

COVID-19: (AUSTRALIA) COMPETITOR COLLABORATION IN THE SHADOW OF COVID-19 - THE ACCC TAKES A PRAGMATIC APPROACH

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IN BRIEF

- Competition and consumer laws in Australia continue to apply during the COVID-19 pandemic.
- The ACCC Chairman, Rod Sims, has commented that there is a need to fight a "common enemy... and so a sense of national purpose, co-ordination is both efficient and carries little or no downside".
- As a result, the ACCC has taken the pragmatic approach of fast-tracking urgent interim authorisations to enable businesses to respond to the crisis.
- Supermarkets, banks, medical technology companies, regional airlines, pharmaceutical wholesalers, and NBN Co and telecommunication providers have been granted urgent interim authorisation (ie immunity from action) by the ACCC to collaborate in conduct that would normally amount to cartel conduct or may otherwise be anticompetitive - albeit with an increasing level of oversight by the ACCC as it faces a plethora of such proposals.
- Businesses should consider future challenges to their industry immediately, keeping in mind that the duration of the crisis is not yet known.
- Businesses looking to collaborate with competitors should **seek legal advice before serious discussions commence** as authorisation cannot cover conduct engaged in before the authorisation.

OVERVIEW

As the COVID-19 pandemic escalates in Australia, it is clear that the impact on the economy has become acute. Many businesses and their staff are under severe pressure from forced closures, significant disruptions to their supply chains, and considerable increases or decreases in consumer demand.

Businesses that are normally vigorous, even vicious, rivals are now looking to cooperate to mitigate some of these pressures. As competition laws continue to apply during times of crisis, businesses need to be careful to avoid any conduct that might amount to anti-competitive behaviour.

ACCC Chairman, Rod Sims has just addressed the issues in a webcast, recognising that competition may hibernate for a time but will re-emerge:

"At a time of crisis such as in war or with a pandemic, where there is a common enemy to fight for the nation's survival, and so a sense of national purpose, co-ordination is both efficient and carries little or no downside,...

It is important that these short-term measures do not give rise to long-term structural damage to competition, market concentration or long-term arrangements that make it more difficult for businesses to enter and compete into the future."

In this Insight, we examine some options open to business to maintain compliance with competition laws while contributing to industry responses to the COVID-19 pandemic.

COMPETITOR COLLABORATION IN THE SHADOW OF COVID-19

Competition and consumer protection laws in Australia still apply during extreme events, including the COVID-19 pandemic. Businesses face a risk of contravening the Competition and Consumer Act (CCA) if they coordinate with competitors, even if those activities are well-intended attempts to alleviate the economic strain caused by COVID-19.

Conduct that could otherwise be alleged to amount to cartel conduct, or would be at high risk of being anticompetitive, during the COVID-19 pandemic includes discussions/arrangements between competitors to:

- prioritise access to goods for particular groups of customers, such as the elderly or people with a disability
- allocate customers or geographic areas
- share resources, information and/or knowledge about inventories, procurement and logistics
- fix, control or maintain prices, even where competitors agree to limit increasing their prices on goods and services.

Good intentions are no defence. While businesses may make genuine efforts to meet or control increased demand for products or services or address supply constraints, coordination may contravene Australian competition laws, particularly if the likely effect is a substantial lessening of competition.

WHAT CAN BUSINESSES DO TO COLLABORATE?

The ACCC has already assisted some businesses to collaborate in the face of COVID-19 by authorising conduct that would otherwise contravene competition laws.

The authorisation process grants statutory protection from court action for specified conduct, and is granted where the ACCC is satisfied that the "likely public benefit from the conduct outweighs the likely public detriment".

Under normal circumstances, a final authorisation decision can take up to six months. Applicants can apply for urgent interim authorisation while the ACCC considers the substantive application for authorisation, which is usually determined within 28 days.

The ACCC is prioritising urgent interim authorisations during the COVID-19 pandemic. In some cases, the ACCC has made a decision within 48 hours.

Businesses should be aware that authorisation cannot cover conduct that was engaged in before the authorisation or that is outside the scope of what is covered by the authorisation. Businesses wishing to collaborate should seek legal advice as soon as possible, and before any serious discussions commence.

Even in the middle of a crisis, there will be limits on coordination. Rod Sims said this week that the ACCC can "ensure price fixing is not allowed, and guard against anti-competitive consequences. And when the crisis is over authorisation can be revoked".

