

CPI's Oceania Column Presents:

Competition in “Lockdown” After the Attack of COVID-19 in Australia

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On February 25, 2020, the Australian Competition and Consumer Commission (“ACCC”) set its enforcement priorities for the year, as per usual, without any suspicion that the world was about to change with the COVID-19 outbreak and that, with this change, competition and the enforcement of its law would take a reverse path. Rather than “just” protecting competition, the current policy seeks to preserve businesses in order to introduce healthy competition once the outbreak is over. This is reflected in the unprecedented number of interim authorizations² the ACCC has granted in the last few weeks, allowing coordination between competitors for the period of the COVID-19 pandemic. This shift in policy and enforcement was confirmed directly by the ACCC’s media release on March 27, which also stressed that it “wants to ensure any changes to the competitive landscape now are temporary and that the ACCC is ready to play its role in supporting competition as the economy recovers.”³ What does this mean for its enforcement priorities and what else can we expect in the next few months and beyond?

While we can expect that some of the ACCC’s compliance and enforcement priorities will remain unchanged, the ACCC has indicated it will “re-focus ... [its] efforts to those priorities of most relevance to competition and consumer issues arising from the impact of COVID 19.”⁴ In this context, Rod Sims has made it clear that the ACCC will need to balance the objectives of: (a) implementing temporary measures to address short-term issues associated with COVID-19 and (b) ensuring that the long-term competitive structure of the economy is maintained. This mantra will call for Australia’s competition regulator to make careful decisions regarding its approach to enforcement in the coming months. The rhetoric of the ACCC to date is not, necessarily, as profound as the general statements made by other international regulators, such as the UK’s Competition and Markets Authority (“CMA”), which has issued guidance providing reassurance that, with regards to coordination between competitors:

provided that any such coordination is undertaken solely to address concerns arising from the current crisis and does not go further or last longer than what is necessary, the CMA will not take action against it.⁵

It is unsurprising that the ACCC has stayed clear of similar statements of general forbearance, which arguably create further uncertainty for businesses as to the limits of the regulator’s blessing. Instead, recent practice shows that the ACCC has opted for granting individually tailored exceptions, where businesses apply for authorizations and notifications.⁶ While this method is more time- and resource-consuming than a general assurance may be, it provides better certainty to the concerned entities. Therefore, it is clear that the ACCC’s new focus on evaluating and granting individual exceptions arising from the COVID-19 pandemic takes away resources which would otherwise be used for matters arising from its newly set competition law enforcement priorities. Indeed, there appears to be an acknowledgement by the ACCC that a heavy regulatory burden is not in line with the current policy stream of preserving businesses and would not be borne well by businesses who are already feeling the pressure of this global crisis; this is likely to guide their enforcement priorities in the coming months.⁷

Cartels and Anti-competitive Agreements

Cartels and anti-competitive agreements have been enduring priorities of the ACCC, with five criminal cartel cases currently before the courts⁸ and an expectation that at least a further two cartel cases would be brought in 2020. Although the most serious forms of cartels, which criminal cartels are, will most likely remain on the ACCC’s current enforcement radar due to

the ACCC's pre-pandemic commitment to eradicating coordination from the economy, some less serious coordination will not be as urgently addressed. Some will even be allowed, with the ACCC's current focus on authorizing coordination between competitors to respond to COVID-19, including the sharing of resources and information which would otherwise be prohibited by the Competition and Consumer Act 2010 (Cth) ("CCA").

Section 88 of the CCA provides the ACCC power to grant authorization for a person to engage in conduct which would or might otherwise contravene provisions in Part IV of the CCA. The test for authorization requires the ACCC to consider whether the public benefits of the proposed conduct outweigh any detriment to the public.⁹ This is not a low threshold. Parties seeking authorization must demonstrate that the public benefit is not "ephemeral or illusory,"¹⁰ but will be carried into effect in a tangible and commercially practical way. With public benefits being related to a pandemic for the first time, the ACCC is navigating its decisions in new waters. The urgency and importance of these authorizations mean that the ACCC is prioritizing this work and approving urgent interim authorizations within 1-2 days,¹¹ ahead of the public consultation process and further consideration of the substantive application.

In the past fortnight we have seen the ACCC authorize supermarkets to collaborate to ensure supply,¹² banks to coordinate the provision of a small business relief package and loan relief,¹³ airlines to synchronize flight schedules on regional routes,¹⁴ medical technology manufacturers and suppliers to manage the supply of medical equipment¹⁵ and wholesalers to work together to ensure continual access to pharmaceutical products,¹⁶ to name a few. Each of these authorizations is viewed as a temporary measure in the public interest. Further applications for interim authorizations are under consideration, including a considerable application by the Australian Energy Market Operator, on behalf of itself and 426 participants in Australia's National Energy Market to discuss, agree to or engage in conduct to ensure the ongoing safe, secure and reliable supply of energy during the pandemic. Authorization determinations cannot apply retrospectively to conduct which has already been engaged in by the applicants,¹⁷ so it is unsurprising that we have seen a flurry of authorization applications and determinations as businesses rush to obtain statutory immunity¹⁸ for their proposed coordination in response to the pandemic.

