

Competition, Co-operation and COVID-19

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The public health response and the economic response to the impact of the COVID-19 pandemic are inextricably linked. In order to support businesses in implementing social distancing measures, with the effects of supply chain disruption and other consequences of the outbreak, the Government has developed numerous policy measures aimed at lessening the economic impact.

The Australian Competition and Consumer Commission (ACCC) has also identified several regulatory priorities arising from the outbreak, establishing a COVID-19 Taskforce.¹ As a result of the pandemic, the ACCC has granted permission for organisations in several sectors to behave in a way which would ordinarily be prohibited, so that businesses can work together to co-ordinate and strengthen Australia's response to COVID-19.

ACCC Chair Rod Sims told the Australian Financial Review Banking & Wealth Summit Crisis Briefing that "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".²

Authorisation

Australia's competition regime allows for conduct which may ordinarily be prohibited for being anti-competitive to be authorised by the ACCC, where that conduct is in the public interest.³ For example, authorisation could permit competitors to co-operate in their response to the effects of the pandemic, including by sharing information and resources.

All forms of restrictive trade practices can be authorised, including agreements which may be anti-competitive and concerted practices. Broadly, the ACCC may authorise conduct where it is satisfied that either:

- the conduct would not have the effect, or likely effect, of substantially lessening competition; or
- the conduct would result, or likely result, in a public benefit, which outweighs any public detriment.⁴

Certain types of conduct, including cartel conduct, secondary boycotts and resale price maintenance, must satisfy the public benefit test.⁵

The party making an application for authorisation must establish that the proposed conduct passes the test. The ACCC's power to approve an authorisation appli-

cation is discretionary and it may choose not to approve an application, even where the legal test is met.⁶

Where conduct is authorised by the ACCC, no legal action can be taken by either the ACCC or third parties: the effect of authorisation is that the relevant restrictive trade practice provisions do not apply. The process provides certainty to businesses who think they may otherwise contravene the CCA. The regime only extends to future conduct which may otherwise breach the CCA, it does not validate past conduct.⁷

Authorisation is typically a lengthy process: under the CCA, the ACCC has a six month period to make a determination, or up to a year following consultation with the applicant.⁸ However, where the application is urgent and upon the request of the applicant, the ACCC may grant interim authorisation before public consultation.⁹ An interim authorisation allows the applicant(s) to commence the activities immediately, ahead of the final determination. An interim authorisation will remain in place until it is revoked or final authorisation is granted and can be revoked at any time.¹⁰

The ACCC has indicated that it will work with businesses to quickly and efficiently assess authorisation applications lodged in response to the COVID-19 outbreak.¹¹ In many cases, the ACCC has granted interim authorisation within days of the application, so that urgent responsive activities can occur while submissions in relation to final authorisation are sought. This turnaround time is significantly faster than the usual 28 days period set out in the ACCC's authorisation guidelines.¹²

Banking Sector

On 30 March 2020, the ACCC granted interim authorisations to the Australian Banking Association (ABA) in response to COVID-19, allowing banks to co-operate regarding loan relief for individuals and businesses and to support government initiatives.¹³ This followed an interim authorisation for the ABA of its small business relief package.¹⁴ The second authorisation covers a broader range of banking customers.

The benefits identified by the ACCC in its determination include:

- the ability to provide financial relief to alleviate the impact of COVID-19 on customers and providing certainty around the minimum relief provisions;

- clear messaging to customers about the possible relief available and how it can be accessed;
- coordinating logistics regarding access to in-person banking services if further physical distancing measures are required; and
- helping customers to satisfy their obligations.¹⁵

The determination decision noted the need for banks to be able to rapidly respond to changing customer needs and government policies during this time.¹⁶

In order to ensure robust competition, the ABA authorisation can be revoked at any time and is subject to two conditions: first, that the ABA notify the ACCC of any proposed financial relief programs or other arrangements arising from the conduct and second, that ACCC approval is sought where third party suppliers or agents are involved. The authorisation is a temporary response to the current crisis and does not extend to cooperation in relation to product pricing.¹⁷ Restrictions relating to pricing, including prohibitions on price coordination and disclosure, are common among the other COVID-19 authorisations set out below.

Importantly, banks are still able to provide relief to their customers that goes beyond any scheme developed as a result of the authorisation and members of the ABA can opt in or out of the proposed conduct.¹⁸

The ACCC has now commenced public consultation regarding the authorisation with a view to making a final decision in September 2020.

