

Competitor Collaboration in the Shadow of COVID-19: The ACCC Takes a Pragmatic Approach

Kluwer Competition Law Blog
August 27, 2020

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Please refer to this post as: Ayman Guirguis, David Howarth, Mei Gong, Connor McNamara, 'Competitor Collaboration in the Shadow of COVID-19: The ACCC Takes a Pragmatic Approach', Kluwer Competition Law Blog, August 27, 2020, <http://competitionlawblog.kluwercompetitionlaw.com/2020/08/27/competitor-collaboration-in-the-shadow-of-covid-19-the-acc-takes-a-pragmatic-approach/>

In brief:

- Industry collaborations that involve restrictions on supply of goods or services are likely to be per se illegal under Australian competition law. However, businesses can seek to self-assess legal risks under the joint venture exception to cartel conduct or seek to have proposed cartel conduct authorised (approved) by the Australian Competition and Consumer Commission (ACCC).
- Following the grant of 25 interim authorisations in March and April 2020, the ACCC has now granted 12 final authorisations and issued 12 draft determinations (with interim authorisations continuing to be in place).
- Businesses looking to collaborate with competitors should seek legal advice before serious discussions commence as authorisation cannot cover conduct engaged in before the authorisation is granted.

COMPETITOR COLLABORATION IN THE SHADOW OF COVID-19

The COVID-19 pandemic has had an acute impact on the Australian economy. Many businesses and their staff are under severe pressure from forced closures, significant disruptions to their supply chains, and considerable fluctuations in consumer demand.

The Commonwealth Government's introduction of a three-step framework in early May to gradually relax its COVID-19 restrictions was a welcome development for businesses seeking to emerge from "hibernation".

Yet with the ever-present risk of a "second wave" (as demonstrated most poignantly in Victoria) and with a vaccine still some way off, combined with the limited scope and duration of Government relief programs, businesses still confront a challenging and uncertain trading environment.

In response, some forms of industry collaboration may be desirable and necessary to help businesses adjust to the impacts of COVID-19. However, competition and consumer protection laws in Australia still apply during extreme events, including the COVID-19 pandemic. Industry collaborations may breach the *Competition and Consumer Act 2010* (Cth) (CCA), either automatically (if they amount to cartel conduct) or if they result in a substantial lessening of competition.

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 or arrangements between competitors to:

- prioritise access to goods for particular groups of consumers, 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; and
- fix, control, or maintain prices, even where competitors agree to limit increasing their prices on goods or 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 the CCA, particularly if the effect is a substantial lessening of competition.

WHAT CAN BUSINESSES DO TO COLLABORATE?

Where businesses need to collaborate during COVID-19, they can self-assess whether the proposed arrangement would be covered by the joint venture exception to cartel conduct, or they can apply to the ACCC for authorisation of the collaborative arrangement.

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". In urgent cases, businesses can apply for an interim authorisation to commence the collaborative activity while awaiting a final determination.

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.

CURRENT AUTHORISATIONS

We have prepared a comprehensive overview of the different final determinations, draft determinations and interim authorisations - see the following tables.

At the time of writing, the ACCC has granted 12 final authorisations and 13 interim authorisations (in addition to issuing 12 draft determinations) across a broad range of sectors, including banking and insurance, retail, medicines and healthcare, telecommunications, aviation, food processing and energy.

The authorisations cover an equally broad range of collaborative conduct, including facilitating coordination between suppliers to mitigate the impacts of COVID-19 on supply chains, providing financial relief and support for affected businesses and individuals, and sharing information to support implementation of the Government's COVID-19 initiatives. In almost all cases, the ACCC has specifically excluded discussions or arrangements relating to pricing in final and interim authorisations. Where coordination regarding pricing is allowed, it cannot be used in a way to disadvantage consumers. For example, the Regional Express interim authorisation provides that fares charged by participating airlines cannot be higher than those applied in their schedules as on 1 February 2020.

The ACCC has also imposed reporting and information disclosure requirements in almost all cases, allowing it to monitor actions pursuant to authorisations.

WHAT NEXT FOR AUTHORISATIONS?

The ACCC is monitoring existing interim authorisations to ensure that they are operating as intended and will revoke interim authorisations that are no longer needed due to a material change in circumstances since the lodgment of the applications.

Therefore, even successful applicants need to continue to demonstrate the importance of industry collaboration. Some applications have been voluntarily withdrawn or limited where there has been a material change in circumstances, removing the necessity for industry collaboration.

