

# EXPLORING OPPORTUNITIES: MANAGING COMPETITION ISSUES WHILST ALLOWING BUSINESSES TO COLLABORATE (AUSTRALIA)

09 April 2020 | Australia

Legal Briefings - By **Patrick Gay, Sarah Benbow, Philip Aitken, Nikita Sivakumaran, Annabel Garrard and Saloni Sharma**

---

The COVID-19 pandemic has resulted in a rush of applications to the ACCC seeking to authorise coordination as between competitors which might otherwise contravene provisions of the *Competition and Consumer Act (CCA)*.

The ACCC has responded quickly and dedicated significant staff to assess these applications. As of 8 April 2020, the ACCC has made 16 COVID-19 interim authorisation determinations. More will follow.

In granting interim authorisations, the ACCC has recognised that it may not be possible for applicants to be precise about the conduct which is to be authorised, given the uncertain nature of the pandemic and the benefits associated with speed and flexibility.

While each application will be considered on its own merits, ACCC practice to date demonstrates that the ACCC is prepared to authorise broadly described conduct where the parties must notify the ACCC of agreements entered into under the terms of the authorisation and respond to future ACCC requests for information. As a result, the ACCC will continue to have a central role in determining the scope of arrangements as between competitors to address supply chain, logistics and resource availability and consumer relief efforts arising from the pandemic.

This update provides an overview of the ACCC's current approach to COVID-19 authorisation applications, as well as other ways in which competition law risk for industry coordination might be managed. It also provides guidance on how to approach industry discussions prior to any authorisation decision of the ACCC.

# ACCC AUTHORISATION

## OVERVIEW

Businesses that would ordinarily compete with one another, and now seek to coordinate their responses to the COVID-19 crisis, may risk contravening Australia's cartel laws. For example, coordination in relation to trading hours, supply chain management, or reductions of capacity could potentially constitute prohibited cartel conduct.

However, the ACCC can authorise coordination between competitors where the public benefits of coordination outweigh any potential public detriments (typically, any loss of competition). Authorisation provides competition law immunity for the relevant conduct. Importantly, the process allows the ACCC to grant interim authorisation which will allow parties to proceed with the proposed conduct prior to the ACCC making a final authorisation decision.

In the wake of COVID-19, the ACCC has acted swiftly in granting requests for interim authorisation across a range of sectors, including banking, insurance, supermarkets, medical technology, pharmaceuticals, regional aviation, and telecommunications.

The ACCC is to be commended in acting quickly (within days and sometimes less) in granting the interim authorisations, allowing businesses to coordinate between each other for the public benefit, without delay. The ACCC's approach to granting interim authorisations is unprecedented in the breadth of conduct that has been authorised and the central role that the ACCC will continue to play in approving and monitoring the responses of businesses to the pandemic.

In commenting on the ACCC's approach to coordination between businesses in response to the pandemic, ACCC Chairman, Rod Sims, has stated "*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.*"<sup>1</sup> However, he has also warned that such measures can, in normal times, lead to complacency, inefficiency and higher prices.

## REVIEW OF AUTHORISATIONS GRANTED TO DATE

As of 8 April 2020, the ACCC has granted 16 COVID-19 interim authorisations covering a broad range of sectors and conduct. These are summarised in detail below and in the table at the end of this Update.

### **(a) A broad range of public benefits have been accepted**

The interim authorisations can be grouped based on the public benefits sought to be achieved through the coordination. These public benefits include:

- **Facilitating the supply of essential products:** a number of interim authorisations have been granted to facilitate the supply of essential products to consumers, businesses and healthcare providers. For example, one of the first COVID-19 related interim authorisation decisions facilitated supermarkets coordinating the supply and equitable distribution of essential every day goods. Since then, broad authorisations have been granted across a range of sectors, for the purpose of facilitating the supply of essential products. These sectors include, energy, fuel, medical equipment suppliers, hospitals and healthcare facilities, pharmaceutical wholesalers and telecommunications providers.
- **Facilitating the distribution of consumer and business relief:** the ACCC has granted immunity to allow coordination between businesses designed to facilitate the provision of pandemic related relief to consumers and businesses. For example, banks have been authorised to coordinate activities in relation to the provision of small business debt relief packages, modification of loan facilities for customers and to support Government fiscal stimulus initiatives. Similarly, insurance providers have been authorised to implement relief measures for small businesses and consumers; and shopping centre landlords have been authorised to share information on financial difficulties of tenants and provide rent relief to small and medium enterprise tenants.
- **Ensuring that competition will be maintained in post-pandemic markets:** the ACCC has also been prepared to authorise coordination between businesses for the purpose of maintaining their commercial viability, thus ensuring that competition will be maintained in post-pandemic markets. In particular, domestic airlines have been authorised to coordinate schedules, capacity, and share revenue, on 10 key regional routes. While it is difficult to predict the circumstances in which the ACCC would be prepared to authorise similar conduct in other industries, the public benefits are most obviously available in concentrated industries with high barriers to entry or sectors that provide a critical community service. In these circumstances, the public benefits of maintaining such industries through the pandemic are likely to be more readily apparent.

