when a matter does not fall within a priority area. As a principle, the ACCC seeks to direct its resources to conduct that results in, or has the potential to result in, widespread consumer detriment.

5.3 To assess the effectiveness of the ACCC in selecting and escalating cases, the ANAO reviewed 200 fair trading cases (consisting of 100 that ended during the under assessment stage, 50 during initial investigation and 50 that proceeded to in-depth investigation). Overall, 152 of the 200 cases (76 per cent) reviewed fell within a priority area, and of the remainder, many appeared to exhibit one or more priority factors. This indicates that cases were selected in accordance with the Compliance and Enforcement Policy. As shown in Figure 5.2, the most common priority area that cases fell within was credence claims followed by emerging issues in the online market place.

26 Priority factors include conduct: involving issues of national or international significance; involving essential goods or services; demonstrating a blatant disregard for the law; or of significant public interest or concern.

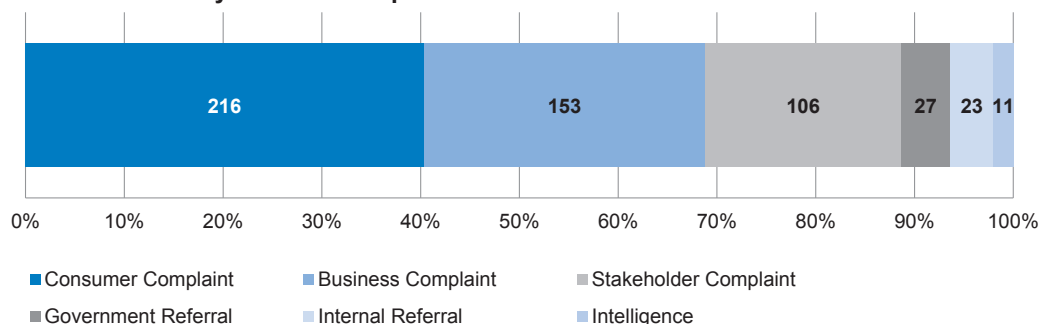
Figure 5.2: Most common priority areas of cases in the ANAO's sample

Source: ANAO analysis of ACCC information.

Under assessment meeting

5.4 The ACCC's main case selection forum is the under assessment meeting. This meeting is held weekly, subject to clear processes and procedures, and attended by key senior executives, including the Executive General Managers of Consumer Enforcement, Competition Enforcement and Consumer, Small Business and Product Safety. Matters considered at the under assessment meeting include complaints from the Infocentre that have come through the round table meeting process²⁷, direct contacts (such as from stakeholders or government agencies), internal referrals and intelligence briefs. These meetings were minuted and included consideration of the merits of matters escalated to the meeting.

5.5 The ANAO reviewed minutes of under assessment meetings for the period 1 July 2013 to 30 September 2015 to identify the source of matters to the meeting. As shown in Figure 5.3, the most common source of matters for the under assessment meeting are complaints (from the general public, businesses and stakeholders). By contrast, there are relatively few cases that originate from intelligence and other internal referrals.

Figure 5.3: Source of fair trading matters considered at under assessment meetings, 1 July 2013 to 30 September 2015

Source: ANAO analysis of minutes of under assessment meetings.

27 The round table meeting was introduced in late 2014 and is the first point of escalation for contacts from the Infocentre. The round table is held by the Infocentre and conducts an initial triage of matters to be included in the weekly under assessment meetings.

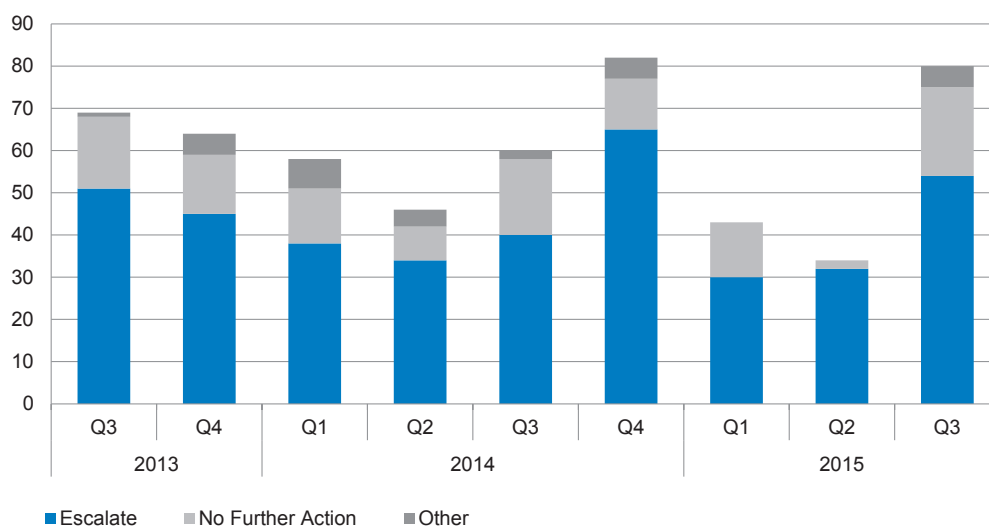
5.6 In its Compliance and Enforcement Policy, the ACCC states that it 'cannot pursue all the complaints it receives' and that 'the ACCC's role is to focus on those circumstances that will, or have the potential to...result in widespread consumer detriment.' While there is a role for the consideration of individual complaints at the under assessment meeting (as individual complaints may raise especially egregious or serious conduct warranting ACCC attention), the focus on individual complaints at under assessment meetings at the expense of cases from other sources (such as intelligence) raises concerns about the extent to which the ACCC focuses its investigation and enforcement resources towards the resolution of cases that provide the greatest overall benefit for consumers.

5.7 The predominance of complaints as a source of cases in under assessment meetings may lead to a narrow focus on individual instances of misconduct rather than potential issues or trends relating to a trader, industry, consumer group or type of conduct. To manage this risk, the Intelligence and Reporting Team provides input on an ad-hoc basis into matters at under assessment meetings (for example, by informing the meeting of any trends or patterns of conduct relating to that trader). However, given that this input is only provided in relation to cases already selected, the input is unlikely to significantly broaden the focus beyond specific instances of misconduct. The Intelligence and Reporting Team also produces monthly reports on trends and issues of interest as well as ad-hoc briefs on particular industries, traders or issues. The monthly reports are prepared for the Enforcement Committee, although since October 2015, following an ANAO suggestion, they are now also considered in the under assessment meeting. The ad-hoc briefs are generally not considered by a decision-making body and are often prepared upon request by an investigation team for the purposes of an investigation, rather than for the purposes of case selection.

5.8 The ACCC's focus on specific complaints is also of concern given that only a very small proportion of fair trading complaints (approximately one per cent) are ultimately escalated to the round table meeting and/or the under assessment meeting, raising the possibility that some matters may be 'missed'. Figure 5.4 shows that about 60 matters are considered at the under assessment meeting each quarter, compared to the approximately 10 000 complaints that the ACCC receives in relation to fair trading related matters each quarter and that most matters considered at the meeting are escalated. The high level of escalations suggests that if more matters were considered, a similar trend would prevail with many of these likely to be considered appropriate for escalation (and by extension, there are a number of matters that may be being 'missed').

Figure 5.4: Fair trading matters considered in under assessment meetings between 1 July 2013 and 30 September 2015, by outcome

Matters per quarter



Source: ANAO analysis of minutes of under assessment meetings.

5.9 The importance of complaints to the ACCC's case selection activities and the low number of cases that are escalated beyond the point of contact means that it is critical that the ACCC has effective arrangements for filtering complaints (and in doing so, ensuring that cases are not 'missed'). There are four main ways that this is managed, however each has limitations:

- *complaints are assessed against the priorities outlined in the Compliance and Enforcement Policy*—however, many of the priorities outlined in the policy are broad and therefore afford significant discretion to Infocentre staff about whether they escalate a matter;
- *Infocentre staff are present at the under assessment meeting and benefit from senior management feedback on strategic matters and considerations to take into account when assessing complaints*—while valuable, this guidance is informal and does not provide assurance that Infocentre operators assess cases in accordance with the strategic direction provided at under assessment meetings;
- *Infocentre staff are subject to the Infocentre's quality assurance arrangements*—as outlined in Chapter 4, the Infocentre's quality assurance processes have not been consistently followed, undermining this as a source of assurance for the appropriate escalation of matters;
- *the Intelligence and Reporting team reviews complaints as part of the preparation of monthly and ad-hoc reports, and as part of this process may identify complaints that should have been escalated*—this is a valuable form of assurance, but could be enhanced by the Intelligence and Reporting team more explicitly and systematically reviewing complaints to identify complaints that should have been escalated.

5.10 Overall, the round table and under assessment meeting processes provide a sound basis for selecting matters for escalation.²⁸ However, these strengths are undermined by limitations in the process for escalating complaints to these meetings. In particular, despite the importance of individual complaints to the ACCC's case selection activities, it does not have adequate arrangements to ensure that complaints that may raise widespread consumer detriment are escalated beyond the point of initial contact.

5.11 To provide greater assurance about targeting investigative and enforcement activities at issues involving the greatest level of widespread consumer detriment, there would be value in the ACCC improving assurance arrangements around the escalation of complaints from the Infocentre and increasing its use of intelligence as part of its case selection activities. In particular, the ACCC should seek to increase the extent to which it selects cases as the result of intelligence activities aimed at identifying trends, patterns of conduct, and other factors that may indicate the existence of widespread consumer detriment in relation to the activities of a trader and/or industry. Greater use of intelligence—and in particular, the use of a more quantitative approach to risk analysis and differentiation (as discussed in paragraph 2.25)—would provide more assurance that the ACCC is not missing potential issues and that it is focussing its limited resources on conduct involving the greatest level of widespread consumer detriment.

5.12 As noted in paragraph 5.7, the ACCC has recently taken a step towards making greater use of intelligence in case selection activities by considering monthly intelligence reports in the under assessment meeting. Beyond this, the ACCC should refocus the reports for a case selection purpose and consider introducing trigger points and/or risk scoring (as discussed in paragraphs 2.25 and 2.27), where matters are brought to the under assessment meeting for consideration if certain criteria are met (for example, a spike in complaints, or a trader with a high proportion of complaints relating to disadvantaged and vulnerable consumers).