While recent activity in this space represents a significant uptick in permitted coordination between competitors, collaboration remains a high risk activity, even where the purpose is to ease the impact of the pandemic or manage supply shortages, as cartel provisions are *per se* illegal in Australia. Further, the current interim authorizations are limited in their application. For instance, the ACCC's determinations have been carefully drafted to exclude sharing of price information or agreements with respect to pricing,¹⁹ the ACCC can only authorize applicants to "engage in conduct"²⁰ rather than authorize codes of conduct more broadly,²¹ and the ACCC has the power to revoke the interim authorization at any time.²² It would not be surprising to see the ACCC take action against businesses who overstep the conduct specified in their authorization (in which case they will not be afforded the statutory immunity provided in respect of the authorized conduct)²³ or, alternatively, decide to bypass the statutory process altogether, to reinforce the exceptional nature of the current circumstances. And, most likely, we will still see the ACCC bringing the prophesied pair of cartel proceedings in 2020.

Essential Services

The ACCC signposted competition and consumer issues arising from the pricing and selling of essential services as a priority for 2020, with a focus on energy and telecommunications. There are a number of activities already underway in this area, including the ACCC's ongoing Electricity Market Monitoring and Gas Inquiry,²⁴ as well as consultation on the ACCC's *Draft Guidelines on Part XICA – Prohibited conduct in the energy market*.²⁵ The Draft Guidelines outline the ACCC's approach to investigating alleged contraventions of the new “big stick” prohibitions inserted into the CCA in relation to retail pricing, electricity financial contracting liquidity and conduct in the electricity spot market.²⁶ The new laws will take effect on June 10, 2020 and have the purpose of reducing energy prices for consumers and businesses. The energy sector in Australia is already highly regulated, and these new prohibitions, which allow for significant government intervention (including forced divestments) and impose strict yet vague conduct requirements, will add a further layer of regulatory burden for energy companies,

With the onset of COVID-19, the ACCC has re-emphasized the importance of affordability issues in the energy, telecommunications and petrol sectors, particularly during a time of growing unemployment. While we may see some additional flexibility regarding time frames and means of complying with statutory notices issued to energy companies pursuant to inquiries,²⁷ it is unlikely the ACCC will show much leniency with respect to the provision of essential services and, in particular, its enforcement of the big stick legislation. In fact, Australia's energy companies are likely to be under heightened scrutiny during the pandemic. On March 27, the Australian Energy Regulator (“AER”) released a Statement of Expectations for energy businesses which set out ten principles aimed at ensuring the continued reliable supply of energy to homes and businesses. These principles reflect the AER's expectation that energy businesses must go “above and beyond” to assist vulnerable consumers and small businesses during the crisis.²⁸

The ACCC has also explicitly raised concerns with respect to potential price gouging in the supply of petrol, with petrol prices across Australia remaining high despite world oil prices diving. There is no express prohibition against charging excessive prices, but this conduct may be captured by other provisions of the CCA. Besides the general competition law provisions, in the context of the supply of essential services, excessive prices and/or targeting vulnerable customers may amount to unconscionable conduct, and misrepresenting the reasons for higher prices (such as falsely suggesting they are due to particular features of the product) may breach sections 18 or 29 of the Australian Consumer Law.²⁹ It will be important for the ACCC to carefully distinguish between price increases driven by increased demand or production costs as a result of the pandemic, and those driven by profiteering.

Digital Economy and Platforms

Since the pandemic outbreak, many businesses have gone into lockdown and people are forced to, or have decided to, stay at and work from home without face-to-face social interactions. What this means is that while the general economy is suffering from the pandemic, the digital one is booming. Unlike in non-digital markets, where businesses are being negatively impacted, the digital space provides better and new opportunities for entities. The ACCC's job will be to ensure that competition is flourishing in digital markets and not being illegally restricted in order to ensure that this boom is to the benefit of consumers and the Australian economy.

Therefore, it is essential that the ACCC's commitment to its work with respect to the digital economy is unwavering, in particular that the new inquiries it announced in February 2020, namely the Digital Advertising Services Inquiry³⁰ and Digital Platform Services Inquiry,³¹ will continue. The COVID-19 outbreak could impact the findings in these inquiries, as Australians spend an increasing amount of time online.

The Digital Advertising Services Inquiry is focused on the supply of digital advertising technology and agency services, but the Digital Platforms Services Inquiry is more consumer-focused, analyzing services that we are all using on a daily basis – such as internet search engine services, social media services and electronic marketplace services. Any pre-existing competition issues in respect to these services are likely to be amplified between now and the interim report in September as demand for these services increases exponentially, both for personal entertainment and for communication between colleagues working remotely.