## **(b) Appropriate flexibility in ACCC approach**

As a general proposition, the ACCC, in considering any authorisation application, will want to have a clear understanding as to the scope of the proposed conduct. Authorisation is therefore most likely to be granted where the parties can be as specific as possible regarding the exact scope and nature of any coordination agreement including, for example, setting out the terms of a draft agreement.

In the context of the COVID-19 interim authorisation applications, the ACCC has taken a more flexible approach while maintaining an ongoing oversight role. While each matter will be assessed on its individual facts, the ACCC has, in current circumstances, provided parties with an appropriate degree of flexibility in determining the final scope of any coordination.

For instance, the supermarkets have been authorised to engage in conduct recommended by the Supermarket Taskforce convened by the Department of Home Affairs or the main working sub-committee of that task force. Importantly, meetings of these groups will include ACCC representatives who will have the ability to raise competition law concerns.

Whilst other interim authorisation decisions may not contemplate a committee like structure, conditions of authorisation include reporting obligations to the ACCC in terms of the agreements or decisions made under the interim authorisation, as well as requirements to respond to ACCC information requests. In circumstances where the ACCC can take steps to revoke any interim authorisation decision, this effectively creates an ongoing role for the ACCC in considering and assessing industry response to the pandemic.

The flexibility contained in the authorisation decisions of the ACCC is reflective of the unprecedented and uncertain nature of the pandemic. The 'trade-off' for this flexibility is that, in many cases, the ACCC has included conditions that provide it with an active monitoring and oversight role in relation to the coordination between the parties concerned.

### **(c) Limitations on authorised conduct**

While seeking to be flexible in its approach, the ACCC will continue to assess applications by reference to the net public benefits test. As such, there must be a clear link between the proposed conduct and the relevant public benefits.

To the extent that coordination goes beyond what is demonstrably necessary to achieve the identified public benefits, this is unlikely to be approved by the ACCC.

The ACCC is less likely to authorise conduct which contemplates price fixing. A number of ACCC decisions to date specifically note that parties will continue to compete in respect of the pricing of relevant retail products. Whilst the domestic airline authorisation contemplates revenue sharing over relevant routes, the ACCC has sought to ensure a level of consumer price protection by imposing a condition that participating airlines must not set a fare which is higher than that specified in their respective fare schedules.

### **(d) Period of authorisation**

Parties have sought authorisation for a period of 6-12 months. Current interim authorisations provide legal immunity for an undefined period (ie until the ACCC releases its final determination or until the ACCC revokes its interim authorisation). The ACCC considers the temporary nature of these authorisations to be unlikely to materially impact competition.

The ACCC will maintain the ability to revoke any authorisation decision if the effects of the pandemic subside at an earlier date. In such circumstances, it is likely that parties would inform the ACCC that the authorisation is no longer necessary and would seek to voluntarily revoke any authorisation.

## APPROACHING THE ACCC FOR AUTHORISATION

Businesses considering application for authorisation should proactively engage with senior representatives of the ACCC in relation to proposed coordinated conduct prior to submitting a formal authorisation application. The ACCC has sought to comment on draft applications within a very short period. Active prior engagement with the ACCC will assist in a timely consideration of the authorisation application and be more likely to result in a positive decision.

## OTHER OPTIONS

While the predominant approach of businesses to date has been to seek an interim authorisation, this is not the only option available to businesses seeking to pursue coordinated responses to the current crisis. Depending on the circumstances, alternatives could include:

- **Self-assessing legal risk including under the joint venture exception:** some forms of coordination may not raise sufficient ACCC risk to require authorisation. In addition, there is an exception to cartel laws for conduct that is for the purposes of, and reasonably necessary for, joint activity between parties. Parties are required to 'self-assess' whether this joint venture defence will be available – unlike authorisation, it is not something granted by the ACCC.
- **Seeking a legislative exemption:** conduct specifically authorised under state or federal legislation or regulations will be exempt from the competition laws. State legislation or regulations will only provide an exemption within the relevant state. Timing issues around the passing of legislation will mean that authorisation will be a preferred route. However, where appropriate regulations may be made under existing legislation, this route might be considered. In theory, a relevant government may be willing to provide legislative for broader and more open-ended forms of competitor collaboration than the ACCC would be comfortable authorising.
- **Obtaining a benefit under a class exemption:** since 2017, the ACCC has the power to grant class exemptions for specific types of business conduct that it considers are unlikely to substantially lessen competition, or are likely to result in a net public benefit. Where a class exemption is in place, businesses can then self-assess whether their proposed conduct falls within the scope of the exemption. There are currently no class exemptions in place. Depending on the length of the pandemic and the ACCC's views regarding the efficacy of the authorisation process, the ACCC might consider the use of COVID-19 class exemptions.

