

COVID-19 (AUSTRALIA): GUIDE TO ACCC APPROVALS ON INDUSTRY COLLABORATION

Accurate as at
20 May 2020

Welcome to our guide on industry collaboration approved by the Australian Competition and Consumer Commission (**ACCC**) due to COVID-19. Additional information is provided in our previous article [here](#), or contact us directly with your query.



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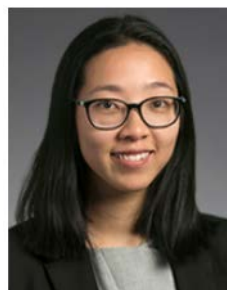


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The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer.

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In Brief:

- Industry collaborations are 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 the conduct approved/”authorised” by the ACCC.
- The ACCC has authorised 27 interim authorisations to date across different sectors.
- This article 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 approved 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.

Introduction:

The Commonwealth Government's recent introduction of a three-stage plan to gradually relax its COVID-19 restrictions has been a welcome development for all affected businesses seeking to emerge from hibernation.

Yet, without a vaccine in sight and the limited duration of government relief programs, all businesses still confront a challenging and uncertain trading environment. In response, some forms of industry collaboration may be desirable and necessary to assist such businesses to adjust to COVID-19 impacts.

Industry collaborations are generally not permitted under the *Competition and Consumer Act 2010 (CCA)* as they can amount to cartel conduct which automatically breaches the CCA, or conduct that substantially lessens competition.

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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 could 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.

Although legislative and ACCC class exemptions are possible alternatives to facilitating industry collaboration, due to timing and other issues, these options have not been taken to facilitate urgent COVID-19 industry collaborations in Australia.

At the time of writing, the ACCC has granted 27 interim authorisations across a broad range of sectors, including finance and banking, retail, pharmaceutical, healthcare, telecommunications and energy. The applications cover an equally broad range of collaborative conduct, including facilitating coordination between suppliers to mitigate COVID-19 induced supply chain constraints, to providing financial relief and support for affected businesses and individuals or 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 interim determinations. Where coordination regarding pricing is allowed, as is in the Regional Express interim authorisation (fares charged cannot be higher than those applied in the participating airlines' schedules on 1 February 2020), it cannot be used in a way to disadvantage consumers.

With the relaxation of COVID-19 restrictions, 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 material change in circumstances since the lodgment of the applications.

In at least three instances, the Applicants have withdrawn their application for authorisation due to a material change in circumstances, so that the proposed conduct could be captured under another application for authorisation or the necessity for industry collaboration is no longer as compelling.

Even after a successful application for Authorisation, participating businesses need to continue to demonstrate they are using and the importance of such collaboration to avoid the ACCC taking the aforementioned actions.

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We have prepared a comprehensive overview of the different ACCC approved interim authorisations. We hope the 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.



FINANCING, BANKING & INSURANCE

Selected Applications for Authorisation (include urgent Interim Authorisation)	Date Interim Authorisation was granted	Summary of Proposed Conduct	Summary of Interim Authorisation conditions	Closing date for submissions responding to the application for Authorisation
<p>Australian Banking Association (ABA) (financial relief programs)</p> <p>Note: The ABA also lodged a separate application for Authorisation regarding provision of financial relief for small businesses. That application was withdrawn on 29 April 2020 due to wanting to streamline its conduct under one application for Authorisation.</p>	30 March 2020	The ABA and its member banks to collaborate to provide relief packages for individuals and businesses affected by COVID-19, and in support of government initiatives.	<ul style="list-style-type: none"> ABA must notify the ACCC of any financial relief programs or other arrangements as soon as practicable before the conduct is implemented. ABA must seek ACCC approval of certain arrangements before implementation. 	1 May 2020
<p>Suncorp Group Limited on behalf of itself and other providers of insurance</p>	2 April 2020	Suncorp, Allianz, QBE Insurance and other insurers and brokers who may wish to join in the future to cooperate in providing COVID-19 relief to small and medium-sized businesses policy holders.	No conditions imposed.	8 May 2020

