

# COVID-19 (AUSTRALIA): AUGUST 2020 UPDATE TO THE GUIDE TO ACCC APPROVALS ON INDUSTRY COLLABORATION

Welcome to our updated guide to industry collaboration approved by the Australian Competition and Consumer Commission (**ACCC**) in response to the COVID-19 pandemic. You can find additional information in our Insight [here](#), or you can contact us directly with your query.

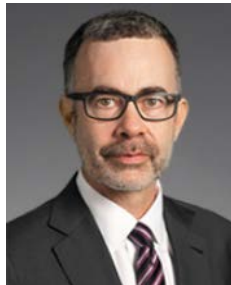


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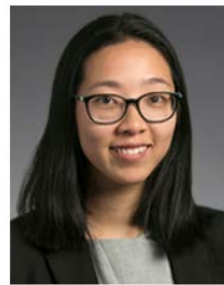


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Accurate as at  
16 August 2020

**RESPONDING TO COVID-19**

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This publication is for informational purposes and does not contain or convey legal advice.

The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer.

## COVID-19 (Australia): August 2020 Update to the Guide to ACCC Approvals on Industry Collaboration

### 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 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).
- This article builds on our initial [Insight](#) dated 3 April and provides a comprehensive overview of the scope of the collaborative conduct approved and conditions imposed.
- We are ready to assist businesses at short notice to either join an existing ACCC authorisation, make a submission about an application, or, if you consider that you need to collaborate with competitors due to the difficulties COVID-19 has created, to assist with preparing an application for authorisation.

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 without a vaccine in sight, 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.

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.

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

## COVID-19 (Australia): August 2020 Update to the Guide to ACCC Approvals on Industry Collaboration

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.

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.

We have prepared a comprehensive overview of the different final determinations, draft determinations and interim authorisations. We hope this information will assist you to identify whether any operational challenges your business may face could be partly addressed by collaborative activity under an authorisation.

It is important to remember that any activity or discussions cannot be authorised retrospectively. K&L Gates has represented several businesses that have successfully applied and joined interim authorisations previously and are available to assist at short notice.

# FINAL DETERMINATIONS



# FINANCE, BANKING & INSURANCE

Authorisation	Takes Effect	Summary of Proposed Conduct	Summary of Conditions	Ends
<a href="#">Suncorp Group Limited on behalf of itself and other providers of insurance</a>	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
<a href="#">Financial Services Council (FSC) on behalf of its Member Life Insurance Companies</a>	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"> <li>• FSC and any Participating Insurer must provide information in relation to the Proposed Conduct requested by the ACCC.</li> <li>• A Participating Insurer must notify the ACCC within 10 business days after it chooses to opt into or opt out of the Proposed Conduct.</li> </ul>	31 July 2020
<a href="#">Australian Banking Association (ABA) (financial relief programs)</a>	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"> <li>• ABA must notify the ACCC prior to the Proposed Conduct involving third party suppliers or agents being implemented.</li> <li>• ABA must notify the ACCC of any financial relief program or other arrangement arising from the Proposed Conduct being implemented.</li> </ul>	14 August 2021



# RETAIL, SUPERMARKETS & SHOPPING CENTRES

Authorisation	Takes Effect	Summary of Proposed Conduct	Summary of Conditions	Ends
<a href="#">7-Eleven Stores Pty Limited</a>	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"> <li>7-Eleven must notify the ACCC of the Franchisees it proposes to approach prior to approaching those Franchisees.</li> <li>7-Eleven must notify the ACCC of those Franchisees that have agreed to a proposed arrangement prior to implementation of the arrangement.</li> </ul>	31 March 2021
<a href="#">Australian Retailers Association (ARA)</a>	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"> <li>ARA and its members to maintain records of all material meetings or communications in relation to Proposed Conduct.</li> <li>ARA and its members to provide to the ACCC the records, and any other information related to the authorisation requested by the ACCC.</li> </ul>	1 September 2021



Authorisation	Takes Effect	Summary of Proposed Conduct	Summary of Conditions	Ends
<a href="#">Victoria Private and Public Healthcare</a>	4 September 2020	Victorian Department of Health and Human Services ( <b>DHHS</b> ) 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"> <li>DHSS must provide regular updates to the ACCC, and provide additional information requested by the ACCC.</li> <li>DHSS must notify the ACCC of any other private healthcare providers wishing to participate in the arrangements.</li> </ul>	30 September 2021
<a href="#">Queensland Private and Public Healthcare</a>	4 September 2020	Substantively the same as above.	Substantively the same as above.	30 September 2021
<a href="#">South Australia Private and Public Healthcare</a>	4 September 2020	Substantively the same as above.	Substantively the same as above.	30 September 2021
<a href="#">Northern Territory Private and Public Healthcare</a>	4 September 2020	Substantively the same as above.	Substantively the same as above.	30 September 2021
<a href="#">New South Wales Private and Public Healthcare</a>	4 September 2020	Substantively the same as above.	Substantively the same as above.	30 September 2021
<a href="#">Western Australia Private and Public Healthcare</a>	4 September 2020	Substantively the same as above.	Substantively the same as above.	30 September 2021
<a href="#">Tasmania Private and Public Healthcare</a>	4 September 2020	Substantively the same as above.	Substantively the same as above.	30 September 2021

# DRAFT DETERMINATIONS

(INTERIM AUTHORISATIONS STILL IN PLACE)