Recommendation No.3

5.13 To improve the selection of cases for investigation and enforcement, the ANAO recommends that the Australian Competition and Consumer Commission:

- (a) improves assurance arrangements for ensuring that complaints involving high levels of widespread consumer detriment are escalated to case assessment meetings; and
- (b) increases the use of intelligence activities aimed at identifying trends, patterns of conduct and other factors that can indicate the existence of widespread consumer detriment in relation to the activities of a trader and/or industry.

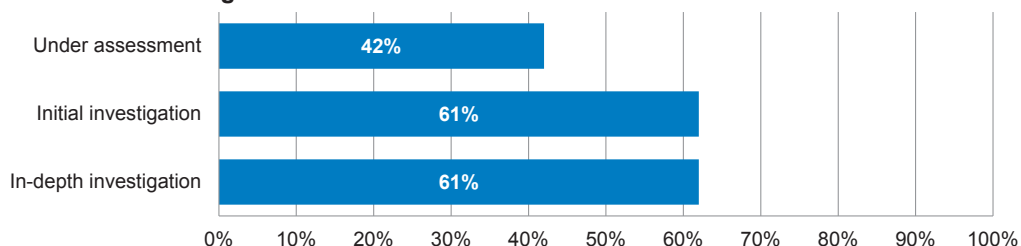
The ACCC's response: *Agreed.*

5.14 A further challenge to the under assessment meeting process is that a significant number of cases bypass the under assessment process. As part of the review of the sample 200 cases, the ANAO assessed whether each of the cases was considered at the under assessment meeting. Only 96 of the 200 cases (48 per cent) were considered at the under assessment meeting, although the

28 There is good consideration by senior officers of matters escalated to the under assessment meeting, providing assurance that matters escalated beyond the meeting involve appropriate levels of widespread consumer detriment.

proportion was higher for cases that reached the initial and in-depth investigation stages (see Figure 5.5).

Figure 5.5: Proportion of fair trading cases considered at the under assessment meeting



Source: ANAO analysis of minutes of under assessment meetings.

5.15 In 41 of the 104 cases that were not considered by the under assessment meeting, the case was initiated as part of a project and accordingly it was reasonable that the matter was not considered. For the other 63 cases, there were circumstances that could explain why the matter was not considered by the under assessment meeting (such as it being a self-initiated matter, a direct approach from a stakeholder that the ACCC believed it could quickly resolve or a referral from another government agency). Overall, however, these reasons did not provide a firm basis for bypassing the under assessment process and there would have been benefit in the cases being considered at the under assessment meeting to: uphold the role of the under assessment meeting as the main process for case selection; support the consistent treatment of cases; and ensure that those matters were subject to appropriate senior management oversight and scrutiny before resources were dedicated to their resolution.

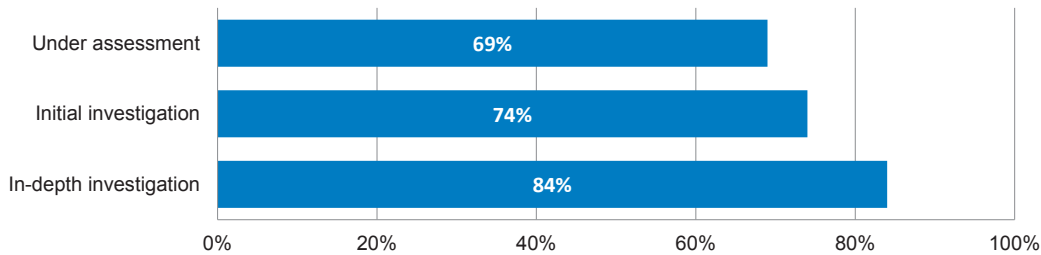
Are there effective arrangements for escalating cases for detailed investigation and enforcement action?

The ACCC's processes for escalating cases for detailed investigation and enforcement action were effective in filtering cases to those falling within an ACCC priority. However, there were issues with the way that case progressions and escalations were recorded that have implications for the accuracy of reporting about the number of cases at various stages of investigation.

5.16 The ACCC process for escalating cases for investigation and enforcement action is outlined in Figure 5.1 and involves cases going through a series of increasingly intensive investigations. The first stage for a case is the under assessment stage, where a case is considered for whether it falls within a priority area or otherwise warrants attention. Following this, a matter may be escalated to an initial investigation. An initial investigation is intended to use minimal resources to determine if there is a prima facie breach of the Australian Consumer Law and if it should be pursued. An initial investigation may be escalated to an in-depth investigation, which is subject to oversight by the Enforcement Committee and generally involves conduct that warrants more serious action by the ACCC. Depending on the outcome of the investigation, an in-depth investigation may lead to the ACCC taking court action against a party.

5.17 Overall, this process was effective in terms of filtering cases down to those that fall within an ACCC priority (and therefore warrant investigative or enforcement action). As shown in Figure 5.6, as cases proceeded throughout the investigation process, they were more likely to fall within a priority area (as discussed in paragraph 5.3, overall 76 per cent fell within a priority area).

Figure 5.6: Proportion of cases within priority area, by case type, ANAO sample



Source: ANAO analysis of 200 sample cases that commenced in 2013–14 and 2014–15.

5.18 Although having a clear process, there were some issues with the recording of case escalations. One issue identified was that a large percentage (56 per cent) of in-depth investigations where an initial investigation was recorded as having occurred had in fact proceeded straight to in-depth investigation (skipping the initial investigation). This was usually due to: the case relating to a compliance project; the case being high-profile or involving a clearly high level of consumer detriment; compliance staff having already undertaken an extensive assessment; and/or peculiarities of the ACCC’s former case management system.

5.19 Another issue that the ANAO identified was that, of the 100 under assessment cases in the sample, approximately one-third remained open for 60 days or more, indicating that something more than an assessment was undertaken (13 of these cases resulted in either an administrative resolution, or a warning letter being sent to the trader). Commonly, this was a record-keeping issue that occurred because a case was referred at the under assessment meeting to a non-investigative team (such as the Consumer and Small Business Strategies branch) for trader engagement rather than an investigation.

5.20 While there were generally sound reasons for cases progressing in the way that they did, the issues identified have implications in terms of accountability and performance measurement and reporting. In terms of accountability, there are certain requirements that are attached to the particular stages of a case, such as the requirement for in-depth investigations to go to the Enforcement Committee. If the process is not followed (or if the details of case progression are not recorded in a timely and accurate way), this may limit the ACCC’s ability to ensure that the relevant requirements are being followed.

5.21 In relation to performance measurement and reporting, the ACCC publishes in its annual report and other publications, the number of under assessment cases, initial investigations and in-depth investigations, and has as a key performance indicator for the 2015–16 financial year the ‘number of in-depth ACL investigations completed’. Given the issues identified, there are questions about the accuracy of the information provided in these publications and the information reported against the stated indicator. This is significant as it means that these publications may under or over-report the true extent of the ACCC’s activities.

5.22 It is noted that the ACCC's move to a new case management and workflow system on 1 July 2015 is likely to resolve some of the issues that the ANAO identified regarding the recording of case progression. Better reporting enabled by the new case management and workflow system will allow senior management to better monitor cases, and focus, in real-time, on identifying anomalous cases. The ACCC should also take the opportunity to revisit its processes and guidance in relation to case escalation, with the aim of improving clarity and ensuring consistency with current practice and expectations, particularly with regard to the accurate recording of case progression.

6. Investigations into non-compliance

Areas examined

The ANAO examined the ACCC's conduct of fair trading investigations, including whether it carried out its investigations in accordance with the Australian Government Investigation Standards and exercised its investigative powers in a proportionate manner. As part of this review, the ANAO reviewed 50 in-depth investigations and the ACCC's use of its investigative powers between 1 July 2013 and 30 June 2015.

Conclusion

The ACCC carries out investigations broadly in accordance with the Australian Government Investigation Standards, with clear policies, well-qualified staff and effective oversight arrangements, but has room to improve its practices for planning investigations.

In relation to investigative powers, the ACCC generally considered the burden associated with the use of these powers, but could more consistently and systematically consider ways to narrow the scope of information gathering notices.

Areas for improvement

The ANAO suggested that the ACCC more consistently consider the burden associated with its use of its investigative powers (para 6.26).

Does the ACCC conduct investigations into non-compliance in accordance with the relevant standard?

Investigations were largely carried out in accordance with the Australian Government Investigation Standards. The ACCC has clear policies on its intranet, well-qualified staff and effective arrangements for the oversight of investigations. There was room for the ACCC to improve its practices in relation to the planning of investigations, as no investigation plan was in place for 14 of 50 investigations reviewed (28 per cent) and risks were not appropriately identified as part of investigation planning.

6.1 The Australian Government Investigation Standards are the 'minimum standards' for government entities 'conducting investigations relating to the programs and legislation they administer'. The Australian Government Investigation Standards refer to an investigation as the 'process of seeking information relevant to an alleged, apparent or potential breach of the law', with the primary purpose being 'to gather admissible evidence for any subsequent action, whether under criminal, civil penalty, civil, disciplinary or administrative sanctions'.²⁹

6.2 Accordingly, the Standards are relevant to ACCC cases once they reach the in-depth investigation stage. The ANAO therefore reviewed the 50 in-depth investigations into non-compliance with fair trading obligations in its sample of 200 cases (described in Chapter 5) for compliance with the Standards. Table 6.1 sets out a selection of the more important standards in the Australian Government Investigation Standards, and the ANAO's high-level assessment for the sampled in-depth investigations.

29 Australian Government, *Australian Government Investigations Standards*, 2011, p. 1.

Table 6.1: Selection of key Australian Government Investigations Standards and the ANAO's assessment of the ACCC's performance against the standards

Standard		
Topic	Among other things the Australian Government Investigations Standards outline that the ACCC should:	Assessment
Investigation policy	Have a clear written policy in regard to its investigative function	Effective
Staff certification	Ensure that investigation staff possess relevant qualifications to effectively carry out their duties	Partially Effective
Planning investigations	Have a standard investigation plan template	Effective
	Commence each investigation with an overall planning process and a written investigation plan	Partially Effective
	Identify and manage risks as part of the planning process and ensure that risk management is incorporated into decision-making through the investigation	Not Effective
Conducting and documenting investigations	Record investigation activities and keep and file all documents and information in accordance with agency procedures and legislative requirements	Effective
	Ensure that supervisors review investigations at appropriate intervals to support adherence with the Australian Government Investigations Standards and investigation plans	Effective
	Ensure that critical decisions are made by an appropriate officer and documented on the investigation file	Effective

Source: ANAO, based on Australian Government Investigations Standards.