Other industries

Interim authorisation has also been granted by the ACCC for organisations operating in other sectors who are seeking to collaborate in their response to COVID-19, including:

1. participants in the health sector, including medical technology companies who are members of the Medical Technology Association of Australia, and suppliers and distributors of medical equipment¹⁹, pharmaceutical companies who are members of the National Pharmaceutical Services Association²⁰ and members of Medicines Australia or the Generic and Biosimilar Medicines Association,²¹ to ensure the secure supply of medicines and equipment;
2. supermarkets, in relation to supply chain and logistics management and to implement recommendations of the Supermarket Taskforce convened by the Government;²²
3. airlines, including Regional Express, QANTAS Airways and Virgin Australia, in relation to route schedules on important regional flights;²³
4. telcos and NBN Co to respond to demand changes, carry out strategies designed by the national work-

ing group of government and providers, and support consumers and businesses experiencing financial difficulty;²⁴

5. insurers and brokers, including Suncorp, Allianz and QBE Insurance, to provide relief to business customers suffering hardship;²⁵
6. the energy sector, including gas and electricity providers, to ensure a secure and reliable energy supply;²⁶
7. oil companies and members of the Australian Institute of Petroleum to ensure the security of fuel supplies;²⁷ and
8. shopping centre owners and members of the Shopping Centre Council of Australia Limited and Scentre Group to provide support to small business tenants.²⁸

Key takeaways

Where co-operation between competitors is necessary to bolster the response to the COVID-19 emergency, the ACCC is working with organisations to “shape” their applications and process authorisation applications expeditiously.²⁹ These measures are intended to be a fit for purpose temporary response to the impact of the pandemic, designed to avoid long-term impact on the economy or market dynamics.

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Footnotes

1. ACCC Media Release, “ACCC Response to COVID-19 pandemic”, 27 March 2020.
2. R Sims, “Will competition survive the current crises?”, Australian Financial Review Banking & Wealth Summit Crisis Briefing, 30 March 2020.
3. Competition and Consumer Act 2010 (Cth) (CCA), Part VII, Division I.
4. CCA, s 90(7).
5. CCA, s 90(8).
6. ACCC Guidelines for Authorisation of Conduct (non-merger), March 2019, [6.8].
7. CCA, s 88(6).
8. CCA, ss 90(10) and (10A).
9. CCA, s 91(2)(d) and ACCC Guidelines for Authorisation of Conduct (non-merger), March 2019, [10.3 and 10.8].
10. CCA, s 91(2AB).

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11. R Sims, “Will competition survive the current crises?”, Australian Financial Review Banking & Wealth Summit Crisis Briefing, 30 March 2020.
12. ACCC Guidelines for Authorisation of Conduct (non-merger), March 2019, [10.9].
13. ACCC Media Release, “Banks authorised to co-operate on loan relief and services”, 30 March 2020.
14. ACCC Media Release, “Australian Banking Association small business relief package”, 20 March 2020.
15. ABA — Application for authorisation AA1000482, Interim authorisation decision, 30 March 2020, [29].
16. ABA — Application for authorisation AA1000482, Interim authorisation decision, 30 March 2020, [28].
17. ABA — Application for authorisation AA1000482, Interim authorisation decision, 30 March 2020, [13].
18. ABA — Application for authorisation AA1000482, Interim authorisation decision, 30 March 2020, [29].
19. ACCC Media Release, “Cooperation to aid supply of COVID-19 medical equipment”, 25 March 2020.
20. ACCC Media Release, “Medicine Wholesalers to co-operate on access to pharmaceutical products”, 31 March 2020.
21. ACCC Media Release, “Medicine manufacturers to coordinate on COVID-19 response”, 3 April 2020.
22. ACCC Media Release, “Supermarkets to work together to ensure grocery supply”, 24 March 2020
23. ACCC Media Release, “ACCC authorises Regional Express to coordinate with other airlines”, 26 March 2020.
24. ACCC Media Release, “NBN Co, telcos to coordinate on demand surge and consumer support package”, 1 April 2020.
25. ACCC Media Release, “Insurers to offer deferred payments, refunds, under small business relief package”, 2 April 2020.
26. ACCC Media Release, “Cooperation to support reliable energy sector authorised”, 3 April 2020.
27. ACCC Media Release, “Oil companies allows to co-operate to secure fuel supply during COVID-19 pandemic”, 3 April 2020.
28. ACCC Media Release, “Shopping centres to co-operate to support retail tenants”, 3 April 2020.
29. R Sims, “Will competition survive the current crises?”, Australian Financial Review Banking & Wealth Summit Crisis Briefing, 30 March 2020.