FINANCING, BANKING & INSURANCE



Selected Applications for Authorisation (include urgent Interim Authorisation)	Date Interim Authorisation was granted	Summary of Proposed Conduct	Summary of Interim Authorisation conditions	Closing date for submissions responding to the application for Authorisation
Financial Services Council (FSC) on behalf of its Member Life Insurance Companies	9 April 2020	<p>The FSC on behalf of its member life insurance companies to coordinate to ensure frontline healthcare workers are not excluded from coverage or receive higher premiums due to their potential or actual exposure to COVID-19.</p>	<ul style="list-style-type: none"> The implementation of the Proposed Conduct will not be mandatory for any participating company. FSC will notify ACCC of any member life insurance companies who choose to 'opt in' to the conduct. 	15 May 2020
Australian Securitisation Forum (ASF)	8 April 2020	<p>The ASF on behalf of itself and its members, to coordinate an industry response to the implementation of the Federal Government's AUD15 billion Structured Finance Support Fund, which will allow smaller authorised deposit-taking (ADI) institutions and non-ADI lenders to access funding at competitive prices.</p>	No conditions imposed.	22 May 2020



RETAIL, SUPERMARKETS & SHOPPING CENTRES

Selected Applications for Authorisation (include urgent Interim Authorisation)	Date Interim Authorisation was granted	Summary of Proposed Conduct	Summary of Interim Authorisation conditions	Closing date for submissions responding to the application for Authorisation
Coles Group on behalf of itself and participating supermarkets	26 March 2020 (replaced 23 March 2020 decision)	Coles on behalf of itself, Woolworths, Aldi and Metcash and other interested grocery retailer to coordinate on supply chain arrangements to facilitate a fair and reliable supply of groceries to customers during COVID-19. Applicants have proposed narrowing scope to discussions and arrangements arising out of the Department of Home Affairs Supermarkets Taskforce.	Other grocery retailers that wish to engage in the Proposed Conduct must seek approval of the ACCC by following the process set out in the Interim Authorisation, with the ACCC maintaining its discretion to refuse participation.	1 May 2020 (22 May 2020 re proposed narrowing of interim authorisation)
7 Eleven Stores Pty Limited	24 April 2020	7-Eleven authorised to approach some of its franchisees to enter into arrangements with those franchisees, should the franchisee be willing, to either temporarily close or reduce the trading hours of certain stores to address COVID-19 impacts.	<ul style="list-style-type: none"> • 7-Eleven must notify the ACCC of the franchisees it proposes to approach before approaching those franchisees. • 7-Eleven must notify the ACCC if the franchisee agrees to the proposed arrangement before implementation of the agreement. 	22 May 2020
Australian Retailers Association (ARA)	22 April 2020	The Australian Retailers Association (ARA) on behalf of itself and its current and future members to collectively negotiate with landlords, and share information, regarding rental relief to be provided to retail tenants who have been adversely impacted by COVID-19.	No conditions imposed.	3 June 2020



RETAIL, SUPERMARKETS & SHOPPING CENTRES

Selected Applications for Authorisation (include urgent Interim Authorisation)	Date Interim Authorisation was granted	Summary of Proposed Conduct	Summary of Interim Authorisation conditions	Closing date for submissions responding to the application for Authorisation
National Retail Association (NRA) Limited on behalf of itself and participating industry organisations	19 May 2020	<p>The NRA, Australian Hotels Association, Franchise Council of Australia Limited, The Pharmacy Guild of Australia, Australian Newsagents' Federation Limited and Australian Federation of Travel Agents Limited applied for authorisation on behalf of current and future members.</p> <p>The Proposed Conduct will enable tenant members of the above industry associations to discuss, share information, and collectively negotiate with landlord regarding COVID-19 rental relief.</p> <p>The Proposed Conduct will also allow landlord members to discuss and share information regarding small and medium enterprise tenants and enter or give effect to relevant COVID-19 rental relief arrangements for the aforementioned class of tenants.</p>	<ul style="list-style-type: none"> • Landlord participants must notify the ACCC of any rental relief measure arising from proposed conduct prior to implementation • The above notification must satisfy the ACCC's relevant minimum criteria and will be placed on the public register. 	TBD