Policies and staff capability

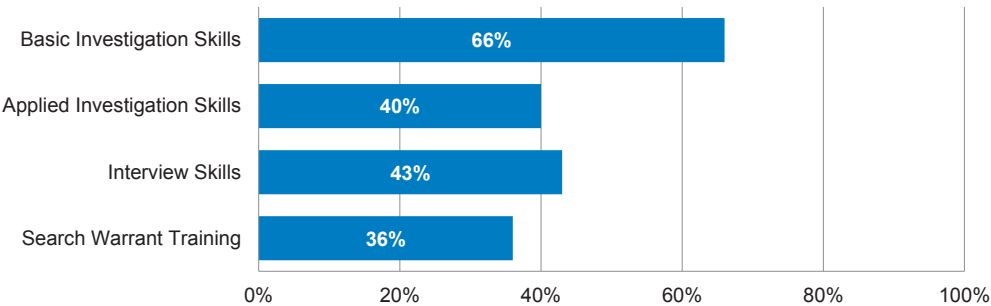
6.3 The ACCC has clear policies on its intranet dealing with the conduct of investigations. These policies cover: the investigation process; handling information; obtaining and handling evidence; civil case management; criminal matters; and the outcomes available to the ACCC. The policies are supported by reference to underlying legislation, outline procedures, and where appropriate, provide templates for investigators to assist them in carrying out investigative tasks. The ACCC's guidance is reviewed for currency, to identify gaps in existing guidance and to identify areas for new guidance by the Transfer of Enforcement Knowledge Committee.³⁰

6.4 The ACCC has well-qualified staff to undertake investigations—nearly all staff had a tertiary qualification. The most common degree amongst investigators was a law degree (69 per cent of investigators). To support investigators, the ACCC has four core internal courses for investigators: basic investigation skills (to be completed within the first 12 months of commencing as an investigator); applied investigation skills (after 12–24 months); interview skills (after 18 months); and search warrant training (aimed at APS6 level staff and above). As shown in

³⁰ The Transfer of Enforcement Knowledge Committee is chaired by the General Manager, Enforcement NSW and Serious Cartels. It was established in 2014 to review guidance, update and remove inconsistency and produce new guidance to inform enforcement staff.

Figure 6.1, 66 per cent of investigators had completed the basic investigation skills courses, with approximately 40 per cent having completed the other forms of training.

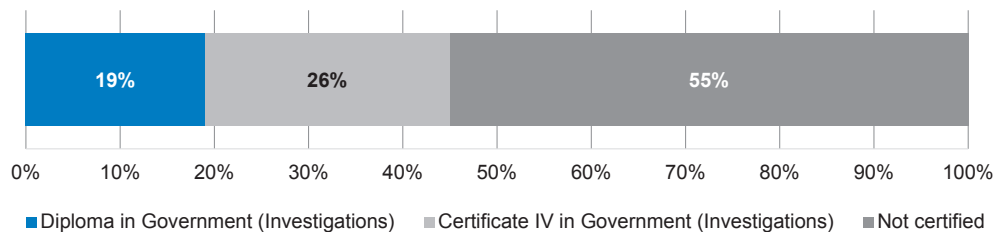
Figure 6.1: Proportion of ACCC investigation staff that have undertaken internal training



Source: Information provided by the ACCC.

6.5 In addition, in 2012, the ACCC commenced a project to require investigation staff to be accredited in line with the Australian Government Investigation Standards (by requiring Australian Public Service-level staff to obtain the Certificate IV in Government (Investigations) and Executive Level staff, the Diploma). As shown in Figure 6.2, at the time of the audit, less than half had completed the relevant training. The ACCC expects all investigators to be certified by the end of 2016.

Figure 6.2: Proportion of ACCC investigation staff certified in line with the Australian Government Investigation Standards



Source: Information provided by the ACCC.

Planning investigations

6.6 According to the Australian Government Investigation Standards, investigations should commence with an overall planning process and result in a written investigation plan. The Standards also state that the planning process should identify and manage risks and that agencies should ensure risk management is incorporated in decision making throughout an investigation. This is supported by the ACCC’s internal policy on investigation plans, which states that ‘as a general rule, an investigation plan is required for in-depth investigations’.³¹ The ACCC has a

31 The policy also states that there ‘will be some circumstances where it will not be necessary to complete an investigation plan for an in-depth investigation, for example, where the investigation is likely to be closed shortly after progressing to the in-depth phase. That said, it is a good habit for staff to use investigation plans’.

standard investigation plan template that has sections for: the alleged conduct; the strategic alignment of the case; oversight; key dates; action plan; steps to be taken for the investigation; and an evidence matrix.

6.7 Of the 50 in-depth investigations in the ANAO's sample, 14 (28 per cent) did not have an investigation plan. For these cases, the reason for not having an investigation plan was mainly that the investigation was not a substantive investigation and/or that extensive investigative inquiries were not made.

Risk management

6.8 In May 2013, an internal audit identified that the ACCC's investigation plan templates did not 'specifically reference risk management practices'. In response, in July 2014, the ACCC amended its investigation plan template to include a section for risk management.

6.9 While the ACCC has been improving its consideration of risk as part of the investigation planning process, there is a need for continual improvement of its practices. Of the 10 in-depth investigations with investigation plans that related to cases starting from July 2014 onwards, only five (50 per cent) of the investigation plans included risk assessments despite these forming part of the template. Further, even where a risk assessment was completed, only an average of 1.8 risks was identified, suggesting insufficient effort went into identifying risks.

Conduct of investigations

6.10 In conducting investigations, it is important that investigations are undertaken in a timely manner, subject to oversight by suitably senior officials, and key decisions in the investigation are documented.

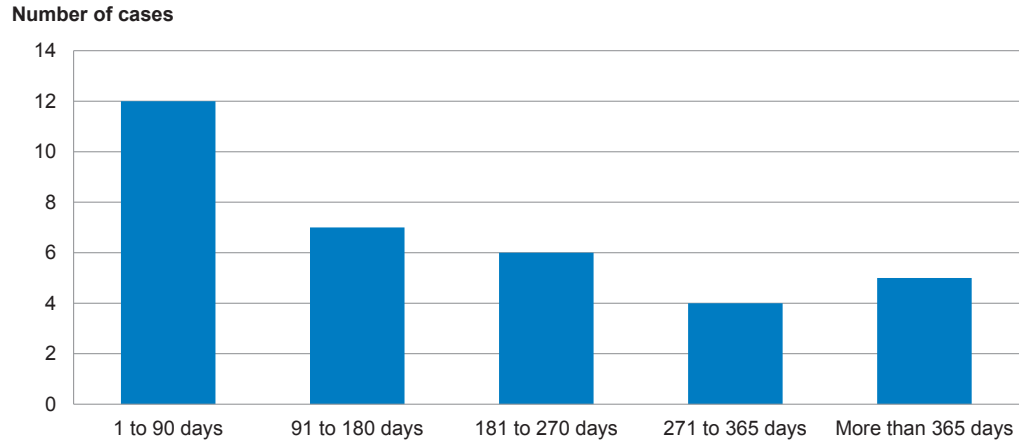
Timeliness

6.11 In the ACCC's Portfolio Budget Statements for 2015–16, the ACCC has as key performance indicators: 'the percentage of initial ACL investigations completed within 3 months' and 'the percentage of in-depth ACL investigations completed within 12 months'. This indicator is reflected in the Enforcement Division's Business Plan for 2014–15 and in the standard investigation plan template.

6.12 As outlined in Chapter 5, there were issues with the way investigators escalated investigations and recorded these in the ACCC's case management and workflow system. The inconsistent recording of escalations limits the ACCC's ability to report on compliance with these targets and during the audit, limited the ANAO's ability to assess performance in this area.

6.13 In relation to initial investigations, inconsistencies with recording of information meant that it was not possible to make an assessment against the relevant target. In relation to the time taken for in-depth investigations, the ANAO assessed the length of time taken to complete the 50 in-depth fair trading investigations in the sample. Of these, 34 had been completed at the time of the audit. The ACCC completed most of these investigations within the specified timeframe, with 29 (85 per cent) of the investigations completed within 12 months. The distribution of time taken by the ACCC to complete in-depth investigations is shown in Figure 6.3.

Figure 6.3: Timeliness of completion of fair trading investigations



Source: ANAO analysis of the 34 completed investigations in the sample of 50 in-depth investigations.

Senior management oversight

6.14 In-depth investigations are overseen by the ACCC’s Enforcement Committee, which meets weekly and is comprised of six of the ACCC’s Commissioners (including the Chairman). The Enforcement Committee’s involvement with any particular matter will depend on the nature, size and complexity of the matter. Generally, the Enforcement Committee will be involved:

- at the start of a matter—within four months of the commencement of an investigation, staff are to present a paper (including the investigation plan) to the Committee outlining why the investigation should continue and how it will proceed;
- during the matter—particularly for higher profile or more complex matters, the investigation team may update the Enforcement Committee on the progress of the matter and seek guidance on how to proceed; and
- on resolution of a matter—the Enforcement Committee is responsible for approving enforceable undertakings, and for referring a decision to issue infringement notices or file court proceedings (these actions are covered in Chapter 7).

6.15 Overall, there was an appropriate level of oversight by the Enforcement Committee. Appearances before the Committee were generally accompanied by detailed papers outlining relevant matters, including: alleged conduct; background to, and progress on, the case; how the case fits within the ACCC’s priorities; and proposed options.

6.16 Importantly, of the 50 cases in the ANAO’s sample, 41 had been reviewed by the Committee (on average, appearing 2.6 times). Of those nine cases that did not come to the Enforcement Committee, eight were cases for which detailed investigative inquiries were not made (see the discussion of inappropriate escalations in Chapter 5), and the remaining case was not yet required to go before the Committee. Further, of the 50 in-depth investigations in the ANAO’s sample, 29 of these involved detailed investigative inquiries and were completed at the time of the audit. The Enforcement Committee was involved with the decision about an outcome for all 29 of these cases.

Documentation of key decisions

6.17 Key decisions were well documented and supported by detailed papers outlining the reason why a particular decision was recommended. Where decisions were made by a decision-making body (the Enforcement Committee or the Commission³²), these decisions were appropriately minuted. The ANAO found documentation to support all of the ACCC's decisions to: use its investigative powers; issue an infringement notice; accept an enforceable undertaking; and file court proceedings.

Does the ACCC exercise its investigative powers in a way that is proportionate to the risk presented by non-compliance?