# GUIDANCE FOR DISCUSSIONS BETWEEN COMPETING BUSINESSES

In the context of exploring potential coordination with competitors, businesses must remain alive to their obligations under competition laws.

Without authorisation (or another exemption or immunity in place), businesses should not reach any sort of agreement with competitors (even if informal or unstated) about matters such as pricing, output, or other aspects of their commercial activities, prior to having assessed the competition law risks of doing so. The fact that such discussions are facilitated by government or industry bodies will not provide protection from the application of competition laws.

In considering discussions with competitors, including in the context of a potential authorisation application, businesses should:

- make it clear that any arrangement will be subject to legal sign off;
- set and adhere to agreed agendas;
- keep preliminary discussions at a general level and avoid disclosure of competitively sensitive information;
- document any proposals as being subject to legal advice; and
- where possible, include legal representatives in discussions.

## DETAILED SUMMARY OF COVID-19 INTERIM AUTHORISATIONS

Please find below a detailed summary of COVID-19 interim authorisations by sector.

### COORDINATION FOR THE PURPOSE OF FACILITATING THE SUPPLY OF ESSENTIAL GOODS AND SERVICES

#### GROCERY

Sector and Date	Applicant(s)	Proposed Conduct	Conditions
<p><b>Grocery</b> Interim authorisation granted 23 March 2020</p>	<p>Coles Group Limited on behalf of:</p> <ul style="list-style-type: none"> <li>• Coles Group Limited;</li> <li>• Woolworths Group Limited;</li> <li>• ALDI Stores; and</li> <li>• Metcash Limited.</li> </ul>	<p>To discuss, enter into or give effect to, any arrangement (including with manufacturers, suppliers, transport and logistics providers), or engage in any conduct, which has the purpose of:</p> <ul style="list-style-type: none"> <li>• facilitating or ensuring the acquisition and/or supply of retail products in Australia;</li> <li>• ensuring fairer access to retail products among the general public;</li> <li>• providing greater access to retail products to those most in need, including the vulnerable or elderly;</li> </ul> <p>or</p> <ul style="list-style-type: none"> <li>• facilitating access to retail products in remote or rural areas.</li> </ul> <p>Such conduct may include engaging in any conduct which has been recommended by the Supermarket Taskforce convened by the Department of Home Affairs, or the main working sub-committee of that Taskforce and approved by the Minister for Home Affairs.</p>	<p><b>ACCC approval of additional parties:</b> Other grocery retailers that wish engage in the Proposed Conduct must seek the approval of the ACCC via email, identifying the type of conduct covered by the authorisation that the retailer proposes to engage in and the reasons it wishes to do so.</p>

# MEDICAL TECHNOLOGY

Sector and Date	Applicant(s)	Proposed Conduct	Conditions
<p><b>Medical technology</b> Interim authorisation granted 25 March 2020</p>	<p>Medical Technology Association of Australia (the <b>MTAA</b>) on behalf of its members and other relevant businesses in the medical technology industry</p>	<p>To make and give effect to arrangements, and to exchange information, for the purposes of:</p> <ul style="list-style-type: none"> <li>• sharing information regarding:               <ul style="list-style-type: none"> <li>◦ available stock and inventory;</li> <li>◦ quantities that can be obtained through existing supply channels;</li> <li>◦ new sources of supply and potential quantities; and</li> <li>◦ opportunities to increase domestic manufacturing,</li> </ul> </li> <li>• for a range of medical equipment and supplies listed in the authorisation;</li> <li>• coordinating order fulfilment and supply requests between suppliers;</li> <li>• prioritising certain requests for supply as nominated by Federal, State and Territory Governments and relevant health authorities;</li> <li>• working together to respond to tenders or requests for supply.</li> </ul>	<p>The interim authorisation was granted without condition.</p>