# RETAIL, SUPERMARKETS & SHOPPING CENTRES

Draft Determination	Date Issued	Summary of Proposed Conduct	Summary of Proposed Conditions	Proposed End
<a href="#">Coles Group on behalf of itself and participating supermarkets</a>	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



Draft Determination	Date Issued	Summary of Proposed Conduct	Summary of Proposed Conditions	Proposed End
<a href="#">National Pharmaceutical Services Association (NPSA)</a>	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"> <li>NPSA must provide fortnightly reports to the ACCC regarding any material developments in relation to the Proposed Conduct.</li> <li>NPSA must provide all information in relation to the Proposed Conduct requested by the ACCC.</li> </ul>	27 September 2021
<a href="#">Medicines Australia (MA)</a>	26 June 2020	MA and the Generic Biosimilar Medicines Association ( <b>GBMA</b> ), 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
<a href="#">Medical Technology Association of Australia Limited (MTAA)</a>	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"> <li>MTAA must notify the ACCC of any new participant in the Proposed Conduct.</li> <li>MTAA must provide regular updates regarding any material developments in relation to the Proposed Conduct.</li> <li>MTAA and other participants involved in the Proposed Conduct must promptly provide further information requested by the ACCC.</li> </ul>	24 March 2021



# MEDICINES, HEALTHCARE & MEDICAL EQUIPMENT

Draft Determination	Date Issued	Summary of Proposed Conduct	Summary of Proposed Conditions	Proposed End
<a href="#">Private Healthcare Australia Limited (PHA)</a>	15 July 2020	PHA and Member Health Fund Alliance ( <b>MHFA</b> ), 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"> <li>• PHA must notify the ACCC of any measures prior to implementing them.</li> <li>• PHA must provide fortnightly reports to the ACCC regarding any material developments in relation to the Proposed Conduct.</li> <li>• PHA must provide information in relation to the Proposed Conduct requested by the ACCC.</li> <li>• Proposed Conduct must not have the effect of increasing health insurance premiums to consumers.</li> <li>• Any agreement reached must provide for immediate termination if the Proposed Conduct is no longer authorised.</li> </ul>	6 months after authorisation granted
<a href="#">Australian Medical Association (NSW) Limited (AMA) - Visiting Medical Officer (VMO) collective bargaining in response to COVID-19</a>	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"> <li>• AMA to notify the ACCC of any additional private hospitals or healthcare providers that it wishes to collectively bargain with.</li> <li>• AMA to provide regular updates to the ACCC and provide additional information requested by the ACCC.</li> </ul>	30 September 2021



# ENERGY, FUEL & MINING

Draft Determination	Date Issued	Summary of Proposed Conduct	Summary of Proposed Conditions	Proposed End
<a href="#">Australian Institute of Petroleum (AIP)</a>	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"> <li>AIP must notify the ACCC of any meetings in relation to the Proposed Conduct.</li> <li>AIP must provide information requested by the ACCC.</li> <li>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.</li> </ul>	6 months after authorisation granted
<a href="#">Australian Energy Market Operator (AEMO)</a>	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"> <li>AEMO must comply with a reporting and communications protocol.</li> <li>WA, NT and Queensland LNG producers must comply with specific requirements.</li> <li>Agreements made under authorisation must provide for immediate termination upon when the authorisation ends.</li> </ul>	31 March 2021



# ENERGY, FUEL & MINING

Draft Determination	Date Issued	Summary of Proposed Conduct	Summary of Proposed Conditions	Proposed End
<a href="#">Australian Energy Council Limited (AEC)</a>	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"> <li>AEC must notify the ACCC of any new members to the Proposed Conduct.</li> <li>AEC must provide the ACCC/AER with prior notice of any meetings where material decisions are made.</li> <li>AEC must provide monthly updates to the ACCC/AER on information shared between the participants and any material developments.</li> <li>All arrangements entered into in reliance on the authorisation must cease when authorisation ends.</li> </ul>	30 June 2021
<a href="#">Minerals Council of Australia (MCA)</a>	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"> <li>MCA must notify the ACCC of any material arrangements as soon as practicable after they are made.</li> <li>MCA must provide any further information to the ACCC on request.</li> <li>MCA must provide regular operational updates to the ACCC.</li> </ul>	30 June 2021



# REGIONAL AIRLINES

Draft Determination	Date Issued	Summary of Proposed Conduct	Summary of Proposed Conditions	Proposed End
<a href="#">Regional Express Pty Ltd (REX)</a>	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"><li>• 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.</li><li>• 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.</li></ul>	30 June 2021



# TELECOMMUNICATIONS

Draft Determination	Date Issued	Summary of Proposed Conduct	Summary of Proposed Conditions	Proposed End
<a href="#">NBN Co Limited (NBN Co) and others</a>	5 August 2020	<p>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.</p>	<ul style="list-style-type: none"> <li>• NBN Co must comply with the reporting and communications protocol agreed with the ACCC.</li> <li>• 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.</li> </ul>	31 January 2021

# INTERIM AUTHORISATIONS

(DRAFT DETERMINATIONS NOT YET ISSUED)





# FOOD PROCESSING

Interim Authorisation	Date Issued	Summary of Conduct	Summary of Conditions	Expected Final Determination
<a href="#">Ingham's Group Ltd (Ingham's) and others</a>	6 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"> <li>Parties must provide a weekly report to the ACCC setting out details of each material decision.</li> <li>Parties must meet with the ACCC to provide regular updates.</li> <li>Parties must provide any further information requested by the ACCC.</li> </ul>	December 2020