The ACCC has extensive processes to ensure that its investigative powers are used in a way that is proportionate to the risk presented by non-compliance, and also having regard to the burden and cost of compliance for a recipient. There was a high level of compliance with these processes and the ACCC exercised its powers in a proportionate way. However, there is room for the ACCC to ensure it more systematically considers ways to narrow the scope of information gathering notices that it issues.

6.18 The ACCC has information gathering powers that include: the ability to apply to a magistrate for a search warrant; the power to require claims to be substantiated; and the power to obtain documents, information and evidence. These powers are outlined in Figure 6.4.

32 The Commission refers to collective decision-making by the ACCC Chair, Deputy Chairs and Commissioners. The Commission meets weekly, is the primary decision-making body of the ACCC, and makes decisions, amongst other things, about whether to commence court action in relation to a case.

Figure 6.4: The ACCC’s main fair trading investigative powers

Part XID <i>Competition and Consumer Act 2010</i>	Search Warrant	<p>The ACCC may apply to a magistrate for a search warrant, allowing the ACCC to enter and search a specified premises, copy evidential material and operate electronic equipment.</p> <p>The magistrate must be satisfied that there are reasonable grounds for suspecting that there is evidential material on the premises in order to grant the warrant.</p>
Section 219 <i>Australian Consumer Law</i>	Substantiation Notices	<p>The ACCC may require a trader, who has made claims or representations about goods, services, land or employment, to provide information and/or produce documents to substantiate or support the claim or representation.</p>
Section 155 <i>Competition and Consumer Act 2010</i>		<p>If the ACCC, Chairperson or Deputy Chairperson has reason to believe that a person is capable of furnishing information, producing documents or giving evidence relating to a matter that constitutes or may constitute a contravention, they may require the person to:</p>
	Section 155(1)(a) Provide information	<ul style="list-style-type: none">• furnish to the ACCC, by writing, any such information;
	Section 155(1)(b) Produce documents	<ul style="list-style-type: none">• produce to the ACCC any such documents; and
	Section 155(1)(c) Provide evidence	<ul style="list-style-type: none">• appear before the ACCC, at a time and place specified in the notice to give any such evidence, either orally or in writing and produce any such documents.

Source: ANAO, based on *Competition and Consumer Act 2010*.

6.19 The ACCC’s use of its main fair trading investigative powers between 1 July 2013 and 30 June 2015 is shown in Table 6.2. The table shows that the most commonly used powers are those under section 155 of the *Competition and Consumer Act 2010* (‘section 155 notices’). Numbers for section 155(1)(a) and (b) notices have been combined, as the notices themselves are usually combined (the ACCC will usually make a request for information and the supporting documents). The ANAO reviewed all 180 section 155 notices (and one search warrant) issued in this period.

Table 6.2: The ACCC’s use of its investigative powers in fair trading cases, 2013–14 and 2014–15

Type of power	2013–14	2014–15	Total
Section 155(1)(a) and (b)—provide information and/or documents	43	50	93
Section 155(1)(c)—provide evidence	68	19	87
Search warrant	1	0	1
Substantiation notice	0	0	0
Total	112	69	181

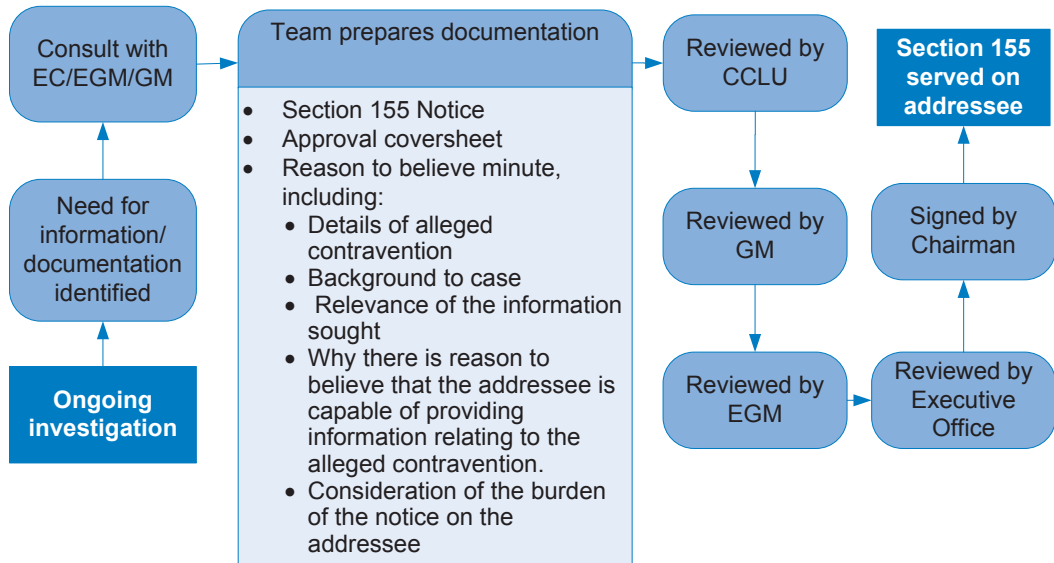
Source: ANAO analysis of ACCC information.

6.20 In submissions to the Competition Policy Review in 2014, some businesses and business stakeholders raised concerns about the ACCC’s use of section 155 notices. These concerns mainly related to the scope and cost of compliance with the notices. In a submission to the review panel,

one large public company stated that the average cost (in terms of legal fees) for them in complying with section 155(1)(a) and (b) notices was \$300 000, but for some notices, was more than \$1 million.

6.21 In recognition of the potential burden associated with section 155 notices, the ACCC has in place extensive processes that must be followed for a notice to be issued. These processes are set out in Figure 6.5. There was a high level of compliance with this process. Reason to believe minutes and signed section 155 notices were found for all 181 notices reviewed, and all notices substantially followed the process set out in Figure 6.5.

Figure 6.5: The ACCC's process to issue section 155 notices



Legend: EC is Enforcement Committee; EGM is Executive General Manager; GM is General Manager; CCLU is Competition and Consumer Law Unit.

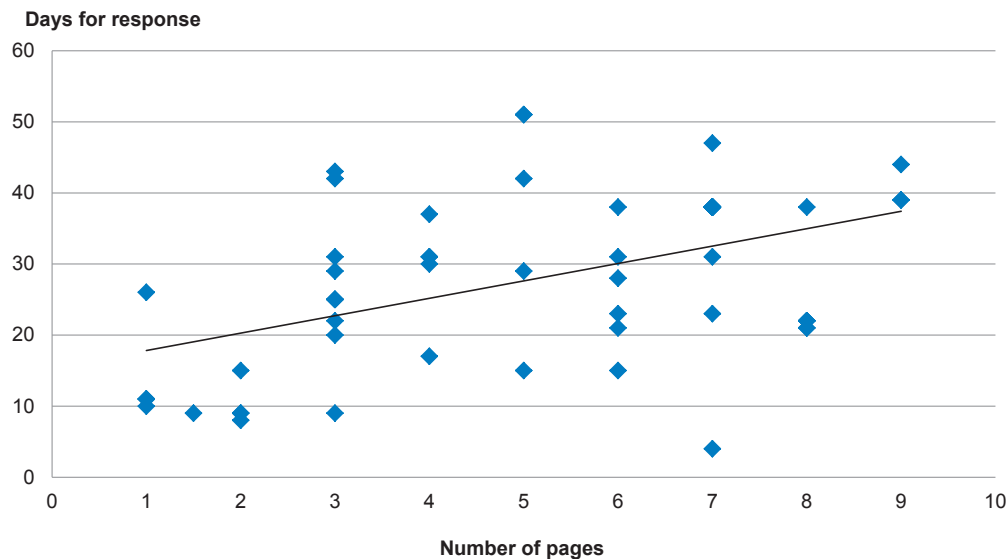
Source: ANAO analysis of ACCC documentation.

6.22 In the reason to believe minutes that accompany each section 155 notice, teams are required to give consideration to the burden placed on the recipient and state how the burden has been taken into account in drafting the notice. For section 155(1)(a) and (b) notices, the template requires investigators to identify ways that the notice has been limited—for example, by timeframe or topic (such as the category, products or personnel to which the notice relates). Despite this, explicit consideration was given to how the notice has been limited for only 57 of the 93 (61 per cent) section 155(1)(a) and (b) notices.

6.23 The template reason to believe minute also recommends that recipients are given three weeks to respond, but states that more or less time may be appropriate depending on the amount of information sought. Figure 6.6 plots the number of days provided for a recipient to respond to a notice against the length in pages of a notice (a rough proxy for the complexity of a notice). There is a moderate relationship with the recipients of longer notices (generally more complex and/or burdensome notices) being provided longer to respond than the recipients of

shorter notices. This indicates that when drafting section 155 notices, investigators were conscious of the impact on the recipient.

Figure 6.6: Relationship between the length of section 155(1)(a) and (b) notices and the time provided for a response



Note: This chart excludes one outlier notice which was 15 pages and provided the recipient 45 days to respond.
Source: ANAO analysis of section 155(1)(a) and (b) notices in 2013–14 and 2014–15.

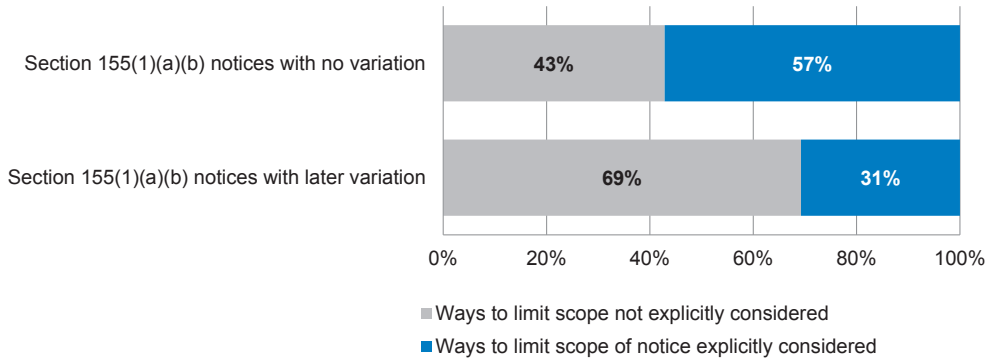
6.24 Between 1 July 2013 and 30 June 2015, the ACCC issued 34 variations to section 155(1)(a) and (b) notices. For 24 of these notices, the variation extended the length of time for compliance, one variation was to narrow the scope of a notice and in nine cases, the variation both extended the length of time for compliance and narrowed the scope of the notice. Where the variation extended the time for compliance, this extension was for an average of 18 days. The main reasons for an recipient requesting an extension were that:

- (a) searches associated with the notice produced a significant volume of information (70 per cent);
- (b) there were practical difficulties (such as issues in extracting the information from information systems) associated with complying with the notice (35 per cent); and
- (c) key staff that the recipient required to assist with complying with the notice were unavailable (32 per cent).³³

6.25 It is noted that the reason to believe minutes for section 155(1)(a) and (b) notices that were subsequently varied were less likely to have contained explicit consideration to how the scope of the notice may be limited (shown in Figure 6.7).