At the same time, the ACCC remains responsive to new applications for authorisation. For example, Ingham's lodged an application on 6 August in response to the introduction of stage 4 restrictions in Victoria. The ACCC granted an interim authorisation on 7 August, allowing Ingham's and other chicken meat producers, processors and distributors in Victoria to cooperate for the purpose of minimising the impacts of the restrictions on the Victorian chicken product industry.

THE ACCC'S REGULATORY APPROACH DURING COVID-19

Under normal circumstances, the ACCC could take up to six months to make a decision about a final authorisation and up to 28 days to determine an urgent application for interim authorisation.

During the height of the pandemic in March and April, the ACCC issued some interim authorisations within 48 hours of the applications being lodged. This 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, European Union, Japan, New Zealand and the USA) have moved towards a broader and more general approach in allowing businesses to collaborate in response to the pandemic. ACCC Chair Rod Sims stated at the outset that the ACCC is less likely to take that approach and set up a dedicated team working flexibly and quickly on authorisation applications.

However, in a recent virtual forum, Rod Sims reiterated the ACCC's preference for the authorisations process over a more general "forbearance" approach. He noted that the latter approach does not provide statutory protection against third party action and is less effective at reducing uncertainty, as businesses still have to decide whether proposed collaboration is within the ambit of the forbearance.

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.

FINAL DETERMINATIONS

Authorisation	Takes Effect	Summary of Conduct	Summary of Conditions	Ends
FINANCE, BANKING & INSURANCE				
Suncorp Group Limited on behalf of itself and other providers of insurance	31 July 2020	Suncorp, Allianz, QBE and other insurers and brokers who notify the ACCC to coordinate minimum relief measures they would offer policyholders, particularly small and medium-sized businesses, suffering hardship due to the COVID-19 pandemic.	No conditions imposed - but the authorisation enables Participating Insurers to implement relief measures that were offered to policyholders prior 1 July 2020. The authorisation does not extend to agreeing or coordinating the offering of any new relief measures.	31 December 2020

Authorisation	Takes Effect	Summary of Conduct	Summary of Conditions	Ends
Financial Services Council (FSC) on behalf of its Member Life Insurance Companies	7 August 2020	FSC on behalf of its member life insurance members to enter into a commitment to ensure that healthcare workers are not denied life insurance, will not be charged higher premiums, and will not have benefits excluded, purely due to exposure or potential exposure to the COVID-19 pandemic.	<ul style="list-style-type: none"> FSC and any Participating Insurer must provide information in relation to the Proposed Conduct requested by the ACCC. A Participating Insurer must notify the ACCC within 10 business days after it chooses to opt into or opt out of the Proposed Conduct. 	31 July 2020
Australian Banking Association (ABA) (financial relief programs)	5 September 2020	ABA, its members banks and third party suppliers or agents to coordinate financial relief packages for individuals and businesses suffering hardship as a result of the COVID-19 pandemic.	<ul style="list-style-type: none"> ABA must notify the ACCC prior to the Proposed Conduct involving third party suppliers or agents being implemented. ABA must notify the ACCC of any financial relief program or other arrangement arising from the Proposed Conduct being implemented. 	14 August 2021
RETAIL, SUPERMARKETS & SHOPPING CENTRES				
7-Eleven Stores Pty Limited	20 August 2020	7-Eleven to approach certain Franchisees and enter into arrangements which will provide for temporary closure or reduced trading hours, helping to reduce the economic impact of the COVID-19 pandemic on the Franchisees and 7-Eleven's network.	<ul style="list-style-type: none"> 7-Eleven must notify the ACCC of the Franchisees it proposes to approach prior to approaching those Franchisees. 7-Eleven must notify the ACCC of those Franchisees that have agreed to a proposed arrangement prior to implementation of the arrangement. 	31 March 2021
Australian Retailers Association (ARA)	28 August 2020	ARA on behalf of itself and its members to exchange information and collectively bargain with landlords regarding rent relief to be provided to retail tenants who have been adversely impacted by the COVID-19 pandemic.	<ul style="list-style-type: none"> ARA and its members to maintain records of all material meetings or communications in relation to Proposed Conduct. ARA and its members to provide to the ACCC the records, and any other information related to the authorisation requested by the ACCC. 	1 September 2021
HOSPITALS				
Victoria Private and Public Healthcare	4 September 2020	Victorian Department of Health and Human Services (DHHS) on behalf of itself and public and private healthcare providers to enter into arrangements which have the broad purpose of maximising healthcare capacity and ensuring State-wide coordination of healthcare services during the COVID-19 pandemic.	<ul style="list-style-type: none"> DHHS must provide regular updates to the ACCC, and provide additional information requested by the ACCC. DHHS must notify the ACCC of any other private healthcare providers wishing to participate in the arrangements. 	30 September 2021
Queensland Private and Public Healthcare	4 September 2020	Substantively the same as above.	Substantively the same as above.	30 September 2021
South Australia Private and Public Healthcare	4 September 2020	Substantively the same as above.	Substantively the same as above.	30 September 2021
Northern Territory Private and Public Healthcare	4 September 2020	Substantively the same as above.	Substantively the same as above.	30 September 2021
New South Wales Private and Public Healthcare	4 September 2020	Substantively the same as above.	Substantively the same as above.	30 September 2021
Western Australia Private and Public Healthcare	4 September 2020	Substantively the same as above.	Substantively the same as above.	30 September 2021
Tasmania Private and Public Healthcare	4 September 2020	Substantively the same as above.	Substantively the same as above.	30 September 2021