MEDICINES, HEALTHCARE & MEDICAL EQUIPMENT



Selected Applications for Authorisation (include urgent Interim Authorisation)	Date Interim Authorisation was granted	Summary of Proposed Conduct	Summary of Interim Authorisation conditions	Closing date for submissions responding to the application for Authorisation
National Pharmaceutical Services Association (NPSA)	31 March 2020	The NPSA on behalf of itself, its members and other CSO distributors to coordinate in respect of supply chain arrangements to facilitate the equitable and timely access to Medicines and Pharmacy Products to consumers during COVID-19.	<ul style="list-style-type: none"> NPSA must regularly update the ACCC regarding material developments in relation to the Proposed Conduct. 	23 April 2020
Medicines Australia (MA)	3 April 2020	MA and the Generic Biosimilar Medicines Association (GBMA), on behalf of themselves and their members, to work together to ensure the continued supply of essential medicines during the COVID-19 pandemic including by identifying or mitigating shortages or supply chain problems that could impact medicine availability in Australia.	<ul style="list-style-type: none"> MA must regularly update the ACCC regarding material developments in relation to the Proposed Conduct. 	27 April 2020
Medical Technology Association of Australia Limited (MTAA)	17 April 2020 (replaced 25 March 2020 revoked decision)	MTAA on behalf of itself, its members, and non-member businesses who supply the relevant medical equipment, to coordinate in respect of supply chain arrangements relating to the manufacture and supply of medical equipment to respond to the COVID-19 pandemic.	<ul style="list-style-type: none"> MTAA must notify the ACCC of any new participant to the Proposed Conduct. MTAA must give the ACCC prior notice where the Applicants intend to exchange certain information (with lesser notice for urgent circumstances). MTAA must provide regular updates to the ACCC on material decisions made pursuant to the Interim Authorisation. 	8 May 2020

MEDICINES, HEALTHCARE & MEDICAL EQUIPMENT



Selected Applications for Authorisation (include urgent Interim Authorisation)	Date Interim Authorisation was granted	Summary of Proposed Conduct	Summary of Interim Authorisation conditions	Closing date for submissions responding to the application for Authorisation
Private Healthcare Australia Limited (PHA)	8 April 2020	Private Healthcare Australia (PHA) and Member Health Fund Alliance (MHFA) on behalf of themselves and their members to discuss and share information with each other in relation to broadening private health insurance coverage to include COVID-19 treatments, providing financial relief and other measures necessary to respond to the COVID-19 pandemic.	<ul style="list-style-type: none"> • PHA must notify the ACCC of any measures under the Authorisation prior to implementation. • The 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. 	21 May 2020
AMA(NSW) - VMO collective bargaining in response to COVID-19	8 May 2020	The Australian Medical Association (NSW) Limited (AMA (NSW)), on behalf of itself and participating Visiting Medical Officers (VMOs) to collectively negotiate with particular private hospital operators regarding the VMOs' engagement terms and conditions for providing medical services to public patients in the private hospital system during the COVID-19 pandemic.	<ul style="list-style-type: none"> • AMA(NSW) to notify the ACCC of any additional private hospitals that it wishes to collectively bargain with. • AMA(NSW) to provide regular updates to the ACCC on collaborative actions taken pursuant to the Interim Authorisation. 	29 May 2020



Selected Applications for Authorisation (include urgent Interim Authorisation)	Date Interim Authorisation was granted	Summary of Proposed Conduct	Summary of Interim Authorisation conditions	Closing date for submissions responding to the application for Authorisation
Victoria Private and Public Healthcare	7 April 2020	Victorian Department of Health and Human Services (DHSS) on behalf of itself, the State of Victoria, and specified private healthcare facilities and public hospitals to coordinate to enter into arrangements which have the broad purpose of maximising healthcare capacity and ensuring State wide coordination of health care services during COVID-19.	<ul style="list-style-type: none"> DHSS must provide regular updates to the ACCC. DHSS must notify the ACCC of any other private healthcare providers wishing to participate in the Proposed Conduct. 	8 May 2020
Queensland Private and Public Healthcare	7 April 2020	Substantively the same as above.	Substantively the same as above.	8 May 2020
South Australia Private and Public Healthcare	17 April 2020	Substantively the same as above.	Substantively the same as above.	8 May 2020
Northern Territory Private and Public Healthcare	17 April 2020	Substantively the same as above.	Substantively the same as above.	8 May 2020
Western Australia Private and Public Healthcare	29 April 2020	Substantively the same as above.	Substantively the same as above.	22 May 2020

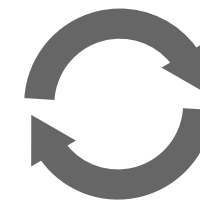


Selected Applications for Authorisation (include urgent Interim Authorisation)	Date Interim Authorisation was granted	Summary of Proposed Conduct	Summary of Interim Authorisation conditions	Closing date for submissions responding to the application for Authorisation
Tasmania Private and Public Healthcare	1 May 2020	Substantively the same as above.	Substantively the same as above.	22 May 2020
New South Wales Private and Public Healthcare	1 May 2020	Substantively the same as above.	Substantively the same as above.	22 May 2020
Australian Capital Territory Public and Private Healthcare	19 May 2020	Substantively the same as above.	Substantively the same as above.	9 June 2020