33 For some variations, more than one factor was relevant.

Figure 6.7: Whether reason to believe minute explicitly considered ways to limit the scope of the notice, by whether variation later issued



Source: ANAO analysis of section 155(1)(a) and (b) notices and variations issued between 1 July 2013 and 30 June 2015.

6.26 The reason to believe minutes for section 155(1)(a) and (b) notices where there was a later variation were also more likely to include, in the consideration of burden, a statement to the effect that ‘the information and documents are of a kind that should be readily available to the recipient’.³⁴ Given that the reasons provided by recipients for requiring extra time to comply with the notice invariably related to the difficulty of obtaining information and/or the significant volume of information, this suggests that the investigator’s views about the availability of information were not well founded. This, combined with the profile of variations shown in Figure 6.7, highlights the importance of giving appropriate consideration to the burden of a section 155 notice on a promisor and to opportunities to limit the scope of a notice.

³⁴ Thirty-nine per cent of minutes for notices where there was a later variation contained a statement to this effect in the consideration of burden, compared to 15 per cent of minutes for notices where there were no later variation.

7. Enforcement actions

Areas examined

The ANAO examined whether enforcement actions taken by the ACCC were proportionate to the identified non-compliance. The ANAO also considered whether enforcement actions taken by the ACCC were effective in addressing non-compliance with fair trading obligations.

Conclusion

The ACCC makes use of a range of enforcement actions. In deciding on the appropriate action, the ACCC has regard to relevant considerations including the objectives of specific and general deterrence.

Though difficult to measure, enforcement actions taken by the ACCC appeared to be effective in their objectives of specific deterrence and general deterrence.

Areas for improvement

The ANAO suggested that the ACCC improve its recording of case actions (para 7.4), and consider its practices following acceptance of an enforceable undertaking in light of recent comments of the Senate Economics References Committee (para 7.12).

Are enforcement actions proportionate to the identified non-compliance?

The ACCC consistently made decisions about the appropriate enforcement action in particular cases in accordance with its Compliance and Enforcement Policy, proportionate to the identified non-compliance, and having regard to the objectives of specific and general deterrence. The ACCC makes use of a range of actions to respond to non-compliance. The most common action taken by the ACCC was accepting an administrative resolution (23 per cent of finalised cases in the ANAO's sample).

7.1 As outlined in Chapter 2, the ACCC's Compliance and Enforcement Policy states that the ACCC uses a range of actions to encourage compliance with fair trading obligations. In making decisions about which enforcement action to take, the ACCC states that its priority is to achieve the best outcome for the community and to manage the risk proportionately. The Compliance and Enforcement Policy is supported by guidance available on the ACCC's intranet about each type of enforcement action, their role and the process for resolving a case with that form of action.

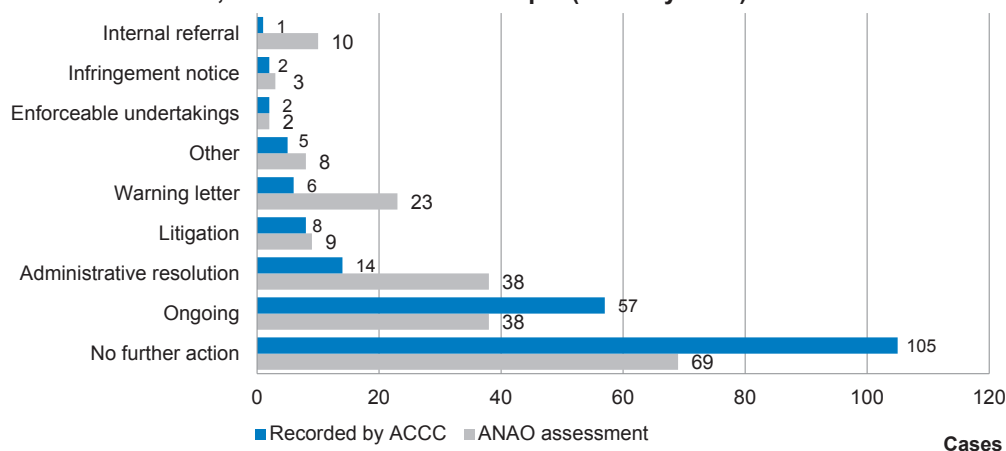
7.2 Table 7.1 shows the actions recorded in the ACCC's case management system for the 718 fair trading cases (including under assessment cases, initial investigations and in-depth investigations) commenced between 1 July 2013 and 30 June 2015. The data suggests that the most common result was no further action (60 per cent of all cases and 82 per cent of finalised cases). Because these numbers are taken at 1 July 2015, a large number of cases were ongoing. The numbers for more formal actions (such as litigation, enforceable undertakings and infringement notices) are relatively low because the longer investigations associated with these actions means that many will not yet have been finalised.

Table 7.1: Actions taken for fair trading cases commenced between 1 July 2013 and 30 June 2015, by case stage (at 1 July 2015)

Action	Under assessment	Initial investigation	In-depth investigation	Total / (per cent)
No further action	369	45	20	434 (60%)
Ongoing	117	22	49	188 (26%)
Administrative resolution	-	19	11	30 (4%)
Warning letter	-	11	9	20 (3%)
Litigation	-	-	13	13 (2%)
Other	3	5	2	10 (1%)
Internal referral/Added to pre-existing investigation	10	-	-	10 (1%)
Enforceable undertaking	1	-	6	7 (1%)
Infringement notice	-	-	6	6 (1%)

Source: ANAO analysis of data from the ACCC's case management and workflow system.

7.3 To assess whether actions were consistently recorded, for each of the 200 cases in the ANAO's sample (referred to in Chapters 5 and 6) the ANAO reviewed each case and made an assessment about the action taken. The results of this analysis are presented at Figure 7.1 and demonstrate two main issues: cases were frequently recorded as no further action when in fact a warning letter was sent or the trader agreed informally to cease the relevant conduct; and cases were not always closed in a timely manner (therefore they were still recorded as ongoing).

Figure 7.1: Action recorded by the ACCC compared to the ANAO's assessment of action, cases in the ANAO's sample (at 1 July 2015)

Source: ANAO analysis of 200 sample fair trading cases in 2013–14 and 2014–15.

7.4 Inconsistent recording of enforcement actions raises issues for transparency and accountability, and for performance measurement and reporting, given that one of the ACCC's key performance indicators is the 'number of enforcement interventions'. In particular, these issues mean that in its annual report and other external publications, the ACCC is currently understating

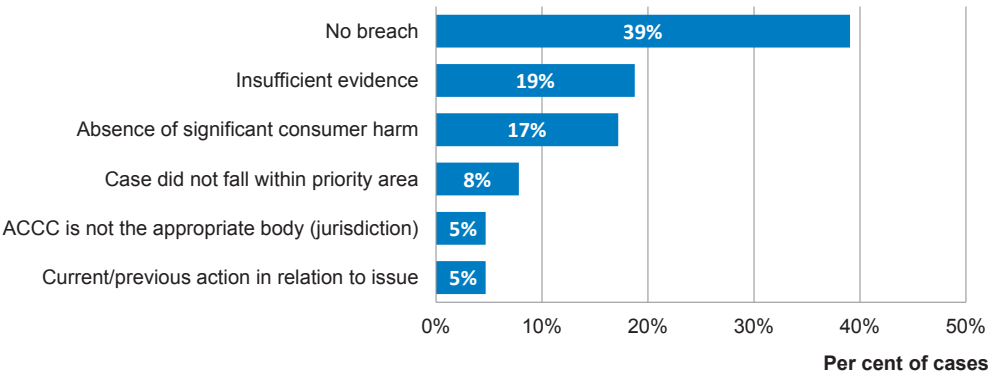
the number of cases that resulted in some form of action. The ACCC should take steps to more accurately record the actions taken in cases, including by mandating and monitoring accurate recording of information about enforcement actions, and making clearer to staff the meaning of particular actions at the time of recording in the case management and workflow system.

7.5 In terms of actions taken, the ANAO’s assessment at Figure 7.1 shows that in responding to potential misconduct, the ACCC used a range of enforcement actions. While the most common action was no further action (42 per cent of non-ongoing cases in the ANAO’s sample), there was also a meaningful proportion that resulted in an administrative resolution (23 per cent of non-ongoing cases in the ANAO’s sample) or the ACCC sending a warning letter (14 per cent of non-ongoing cases in the ANAO’s sample). The ACCC’s enforcement actions were broadly consistent with the graduated response model of regulation, with most enforcement actions taking the form of less serious and more persuasion-oriented actions (such as administrative resolutions and warning letters) compared to more serious actions such as litigation.

No further action

7.6 As noted in Chapter 5, the vast majority of complaints that the ACCC receives do not lead to it taking regulatory action, with most filtered out by the Infocentre. Even of those that do go beyond the Infocentre and are placed ‘under assessment’, the ACCC often later decides to take no further action. The most common reasons for the ACCC deciding to take no further action for the 69 cases assessed as ‘no further action’ in the ANAO’s sample of 200 are shown in Figure 7.2. The reasons are consistent with the ACCC’s Compliance and Enforcement Policy, in that they largely relate to a lack of widespread consumer detriment (either because there was no breach, or if there was a breach, there was an absence of significant consumer harm).

Figure 7.2: Most common reasons for ACCC deciding to take no further action, cases in the ANAO’s sample



Source: ANAO analysis of the 69 cases with no further action in the sample of 200 cases.

Administrative resolutions and warning letters

7.7 The most common action taken by the ACCC in response to identified non-compliance is to resolve a matter informally, through an administrative resolution. The nature of an administrative resolution can differ significantly depending on the particular matter, but will generally involve the

trader: agreeing to stop the offending conduct; compensating those adversely affected by the conduct; and/or taking other measures necessary to ensure the conduct does not reoccur.