These inquiries will build on concerns raised by the final report of the ACCC's Digital Platforms Inquiry in 2019, among other things in relation to consumers being misled over the collection and use of their personal data, and competition issues surrounding platforms. We have already seen enforcement activity in this space, with proceedings being brought against Google for allegedly misleading consumers about the collection, retention and use of personal location data. These concerns are only likely to become further exacerbated as the population is confined to their homes and legally required to practice social distancing.

Competition Lessened Temporarily

The strongest message is that the change in the ACCC's enforcement priorities is partial and temporary. While some of the pre-pandemic ACCC's activities remain its priorities (such as the most serious infringements of competition law, most notably, already existing proceedings, its work in the digital space, and protecting consumers and small businesses), other activities will go against protecting competition in order for competition to take place after the pandemic resolves. In the current situation, we can expect less competition and more coordination among businesses in Australian non-digital markets, while people, some businesses and the economy fight for their survival.

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- ² *Competition and Consumer Act 2010* (Cth), s 88, 90, 91(2).
- ³ Media Release, Australian Competition and Consumer Commission, ACCC Response to COVID-19 Pandemic (March 27, 2020).
- ⁴ Media Release, Australian Competition and Consumer Commission, ACCC Response to COVID-19 Pandemic (March 27, 2020).
- ⁵ Competition & Markets Authority, CMA approach to business cooperation in response to COVID-19 (March 25, 2020) at [1.5].
- ⁶ *Competition and Consumer Act 2010* (Cth), Part VII (ss 87ZP-95AB).
- ⁷ Media Release, Australian Competition and Consumer Commission, ACCC Response to COVID-19 Pandemic (March 27, 2020).
- ⁸ *CDPP v ANZ & Ors, CDPP v. Country Care & Ors, CDPP v. Vina Money Transfer Pty Ltd & Ors, CDPP v. Wallenius Wilhelmsen Ocean AS, and CDPP v CFMMEU.*
- ⁹ *Competition and Consumer Act 2010* (Cth), ss 90(7) and 90(8).
- ¹⁰ *Re Qantas Airways Ltd* (2005) ATPR 42-065 at [156]; *Re Medicines Australia Inc* (2007) ATPR 42-164 at [109].
- ¹¹ As opposed to the usual timing of interim authorizations being granted within 28 days of the application being lodged.
- ¹² ACCC Interim authorization decision in respect to the application for authorization AA1000477 made on March 20, 2020 by Coles Group Limited on behalf of itself and Woolworths Group Limited, Aldi Stores, Metcash Limited, March 26, 2020.
- ¹³ ACCC Interim authorization decision in respect to the application for authorization AA1000475, lodged by the Australian Banking Association, March 20, 2020; ACCC Interim authorization decision in respect of the application for authorization AA1000482, lodged by the Australian Banking Association, March 30, 2020.
- ¹⁴ ACCC Interim authorization decision in respect to the application for authorization AA1000478, lodged by Regional Express, March 26, 2020.
- ¹⁵ ACCC Interim authorization decision in respect to the application for authorization AA1000479, lodged by the Medical Technology Association of Australia, March 25, 2020.
- ¹⁶ ACCC Interim authorization decision in respect to the application for authorization AA1000480 lodged by the National Pharmaceutical Services Association, March 31, 2020.
- ¹⁷ *Competition and Consumer Act 2010* (Cth), s 88(6).
- ¹⁸ See *Competition and Consumer Act 2010* (Cth), s 88(2).
- ¹⁹ For example, the ACCC Interim authorization decision in respect to the application for authorization AA1000480 lodged by the National Pharmaceutical Services Association, March 31, 2020 at [10], [23].
- ²⁰ The phrase "engage in conduct" is defined in section 4(2) of the CCA and includes refusing to do an act, the making of, or giving effect to, a provision of a contract or arrangement or understanding, or engaging in a concerted practice.
- ²¹ *Jones v. ACCC* (2003) 131 FCR 216.
- ²² *Competition and Consumer Act 2010* (Cth), s 91(2AB).
- ²³ *Competition and Consumer Act 2010* (Cth), s 88(3).
- ²⁴ The ACCC intends to provide its next report to the Treasurer by May 29, 2020.
- ²⁵ Consultation to close on April 3, 2020.
- ²⁶ *Competition and Consumer Act 2010* (Cth), ss 153E, 153F, 153G, 153H.
- ²⁷ It is an offence not to comply with a notice issued by the ACCC pursuant to s 95ZK of the CCA.
- ²⁸ Australian Energy Regulator, AER Statement of Expectations of energy businesses: Protecting consumers and the energy market during COVID-19 (March 27, 2020), https://www.aer.gov.au/system/files/aer-statement-of-expectations-of-energy-businesses_1.pdf.
- ²⁹ This type of behavior is not foreign to the ACCC, who previously established specialized teams to target businesses sorting consumers after the introduction of GST and the carbon tax for false and misleading claims about the impacts of the new taxation arrangements.
- ³⁰ The final report is due August 31, 2021.

³¹The first interim report is due September 30, 2020 and the final report is due March 31, 2025.