CURRENT INTERIM AUTHORISATIONS FOR SUPERMARKETS, BANKS, MEDICAL TECHNOLOGY COMPANIES, AIRLINES AND REGIONAL AIRLINES

The ACCC has recently granted urgent interim authorisation to several major industries:

- **Supermarkets** - In response to challenges from extremely high demand and supply constraints on essential items, Australia's four major supermarkets applied for, and were granted, interim authorisation to discuss and enter into arrangements to facilitate the supply of groceries, and ensuring a fair and reliable supply of groceries to consumers. The ACCC has also opened the authorisation to allow other grocery retailers to participate.
The terms of the authorisation are wide and allow for a range of coordinated activities between supermarkets. The authorisation does not allow supermarkets to agree on setting the retail prices of products, but does allow supermarkets to coordinate to exert pressure on the prices of suppliers.
- **Medical technology** - On 25 March 2020, the ACCC granted urgent interim authorisation to medical technology companies to coordinate the supply of equipment needed to deal with the COVID-19 pandemic. The decision authorises the participants to coordinate almost all aspects of the manufacture and supply of equipment, and exchange information. The ACCC granted interim authorisation on the application overnight.
- **Banks** - The Australian Banking Association and member banks have been granted interim authorisation by the ACCC to work together to provide debt relief by deferring repayments to small businesses and their staff in sectors that have been impacted by COVID-19. The ACCC granted a second interim authorisation on 30 March 2020 to cover supplementary relief packages for individuals and businesses affected by the crisis. The authorisation is conditional on banks providing details of any arrangements to the ACCC and seeking approval of arrangements in some circumstances.
- **Regional airlines** - Regional Express, QantasLink and Virgin have been granted interim authorisation to coordinate flight schedules and share revenue on ten regional flight routes during the COVID-19 pandemic. The ACCC recognised the urgency of the request and that airlines face significant challenges

during the pandemic. The airlines cannot charge fares higher than those in place on 1 February 2020 and they will not be able to coordinate prices.

- **Pharmaceutical wholesalers** - The National Pharmaceutical Services Association, on behalf of its members and CSO Distributors, has been granted interim authorisation to coordinate efforts to make vital medicine and pharmacy products available to consumers during the crisis. Coordination between pharmaceutical wholesalers will be subject to oversight from government and regulatory bodies, and price fixing behaviour is not allowed under the authorisation. We were fortunate enough to assist the industry with this application.
- **NBN Co and telecommunications providers** - NBN Co (NBN) and Australia's five biggest telecommunications providers Optus, Telstra, TPG Vocus and Vodafone Hutchinson have been authorised to share information, manage congestion and otherwise coordinate management to ensure Australia's telecommunications network operates effectively during the pandemic. Two conditions of the authorisation are that the ACCC will be an observer of the group, and that the NBN must inform non-member service providers of any material discussions made by the group that may affect them.

ACCC Chairman Rod Sims has said that the ACCC now has numerous other applications under consideration from all sectors of the economy. The ACCC will eventually conduct public consultation processes on the substantive applications for authorisation for supermarkets, banks, medical technology companies and regional airlines in the coming days.

THE ACCC'S REGULATORY APPROACH DURING COVID-19

The granting of the interim authorisations almost immediately indicates that the ACCC is working hard to ensure businesses are able to respond to the impact of COVID-19.

Competition regulators in some other jurisdictions (such as the UK, the European Union, Japan, New Zealand and the U.S.) have moved towards a broader and more general approach in allowing businesses to collaborate in response to the pandemic. Rod Sims has stated that the ACCC is less likely to take that approach and has a dedicated team working flexibly and quickly on authorisation applications, and will even help parties draft the application document.

However, since 2017, the ACCC has also had a broader - as yet untested - power to make "class exemptions", which can exempt types of business conduct that would either not have the effect of substantially lessening competition or would be likely to result in a net public benefit. The ACCC can limit the persons and circumstances to which it applies and can specify conditions.

A class exemption would present several implementation challenges, but the ACCC may consider it if the number of authorisation applications starts to overwhelm its capacity to assess them in time. Businesses would then need to consider how their proposed cooperation fits within the terms of the class exemption.

WHAT SHOULD YOUR BUSINESS BE CONSIDERING?

Almost everything to do with COVID-19 is uncertain and becomes urgent sooner than expected. Businesses should therefore consider any potential challenges in their industry that may demand coordination with competitors as soon as possible.

The ACCC can assist in authorising behaviour that may contravene competition laws to allow businesses to continue to operate during these uncertain times, but authorisation must be granted before coordination begins.

The K&L Gates Competition Team has already advised on authorisations relevant to COVID-19. If you are considering initiatives to help your industry and consumers cope with the challenges of COVID-19, please speak to us prior to entering into any discussions with competitors on potential collaboration.

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