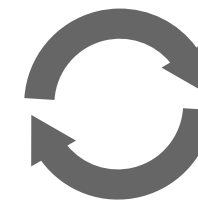


TELECOMMUNICATIONS

Selected Applications for Authorisation (include urgent Interim Authorisation)	Date Interim Authorisation was granted	Summary of Proposed Conduct	Summary of Interim Authorisation conditions	Closing date for submissions responding to the application for Authorisation
NBN CO Limited & Ors (NBN)	31 March 2020	NBN on behalf of itself and Optus, Telstra, TPG and Vodafone to share information, manage congestion and otherwise coordinate hardship measures and capacity optimisation strategies to ensure Australia's telecommunications network operates effectively during the COVID-19 pandemic.	<ul style="list-style-type: none"> NBN Co must develop and implement an appropriate reporting protocol to notify the ACCC of any material decisions made pursuant to the Interim Authorisation. NBN Co must provide to non-Applicants any pertinent information falling within the Proposed Conduct that might affect other service providers' business activities. 	22 May 2020



Selected Applications for Authorisation (include urgent Interim Authorisation)	Date Interim Authorisation was granted	Summary of Proposed Conduct	Summary of Interim Authorisation conditions	Closing date for submissions responding to the application for Authorisation
Australian Institute of Petroleum (AIP)	3 April 2020	<p>AIP on behalf of itself, its members and approved future parties, to discuss and implement arrangements to ensure the availability of fuel supplies during and after the COVID-19 pandemic and economic shutdown.</p>	<ul style="list-style-type: none"> • AIP must notify the ACCC of any material arrangements before the proposed arrangements are implemented. • AIP must provide information to the ACCC on request in a timely and efficient manner. • Any other party wishing to participate must follow the process outlined in the Interim Authorisation. 	1 May 2020
Australian Energy Market Operator (AEMO)	<p>17 April 2020 (replaced 3 April 2020 revoked decision)</p>	<p>AEMO on behalf of itself, all AEMO participants and any other future parties wishing to participate, to coordinate on measures including those deemed necessary to minimise the risk of outages and the sharing of energy infrastructure resources during the COVID-19 pandemic.</p>	<ul style="list-style-type: none"> • AEMO must comply with certain reporting protocols and promptly provide information to the ACCC about the Proposed Conduct from time to time. • All participants must comply with conditions imposed by other Authorisations to the extent the conduct overlaps across multiple Authorisations. • Agreements made under the authorisation cannot continue beyond the Authorisation period (12 months). 	20 May 2020



Selected Applications for Authorisation (include urgent Interim Authorisation)	Date Interim Authorisation was granted	Summary of Proposed Conduct	Summary of Interim Authorisation conditions	Closing date for submissions responding to the application for Authorisation
Australian Energy Council Limited (AEC)	1 May 2020	<p>AEC on behalf of itself, its member energy retailers and other energy retailers share information and enter into arrangements to provide financial and other relief to energy users who may be financially impacted by the COVID-19 pandemic.</p>	<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. • The participating parties must not enter into any arrangements that are inconsistent with AER's Statement of Expectations. • AEC must provide regular updates to the ACCC/AER on information shared between the participants and any material decisions. • All arrangements entered into in reliance on the Authorisation must cease when Authorisation ends. 	22 May 2020
Minerals Council of Australia (MCA)	24 April 2020	<p>MCA on behalf of itself and seven other mining and industry exploration associations, to share inventories, coordinate scheduling and supply chain activities and details of potential suppliers of Personal Protective Equipment (PPE) to ensure the mining industry can continue to operate safely and efficiently during the COVID-19 pandemic.</p>	<ul style="list-style-type: none"> • MCA must notify the ACCC of any material arrangements. • The Applicants must provide further information to the ACCC on request. • MCA must provide regular operational updates to the ACCC. 	22 May 2020

REGIONAL AIRLINES



Selected Applications for Authorisation (include urgent Interim Authorisation)	Date Interim Authorisation was granted	Summary of Proposed Conduct	Summary of Interim Authorisation conditions	Closing date for submissions responding to the application for Authorisation
Regional Express Pty Ltd (REX)	26 March 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"> The Applicants must not set a fare for a coordinated flight that is higher than the equivalent fare specified in their respective flight scheduled in place as at 1 February 2020. 	11 May 2020