DRAFT DETERMINATIONS

(interim authorisations still in place)

Draft Determination	Date Issued	Summary of Proposed Conduct	Summary of Proposed Conditions	Proposed End
RETAIL, SUPERMARKETS & SHOPPING CENTRES				
Coles Group on behalf of itself and participating supermarkets	15 July 2020	Coles, Woolworths, Metcash, ALDI, and other grocery retailers to cooperate in response to the COVID-19 pandemic to ensure the supply and fair and equitable distribution of groceries to consumers.	Any grocery retailer that wishes to engage in the Proposed Conduct must seek the approval of the ACCC by following the process set out in the Draft Determination, with the ACCC maintaining its discretion to refuse participation.	31 March 2021
MEDICINES, HEALTHCARE & MEDICAL EQUIPMENT				
National Pharmaceutical Services Association (NPSA)	24 July 2020	NPSA on behalf of itself, its members, and other CSO distributors to coordinate activities for the purpose of promoting continual, fair, and equitable access to medicines and pharmacy products during the COVID-19 pandemic.	<ul style="list-style-type: none"> NPSA must provide fortnightly reports to the ACCC regarding any material developments in relation to the Proposed Conduct. NPSA must provide all information in relation to the Proposed Conduct requested by the ACCC. 	27 September 2021
Medicines Australia (MA)	26 June 2020	MA and the Generic Biosimilar Medicines Association (GBMA), on behalf of themselves and their members, to implement a coordinated strategy in relation to the supply of Critical Medicines and Critical Devices in response to the COVID-19 pandemic.	MA must update the ACCC regarding any material developments in relation to the Proposed Conduct, including by providing information to and meeting with the ACCC.	27 March 2021
Medical Technology Association of Australia Limited (MTAA)	26 June 2020	MTAA on behalf of itself, its members, and non-member businesses who supply relevant medical equipment, to coordinate the supply of medical equipment and related supplies in response to the COVID-19 pandemic.	<ul style="list-style-type: none"> MTAA must notify the ACCC of any new participant in the Proposed Conduct. MTAA must provide regular updates regarding any material developments in relation to the Proposed Conduct. MTAA and other participants involved in the Proposed Conduct must promptly provide further information requested by the ACCC. 	24 March 2021
Private Healthcare Australia Limited (PHA)	15 July 2020	PHA and Member Health Fund Alliance (MHFA), on behalf of themselves and their members, to make arrangements and share information to broaden private health insurance coverage to include COVID-19 treatments, provide financial relief, and implement other measures necessary to respond to the COVID-19 pandemic.	<ul style="list-style-type: none"> PHA must notify the ACCC of any measures prior to implementing them. PHA must provide fortnightly reports to the ACCC regarding any material developments in relation to the Proposed Conduct. PHA must provide information in relation to the Proposed Conduct requested by the ACCC. Proposed Conduct must not have the effect of increasing health insurance premiums to consumers. Any agreement reached must provide for immediate termination if the Proposed Conduct is no longer authorised. 	6 months after authorisation granted
Australian Medical Association (NSW) Limited (AMA) - Visiting Medical Officer (VMO) collective bargaining in response to COVID-19	5 August 2020	AMA on behalf of itself and participating VMOs to collectively negotiate with private hospitals and day surgeries in relation to the terms and conditions (including remuneration) for VMOs engaged to provide medical services to public patients in the private hospital system in responding to the COVID-19 pandemic.	<ul style="list-style-type: none"> AMA to notify the ACCC of any additional private hospitals or healthcare providers that it wishes to collectively bargain with. AMA to provide regular updates to the ACCC and provide additional information requested by the ACCC. 	30 September 2021
ENERGY, FUEL & MINING				