7.8 In most cases (32 of the 38 administrative resolutions in the ANAO's sample), an administrative resolution was achieved where, at an early stage in the assessment/investigation of an investigation, the ACCC wrote to a trader expressing concerns and the trader very quickly agreed to cease the offending conduct. In other cases, an administrative resolution may follow extensive negotiations with the trader about the actions the trader will take to resolve the ACCC's concerns. The following case study provides an example of an administrative resolution achieved by the ACCC.

Case study 2. Mislabelled flathead fish products

In 2013, the ACCC became aware of a trader that was supplying for retail sale, fish products labelled as 'flathead fillets'.

The ACCC identified two main issues with the sale of the product. First, the labelling of the product as 'Flathead' was not consistent with the Australian Fish Names Standard which required the particular species of fish to be labelled as 'South American Flathead' not 'Flathead'. Secondly, the product was misleadingly represented as a 'Product of Malaysia' when the majority of the ingredients were sourced from South America.

The ACCC wrote to the trader to notify it of these concerns. After receiving this letter, the trader notified the ACCC that it was reviewing its existing product descriptions and practices. Soon after, the trader responded to the ACCC notifying that it had confirmed with its suppliers that the products did not comply with the standard, advised that it has repackaged the product to resolve the ACCC's concerns, and stated that it proposes to discontinue selling the product once existing stock had been depleted.

7.9 In other cases, the ACCC has sent a 'one-way' warning letter to a trader. These letters typically drew the relevant non-compliance to the trader's attention, informed the trader of the ACCC's view about the conduct, and advised that if the ACCC receives further complaints about the misconduct, it may consider taking relevant enforcement action. These letters were usually sent in relation to cases that, while potentially involving non-compliance, the ACCC considered that: there was an absence of consumer harm; the case did not fall within an ACCC priority area; and/or a warning letter would provide sufficient deterrence.

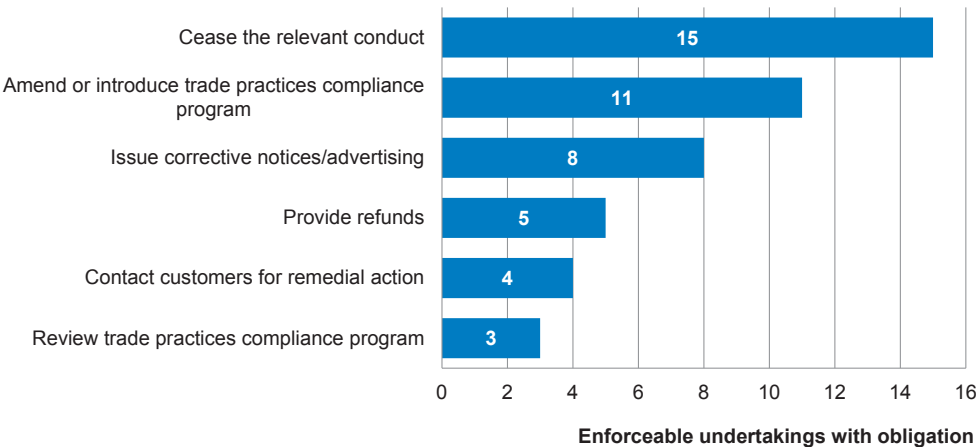
Enforceable undertakings

7.10 An enforceable undertaking is a written undertaking given under section 87B of the *Competition and Consumer Act 2010* to the ACCC by a trader that it will operate in a certain way. Between 1 July 2013 and 30 June 2015, the ACCC accepted 17 enforceable undertakings from traders related to non-compliance with fair trading obligations.³⁵ While undertakings were

35 A difference between this number and the number in Table 7.1 arises because 10 of the enforceable undertakings accepted between 1 July 2013 and 30 June 2015 relate to cases that commenced before 1 July 2013. Table 7.1 only deals with cases that commenced between 1 July 2013 and 30 June 2015 and were finalised before 1 July 2015.

tailored to the particular circumstances of each case, some of the more common obligations in these enforceable undertakings are shown in Figure 7.3.

Figure 7.3: Common terms in enforceable undertakings accepted between 1 July 2013 and 30 June 2015



Source: ANAO analysis of enforceable undertakings accepted by the ACCC between 1 July 2013 and 30 June 2015.

7.11 Each enforceable undertaking was considered by the Enforcement Committee and/or the Commission, with a paper usually³⁶ prepared outlining the various options (in terms of enforcement actions) and the advantages and disadvantages of each option. Some of the more common reasons for accepting an enforceable undertaking included that an undertaking would: be a public outcome with the associated deterrence impact; send a stronger message to the trader and broader market than an administrative resolution; allow for flexibility in terms of remedy compared to court action (for example, more generous compensation for consumers); and provide a quicker, cost effective and more certain resolution to the case compared to court action. Six of the enforceable undertakings were coupled with the issuing of one or more infringement notices.

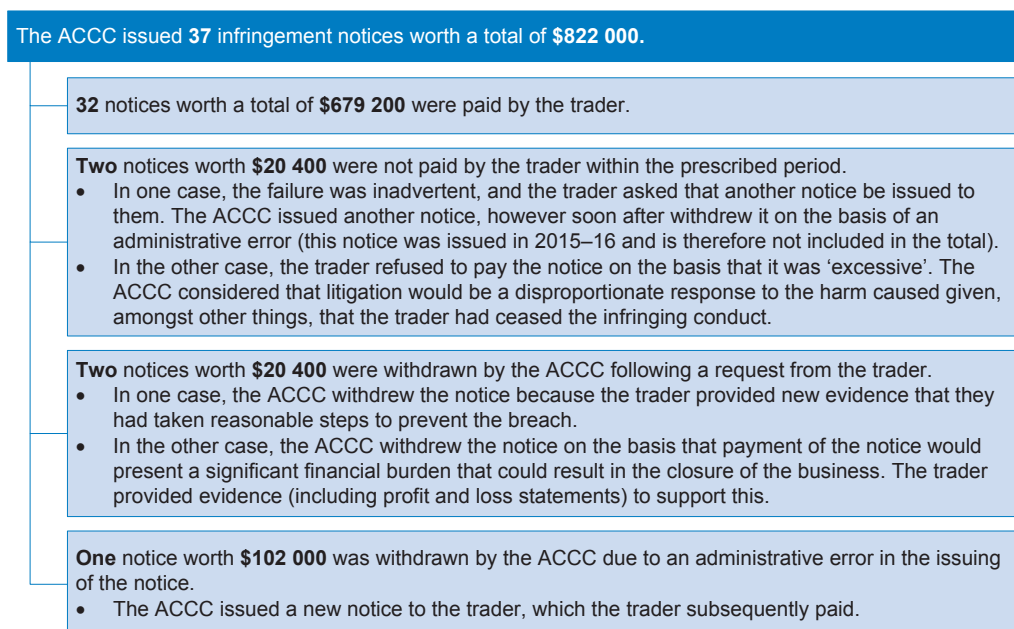
7.12 Although the ACCC issues media releases for each enforceable undertaking and publishes the full text of the undertaking on its website, it does not provide details on whether an entity has complied with an undertaking. In 2014 the Senate Economics References Committee recommended that the Australian Securities and Investments Commission consider ways to make the monitoring of ongoing compliance with undertakings more transparent. In this context, the ACCC should consider the relevance of the Senate Economics References Committee recommendation in relation to enforceable undertakings that it accepts.

36 This was the case for 13 of the 17 enforceable undertakings reviewed (76 per cent).

Infringement notices

7.13 The ACCC may issue an infringement notice where it has reason to believe a trader has breached certain provisions of the Australian Consumer Law.³⁷ The infringement notice will provide an amount that the trader can pay (in 2015–16, \$108 000 per notice for a listed corporation, \$10 800 for any other corporation and \$2160 for an individual) to resolve the matter. If the party does not pay the amount specified on the notice, the ACCC may take court action against the trader in relation to the conduct specified in the notice. Figure 7.4 sets out the outcomes for the 37 infringement notices worth a total of \$822 000 issued by the ACCC between 1 July 2013 and 30 June 2015.³⁸

Figure 7.4: Outcomes of infringement notices issued by the ACCC between 1 July 2013 and 30 June 2015



Source: ANAO analysis of infringement notices issued by the ACCC between 1 July 2013 and 30 June 2015.

7.14 The relevant procedures—including the preparation of a reason to believe minute—were followed for all infringement notices. A media release was issued for all notices that were paid, and details of the notice were available on the ACCC's infringement notices register. The ACCC's reasons for issuing an infringement notice in a given case depended on the circumstances, but

37 Separate notices may be issued for each breach of the Australian Consumer Law. Accordingly, multiple notices may be issued to the same trader for similar conduct (for example, if a trader makes false representations on their website, in printed advertising and on television, the ACCC could issue three infringement notices).

38 A difference between this number and the number in Table 7.1 arises because Table 7.1 only deals with cases that commenced between 1 July 2013 and 30 June 2015 and were finalised before 1 July 2015 with an infringement notice paid. Figure 7.4 takes account of: multiple infringement notices are often issued in relation to a single case; some infringement notices issued were not paid; and the 16 infringement notices issued and paid between 1 July 2013 and 30 June 2015, but relating to cases commenced before 1 July 2013.

generally related to: the timeliness and efficiency of infringement notices compared to court action; the specific deterrence effect in terms of preventing future non-compliance by the trader; and due to an infringement notice being a public enforcement action, the general deterrence effect in sending a message to the broader industry.

Court action

7.15 Between 1 July 2013 and 30 June 2015, the ACCC commenced 32 court proceedings relating to breaches of fair trading obligations.³⁹ At 18 September 2015, court proceedings had concluded for 18 of these cases, with the remaining 14 still in progress. The ACCC was successful in one or more of its claims for all of the 18 cases, with penalties ordered totalling \$18.9 million. Most cases also resulted in further orders being made (such as a requirement for the trader to implement a trade practices compliance program, to refrain from certain conduct and/or publish corrective notices).

Are the enforcement actions taken by the ACCC effective in addressing non-compliance?

Enforcement actions taken by the ACCC were effective in responding to and managing non-compliance. The ANAO identified a decline in the number of complaints about a trader in the period following an action being taken against that trader, suggesting that enforcement actions were effective in achieving specific deterrence.

