

Cooperation between competitors and Covid-19

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Abstract:

The COVID-19 pandemic raises unprecedented issues for Australian businesses and consumers. There is scarcity of and increased demand for certain goods and services, particularly food and health related items. In addition, social distancing and self-isolation requirements not only present new challenges but also increased opportunities for businesses to sell products online and deliver them safely to consumers.

Some industries, such as groceries, financial services and healthcare, are facing unprecedented demand for their goods and services. Coordination between competitors of these essential products may be necessitated in order to be able to meet consumer demand.

It may be permissible for industry members to coordinate responses to supply chain, logistics or other issues provided they meet the ACCC's test for authorisation. The ACCC has already granted interim authorisation to three major industries seeking to coordinate their activities as a result of COVID-19, which (if given final authorisation following a period of public consultation) will allow:

- **Medical technology companies**, who are members of the Medical Technology Association of Australia (the MTAA), to share information between each other, co-ordinate orders and supply requests, prioritise requests and jointly tender to supply COVID-10 medical equipment. The ACCC granted interim authorisation one day after it was sought, demonstrating how the ACCC will prioritise requests of this nature. For further information, see [here](#).
- **supermarket operators** to coordinate to ensure consumers have reliable and fair access to groceries during COVID-19. This includes allowing them to co-ordinate with each other in relation to manufacturing, supply, transport and logistics issues but not in relation to price. For more information, see [here](#).
- providing interim authorisation to the **Australian Banking Association (ABA) and banks** to work together to implement a small business relief package. For more information, [here](#).

Authorisation provides statutory protection from court action for conduct that might otherwise raise concerns under the competition law provisions of the Competition and Consumer Act 2010 (Cth) (CCA), such as cartel conduct and concerted practices. In general terms, the ACCC may grant authorisation if it is satisfied that the likely public benefit from the proposed conduct, in all the circumstances, outweighs any likely detriment it might cause.

For more information, see: [Overview – Authorisation](#).

A number of competition law regulators have made public announcements about their likely approach to essential business cooperation following COVID-19. For example:

- the **UK Competition and Markets Authority (CMA)** has stated that “*the CMA has no intention of taking competition law enforcement action against cooperation between businesses or rationing of products to the extent that this is necessary to protect*

consumers – for example, by ensuring security of supplies”: More guidance is expected to follow. For further information, see: [here](#); and

- the **New Zealand Commerce Commission (NCCC)** announced that “*The Commission has no intention of taking enforcement action under the Commerce Act against businesses who are cooperating to ensure New Zealanders continue to be supplied with essential goods and services during this unprecedented time. If you need to work with your competitors to share staff or distribution networks or take other measures to ensure security of supply, you are able to do this. However, the Commission will not tolerate unscrupulous businesses using COVID-19 as an excuse for non-essential collusion or anti-competitive behaviour. This includes sharing information on pricing or strategy where it isn’t necessary in the current situation.*” For further information, see [here](#).

It remains to be seen whether the ACCC will issue similar guidance to business in relation to its approach to coordination between businesses who are competitors in the supply of high demand or essential goods and services. Some legal practitioners are calling for the ACCC to issue guidance along these lines, saying that “Without quick action, Australia’s competition laws risk impeding our ability to respond effectively to the current crisis”. For further information, see: [here](#).