Draft Determination	Date Issued	Summary of Proposed Conduct	Summary of Proposed Conditions	Proposed End
Australian Institute of Petroleum (AIP)	23 July 2020	AIP on behalf of itself, its members and approved future parties, to cooperate to improve the security of supply of fuel products and facilitate the efficient use of refining capacity and fuel storage capacity during the COVID-19 pandemic.	<ul style="list-style-type: none"> AIP must notify the ACCC of any meetings in relation to the Proposed Conduct. AIP must provide information requested by the ACCC. Any party that wishes to engage in the Proposed Conduct must seek the approval of the ACCC by following the process set out in the Draft Determination, with the ACCC maintaining its discretion to refuse participation. 	6 months after authorisation granted
Australian Energy Market Operator (AEMO)	24 July 2020	AEMO on behalf of itself and participants in the gas and electricity markets to cooperate to ensure the ongoing safety, security, or reliability of energy systems during the COVID-19 pandemic.	<ul style="list-style-type: none"> AEMO must comply with a reporting and communications protocol. WA, NT and Queensland LNG producers must comply with specific requirements. Agreements made under authorisation must provide for immediate termination upon when the authorisation ends. 	31 March 2021
Australian Energy Council Limited (AEC)	5 August 2020	AEC on behalf of itself, its member energy retailers and other energy retailers to share information and discuss and enter into arrangements to provide financial and/or other relief to retail energy customers facing financial difficulties as a result of the COVID-19 pandemic, including residential customers and business customers of any size.	<ul style="list-style-type: none"> AEC must notify the ACCC of any new members to the Proposed Conduct. AEC must provide the ACCC/AER with prior notice of any meetings where material decisions are made. AEC must provide monthly updates to the ACCC/AER on information shared between the participants and any material developments. All arrangements entered into in reliance on the authorisation must cease when authorisation ends. 	30 June 2021
Minerals Council of Australia (MCA)	5 August 2020	MCA on behalf of itself and seven other mining and industry exploration associations to coordinate and collaborate to respond to disruptions in the supply of specified critical services and supplies caused by the COVID-19 pandemic.	<ul style="list-style-type: none"> MCA must notify the ACCC of any material arrangements as soon as practicable after they are made. MCA must provide any further information to the ACCC on request. MCA must provide regular operational updates to the ACCC. 	30 June 2021
REGIONAL AIRLINES				
Regional Express Pty Ltd (REX)	30 July 2020	REX on behalf of itself, Qantas Link and Virgin Australia to coordinate flight schedules and share revenue on ten regional flight routes during the COVID-19 pandemic.	<ul style="list-style-type: none"> Applicants must not set a fare for a coordinated flight that is higher than the equivalent fare specified in their respective flight schedules in place as at 1 February 2020. Applicants must provide monthly updates to the ACCC to be published on the ACCC's public register regarding any developments in relation to the Proposed Conduct. 	30 June 2021
TELECOMMUNICATIONS				
NBN Co Limited (NBN Co) and others	5 August 2020	NBN Co on behalf of itself and Telstra, Optus, TPG, Vocus and Aussie Broadband to discuss, agree and implement capacity optimisation strategies for the National Broadband Network, solely for the purpose of responding to the changes in demand on the network resulting from the COVID-19 pandemic.	<ul style="list-style-type: none"> NBN Co must comply with the reporting and communications protocol agreed with the ACCC. NBN Co must provide to retail service providers who are not applicants any pertinent information falling within the Proposed Conduct which might affect their business activities. 	31 January 2021

INTERIM AUTHORISATIONS

Interim Authorisation	Date Issued	Summary of Conduct	Summary of Conditions	Expected Final Determination
FOOD PROCESSING				
Ingham's Group Ltd (Ingham's) and others	7 August 2020	Ingham's, Turosi, Hazeldene and the Australian Chicken Meat Federation to coordinate the production, processing and supply of chicken meat products in Victoria for the purpose of minimising disruption caused by the introduction of stage 4 restrictions in Victoria.	<ul style="list-style-type: none"> Parties must provide a weekly report to the ACCC setting out details of each material decision. Parties must meet with the ACCC to provide regular updates. Parties must provide any further information requested by the ACCC. 	December 2020