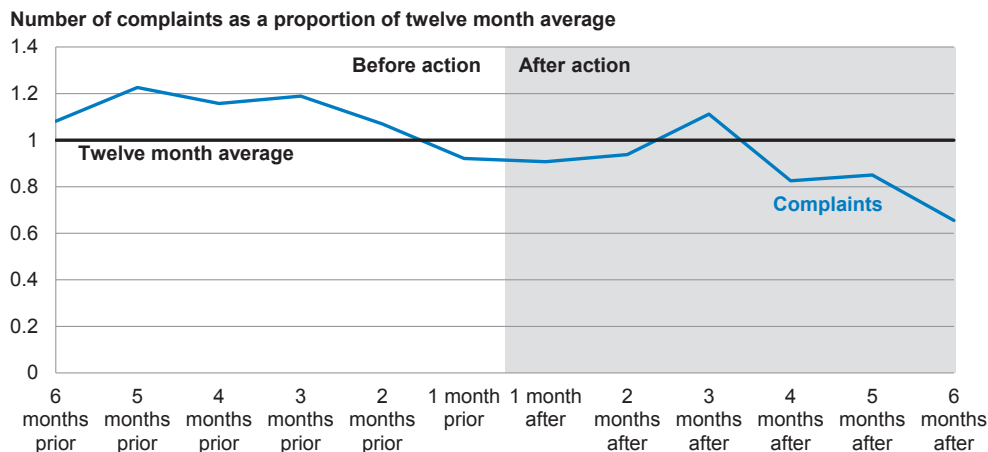
The effect in terms of general deterrence is more difficult to measure, although particularly where the ACCC adopted an industry-wide approach, it appeared that enforcement actions did have an impact on compliance in the broader industry.

7.16 As indicated in the preceding section, in general and consistent with a risk-based approach to regulation, when taking an enforcement action, the ACCC seeks to: cease the non-compliance; deter future non-compliance by the trader; and send a message to the broader industry (and in this way, deter other industry participants from engaging in the relevant conduct).

7.17 To assess the effectiveness of enforcement actions in ceasing the non-compliance and deterring future non-compliance by a trader, the ANAO analysed the trend of complaints about traders' non-compliance with fair trading obligations in the period six months before and after an enforcement action was taken against them (Figure 7.5). Overall, ACCC enforcement actions appeared to have some impact in terms of ceasing the non-compliance and deterring future non-compliance by the trader. On average, the six-month period after an enforcement action was associated with a 21 per cent decrease in complaints compared to the six-month period before an enforcement action (the largest single decrease for a trader was 72 per cent).

39 A difference between this number and the number in Table 7.1 arises because 19 of the court proceedings commenced between 1 July 2013 and 30 June 2015 relate to cases that commenced before 1 July 2013. Table 7.1 only deals with the 13 cases that commenced between 1 July 2013 and 30 June 2015 and were finalised before 1 July 2015 with a litigation commenced.

Figure 7.5: Average trend of complaints about traders' non-compliance with fair trading obligations for the period before and after an enforcement action



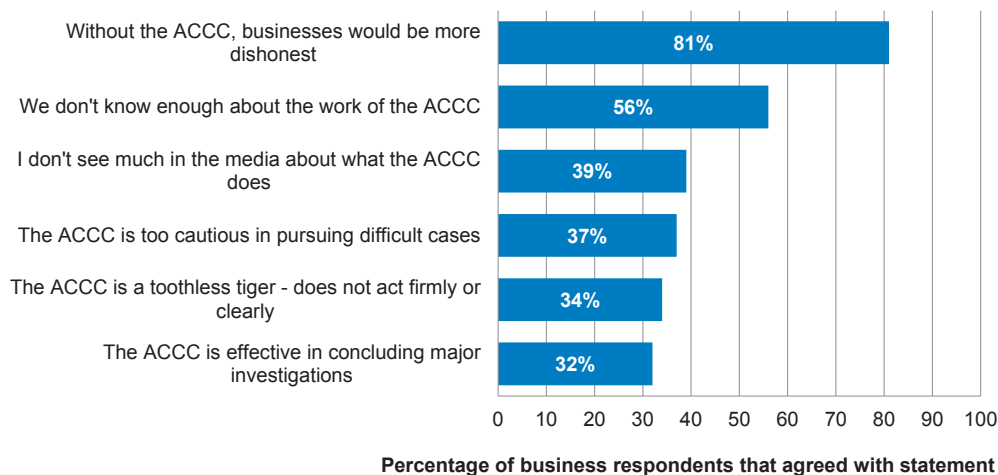
Note: The change in complaints is not a perfect measure; however the ANAO nevertheless considers it a useful metric. Factors that may influence the usefulness of a change in complaints include: an enforcement action and the related publicity could lead to more complaints due to greater consumer awareness of an issue; for most traders, the low number of complaints that the ACCC receives means that increases/decreases could be attributed to statistical variance; and for large traders, an action in relation to one part of the business may not always have an impact on the compliance behaviour of other parts of the business.

Source: ANAO analysis of ACCC complaints data.

7.18 Assessing the effectiveness of an enforcement action in terms of the effect on the behaviour of the broader industry is more challenging. In particular, it can be difficult to: determine what changes in behaviour are relevant for an assessment of effectiveness; measure these changes; and establish a cause-effect relationship between the enforcement action and the change in behaviour. One useful measure is to assess whether industry participants are aware of the actions that the ACCC takes against other traders (including other traders in their industry) and their perceptions of those actions. If traders are aware of the ACCC's actions and perceive those actions as being appropriate and effective, then this suggests that the ACCC's actions are having the desired general deterrence effect.

7.19 As described in Chapter 3, in 2015 the ACCC engaged an external firm to conduct a survey of consumer and business perceptions of the ACCC. This survey provides a useful guide to the awareness and perceptions of businesses of the ACCC's enforcement actions. Figure 7.6 shows the proportion of businesses that agreed to selected statements from the survey relevant to whether the ACCC is achieving general deterrence through its enforcement activities.

Figure 7.6: Business responses to selected questions in the ACCC Consumer and Small Business Perceptions Survey



Source: ACCC Consumer and Small Business Perceptions Survey 2015.

7.20 The survey presents mixed results for the ACCC in relation to the effectiveness of its enforcement outcomes. A number of the results indicate that many businesses do not know enough about the work of the ACCC or its activities. Further, a sizeable minority of people questioned have negative views about enforcement work that the ACCC undertakes (with 34 per cent believing that the ACCC is a ‘toothless tiger’). Despite this, the results of the survey indicate that most business believe that the ACCC has an important deterrent impact (81 per cent agree that ‘without the ACCC, businesses would be more dishonest’).

7.21 One way that the ACCC seeks to maximise the effectiveness of its regulatory activities is by taking an industry-wide approach to problems in the market and/or attempts to ‘multiply’ the impact of enforcement actions through awareness activities. This is often seen in the context of projects (discussed in Chapter 3) that include an enforcement component. As part of these projects, the ACCC usually: generates trader awareness about the ACCC’s interest in an issue (through media releases and engagement); undertakes consumer education; and commences multiple investigations into non-compliance. An example of the effectiveness of this approach is shown in Case Study 3.

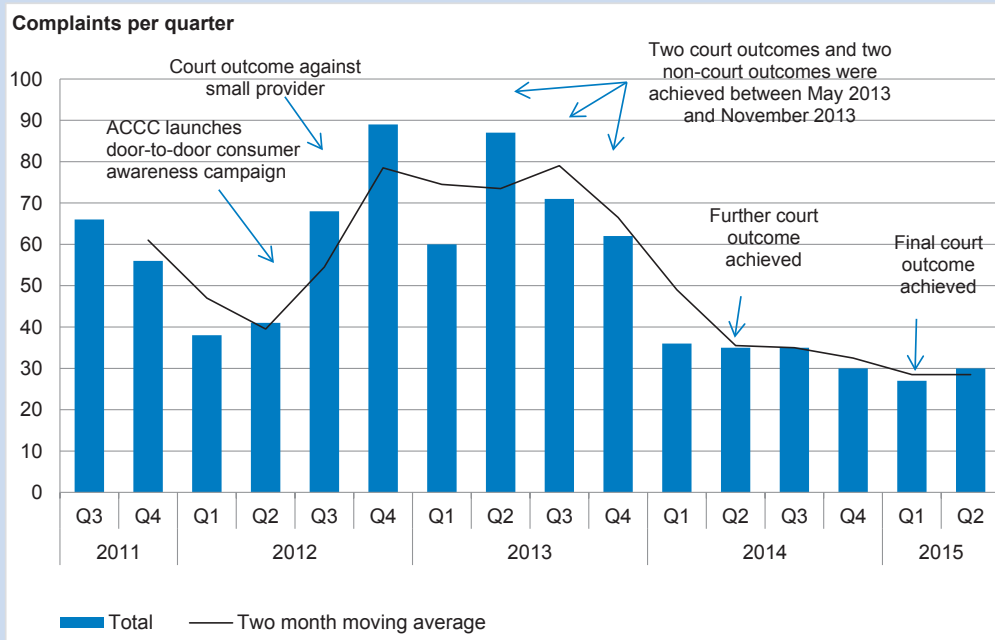
Case study 3. Door-to-door energy sales

In 2011, the ACCC commenced a project aimed at addressing non-compliance associated with the door-to-door marketing of electricity and gas plans. This project was based on complaints from consumers and stakeholders about false and misleading information that was being provided to consumers during the course of door-to-door marketing of the plans, driven by the commissions-based nature of door-to-door employment arrangements.

As part of the project, the ACCC wrote to energy retailers advising them of their obligations and soon after released a media release putting the energy retailers on notice. In late 2011 and early 2012, the ACCC commenced investigations into a number of energy retailers. These investigations led to the ACCC taking enforcement action against energy retailers in relation to door-to-door sales, including five court actions (four resulting in penalties of over \$1 million) and two non-court actions (infringement notices and enforceable undertakings).

Following early successes in court actions in 2013, three of the largest energy retailers announced that they would cease door-to-door sales of energy plans. Since 2013, there has been a significant and sustained decrease in the number of complaints the ACCC receives about door-to-door energy sales (Figure 7.7). As part of the end project evaluation, the ACCC also obtained statistics from the energy ombudsmen in New South Wales, Victoria and Queensland. Data provided by these offices also showed significant drops in door-to-door related complaints around the same period.

Figure 7.7: Door-to-door energy sales complaints to the ACCC, 1 July 2011 to 30 June 2015



Source: ANAO analysis of ACCC complaints data.

7.22 The ACCC also seeks to leverage the effectiveness of its non-project enforcement activities. The ACCC issues a media release with each formal enforcement action (enforceable undertakings, infringement notices and court action) and some informal actions (administrative resolutions) to make other traders aware of the ACCC's views about certain conduct. In some cases, the ACCC also specifically contacts other traders to bring the ACCC's enforcement action to their attention. An example of this is provided in Case Study 4.

Case study 4. Capped price servicing

In late 2014, the ACCC received a complaint that the terms and conditions of a major car manufacturer's capped price servicing offer included exclusions (such as the ability for the manufacturer to increase the cost of services at any time) that rendered the labelling 'capped price servicing' potentially misleading. As the complaint related to an ACCC priority area (complexity and unfairness in consumer contracts), the ACCC commenced an initial investigation.

The manufacturer worked constructively and cooperatively with the ACCC during the investigation and agreed, as part of an administrative resolution, to amend its terms and conditions, write to consumers, offer refunds to consumers and implement a consumer law compliance program. During the investigation, the ACCC became aware that this conduct was widespread across the industry and accordingly, in the media release for the action, announced that it 'intends to review other capped price service offers made to consumers'.

Soon after announcing the action, the ACCC wrote to 15 motor vehicle manufacturers/importers that it identified as offering capped price servicing. The ACCC's letters attached a copy of the media release regarding the administrative resolution and asked the companies to conduct an urgent review of their own offers.

After sending the letters, the ACCC undertook a review of the compliance of the capped price servicing offers. It found that seven of the companies had amended their offer following the ACCC's letter. The offers of the other eight companies did not raise any fair trading related issues—in some cases because it appeared that the companies had amended their offers immediately following the ACCC announcing the initial administrative resolution.



Grant Hehir
Auditor-General

Canberra ACT
25 February 2016

Appendices


Appendix 1 ACCC's response



EXECUTIVE OFFICE

23 Marcus Clarke Street
Canberra ACT 2601
GPO Box 3131
Canberra ACT 2601
tel: (02) 6243 1111
fax: (02) 6243 1199
www.accc.gov.au

Contact officer: Chelsea Kyburz
Contact phone: (02) 6243 4986

 February 2016

Ms Michelle Kelly
Group Executive Director
Performance Audit Services Group
Australian National Audit Office
19 National Circuit
BARTON ACT 2600

Via email: Michelle.Kelly@anao.gov.au

Dear Ms Kelly

ANAO Performance Report - Managing Compliance with Fair Trading Obligations

I am writing to provide the Australian Competition and Consumer Commission (ACCC) response to the Australian National Audit Office's (ANAO) Proposed Report of the ACCC's performance audit Managing Compliance with Fair Trading Obligations.

The ACCC agrees with the three recommendations made in the section 19 report.

Please find enclosed a short summary of ACCC's response for inclusion in the Summary section of the final report and the ACCC's final response for inclusion as an appendix to the final report.

I would like to thank the ANAO audit team for the cooperative and professional manner they have adopted in working with us on this matter.

If you require further information on this matter, please contact Scott Gregson, Executive General Manager Consumer Enforcement on (02) 6243 1350.

Yours sincerely

Rod Sims
Chairman

ACCC's Summary Managing Compliance with Fair Trading Obligations

The ACCC welcomes the report and its findings that the ACCC has a sound compliance and enforcement strategy.

The ACCC notes the ANAO's comments that there are opportunities for the ACCC to improve its use and gathering of intelligence to provide greater assurance that the ACCC is targeting its regulatory activities at conduct involving the greatest level of widespread consumer detriment.

The ACCC agrees with the three recommendations made in the report, which focuses on intelligence and improvement of quality of complaints data. The ACCC response notes recent, current and possible future actions that might address the recommendations.

ACCC's Formal Response Managing Compliance with Fair Trading Obligations

The ACCC welcomes the report and its findings that the ACCC has a sound compliance and enforcement strategy. The report provides helpful findings for improvements in practices and our response notes recent, current and possible future actions that might address the recommendations.

Managing fair trading compliance risks

The ACCC acknowledges the findings that the ACCC has a sound compliance and enforcement strategy. We further note the ANAO's findings that we have established processes for identifying and managing our priority areas, through our extensive consultative strategic review process. The ACCC considers that its current approach embodies much of the principles and practices the report has identified. The ACCC has been exploring options for our priorities process that take on additional approaches as referenced by the ANAO including formal establishment of projects against each priority and subsequent project evaluation.

We agree with the recommendation aimed at the ACCC improving the extent and use of information for intelligence purposes both in relation to analysis of complaints and reports received but importantly in combination with broader sources of intelligence. We agree that greater use of and weight given to a broad range of intelligence in our compliance and enforcement activities and decision making would improve our effectiveness. We have already implemented some action following suggestion from the ANAO (for example referral of complaint trend reports to matter escalation meetings) and will further review and action others (including greater interrogation of complaint data for trends and areas of harm).

Since October 2015, the ACCC and other ACL Regulators have been involved in the development of a pilot project working towards greater sharing of intelligence and complaint data. The aim of this project is to develop a more effective and comprehensive approach to sharing information and identifying consumer issues and trends in the marketplace. In addition to this project, the ACCC will continue to obtain data feeds from other regulatory and industry bodies as necessary to inform our assessments and decision making when escalating issues in line with ACCC priorities.

Promoting voluntary compliance

The ANAO concludes that our voluntary compliance activities are well targeted, achieving good results and viewed positively by stakeholders. The ACCC agrees that we could improve on our evaluation of our compliance projects and risk management in our compliance projects and will seek to ensure this is applied consistently. Approaches that were in train through the audit to more effective project evaluation have already been developed and endorsed at senior levels within the ACCC.

Managing complaints of non-compliance

In line with the ANAO's conclusion, the ACCC acknowledges that there is scope to improve the speed and quality of receiving and responding to complaints, and call handling quality assurance processes. We have commenced a review of our processes and resources required.

We consider our complaint handling practices and use of complaint information to be generally of a high standard. This said, we agree with the ANAO's recommendation aimed at improving the quality of complaints data. The ACCC currently utilises a data quality checking process and will seek to formalise this process, in line with recommendation 2 (a). The ACCC notes that system solutions will need to be explored to improve data quality, particularly in relation to duplicate traders. These measures will relieve current practices undertaken in the way we search and use data to manually account for data recording imperfections. We have already made decisions in relation to additional resources to our information centre and will consider further as required to address data quality issues.

Case selection and escalation

The ACCC notes the ANAO's conclusion that we focus heavily on specific complaints, shortcomings in arrangements for escalating complaints and scope to improve our case selection activities.

We consider that while escalation processes do have a particular focus on complaints received, the role of our annual strategic review and priority setting processes provide a more broadly informed approach as does the inclusion of organisation identified issues that are escalated for action. This said, as noted above, we agree that we would benefit from greater weight to other sources of intelligence beyond complaints.

The ACCC notes that the ANAO has commented that our processes for the escalation of cases are not always consistently followed which can have implications for the reporting about the number of cases at various stages of investigation. We note that our processes and guidance are consciously flexible to allow practices to reflect the variety of matters and circumstances we handle. We consider it is important not to have hard rules that constrain judgment about the approach to escalation of matters.

Some examples discussed in the course of the audit were the immediate escalation of certain matters with assessment or investigations immediately escalated to in-depth investigations.

We note that the audit did reveal a number of instances concerning variability in recording and escalation approaches and recognise there is scope for us to improve consistency in this area. The introduction of a new case management IT system has introduced a better workflow system and will provide greater oversight of cases for senior managers. We believe this will assist and improve our case management in this respect. We are currently undertaking reviews and reporting activity which should improve the issues identified.

The ACCC agrees with the ANAO's recommendation in relation to improvement of the selection of cases for investigations and enforcement. However, the ACCC does not consider that we have significant limitations in our current process that would lead to us 'missing' complaints that display widespread consumer detriment. We consider we have a number of checks and balances such as intelligence monthly reports, and trader watch lists that would assist us to identify any instances of widespread consumer detriment. In light of the ANAO recommendation we will review these and other possible measures to lessen prospects of important matters not being identified.

In relation to recommendation 3(a), the ACCC will give further consideration to the development of an automated process to assess the level of consumer detriment associated with each matter for case selection, such as risk scoring. In relation to recommendation 3(b), the ACCC will seek to incorporate additional analysis into our quarterly trend analysis such as broader data sources and additional analysis of patterns of conduct by traders or industries.

Investigations and non-compliance

The ACCC acknowledges the ANAO's findings that the ACCC has clear policies, well-qualified staff and effective oversight arrangements for our investigations. The ACCC notes the ANAO's findings that there is room to improve practices for planning of investigations, such as in relation to our investigation plans and risk identification. We will consider additional communication and education to our investigators to improve risk management in our investigations.

We note that the ANAO considers that we could more consistently and systematically consider ways to narrow the scope of information gathering notices. The ACCC carefully considers the information and associated burden with the information we require, to allow us to investigate alleged breaches of the Act. The ACCC notes that a large proportion of our information gathering notices are varied following consultation with the parties to allow the parties to comply with the notice. For the majority of variances, they were for reasons that were unable to be ascertained by investigators at the time of drafting the notices. We are actively looking at internal guidance and approaches that will assist in narrowing the burden wherever possible without compromising investigations.

Enforcement actions

The ACCC appreciates findings that enforcement actions taken by the ACCC were effective in responding to and managing non-compliance.

We note the suggestion that the ACCC improves its recording of case actions. The ACCC agrees that we may have previously had inconsistent recording of investigations such as no further action when in fact an outcome was achieved, either through a warning letter to the trader or the trader agreeing to change their conduct. This represents a nomenclature issue that we can address to better reflect the extent of our activity and outcomes. In moving to our new case management IT system, investigators will have the capacity to accurately record an outcome of an investigation to account for instances where conduct is resolved by an administrative resolution.

The ACCC is aware of the 2014 Senate Economics References Committee recommendation relating to publicising compliance with an enforceable undertaking. While we do monitor the substantial elements of enforceable undertakings (such as corrective advertising or compensation for consumer losses) which typically occur immediately after they are given, and we maintain a central record of all businesses who have provided them, we do not consider it appropriate to publish further references to compliance on the ACCC website for

a number of reasons. We would note that ultimately non-compliance with a court enforceable undertaking can lead to further investigation and ultimately litigation by the ACCC. This has occurred rarely in practice even in those circumstances when the ACCC had a more intensive monitoring program.