# PHARMACEUTICAL SERVICES

Sector and Date	Applicant(s)	Proposed Conduct	Conditions
<p><b>Pharmaceutical Services</b> Interim authorisation granted 31 March 2020</p>	<p>National Pharmaceutical Services Association (<b>NPSA</b>) on behalf of its current and future members and other Community Service Obligation (<b>CSO</b>) Distributors</p>	<p>To discuss, enter into or give effect to arrangements between the Applicants, or engage in conduct (excluding the sharing of price-information) with the purpose of:</p> <ul style="list-style-type: none"> <li>• facilitating the supply of, and access to, medicines and pharmacy products; and/or</li> <li>• cooperating with any conduct which has been recommended by the Australian Government and/or Working Groups (which includes the TGA coordinated Medicine Shortages Working Group and the Department of Health’s Medicine Shortages Working Party).</li> </ul> <p>The Applicants propose to engage in activities relating to coordinated:</p> <ul style="list-style-type: none"> <li>• stock acquisition;</li> <li>• inventory management strategies; and</li> <li>• logistical arrangements, to assist in the equitable distribution of medicines and pharmacy products.</li> </ul>	<p><b>Regular updates to be provided:</b> The NPSA must regularly update the ACCC regarding any material developments in relation to the Proposed Conduct, including:</p> <ul style="list-style-type: none"> <li>• any material recommendation made by the Working Groups;</li> <li>• key operational and supply arrangements and material conduct in parallel with, or to enable the optimal implementation of, Government decisions; and</li> <li>• any changes to the Applicant group.</li> </ul>

## TELECOMMUNICATIONS

Sector and Date	Applicant(s)	Proposed Conduct	Conditions
<p><b>Telecommunications</b> Interim authorisation granted 31 March 2020</p>	<p>NBN Co Limited on behalf of itself and major retail service providers part of the 'Special Working Group' (<b>SWG</b>), and other parties which join the SWG or engage in the Proposed Conduct in the future</p>	<p>To discuss, enter into or give effect to any arrangement between them or engage in any conduct which has the purpose of:</p> <ul style="list-style-type: none"> <li>• facilitating or ensuring the supply of voice or data telecommunications services;</li> <li>• sharing of information and resources regarding availability of telecommunications services;</li> <li>• implementing network resiliency, demand and congestion management strategies;</li> <li>• restricting supply of certain hardware or services;</li> <li>• providing a collective industry response to economic hardship faced by end users arising from the COVID-19 crisis; and</li> <li>• sharing generic customer and usage information, and future demand forecasts and logistics information.</li> </ul>	<ul style="list-style-type: none"> <li>• <b>Reporting requirements:</b> NBN Co must notify the ACCC of material decisions entered into by the Applicants pursuant to the Proposed Conduct.</li> <li>• <b>Provision of information relating to material decisions:</b> NBN Co must, as soon as practicable, provide to non-SWG retail service providers any pertinent information about measures falling within the Proposed Conduct arising from material decisions which NBN Co implements and which might affect those other retail service providers' business activities.</li> </ul>

## ENERGY

Sector and Date	Applicant(s)	Proposed Conduct	Conditions
<p><b>Energy</b> Interim authorisation granted 3 April 2020</p>	<p>Australian Energy Market operator (<b>AEMO</b>) on behalf of itself and all AEMO participants and any other future parties which engage in the Proposed Conduct.</p>	<p>To discuss, enter into or give effect to any contracts, arrangements or understandings regarding the following conduct:</p> <ul style="list-style-type: none"> <li>• co-ordinating certain repairs and maintenance;</li> <li>• sharing essential personnel;</li> <li>• sharing essential inputs;</li> <li>• deferring non-essential works; and</li> <li>• sharing information in relation to any of the above.</li> </ul> <p>Applicants can engage in this conduct to the extent that it has one or more of the following purposes:</p> <ul style="list-style-type: none"> <li>• ensuring the safe, secure and reliable operation of energy systems and/or the continued operation of wholesale energy markets during the pandemic;</li> <li>• ensuring ongoing energy supply during the pandemic;</li> <li>• minimising risk of any energy outages during the pandemic;</li> <li>• ensuring sufficient resources are available to maintain and operate energy infrastructure; or</li> <li>• planning or preparing for the impacts of the pandemic in relation to any of the above.</li> </ul>	<ul style="list-style-type: none"> <li>• <b>Reporting requirements:</b> AEMO must regularly notify the ACCC about all material agreements or decisions made pursuant to the Proposed Conduct.</li> <li>• <b>Compliance with other conditions:</b> Applicants must continue to comply with any conditions imposed in other authorisations applicable to the Applicants.</li> <li>• <b>Duration of agreements:</b> Agreements made under the authorisation cannot continue beyond the authorisation period, being 12 months from the date of the authorisation.</li> </ul>

## MEDICINES

Sector and Date	Applicant(s)	Proposed Conduct	Conditions
<p><b>Medicines</b> Interim authorisation granted 3 April 2020</p>	<p>Medicines Australia on behalf of itself and its members and the Generic Biosimilar Medicines Association and its members.</p>	<p>The Applicants may:</p> <ul style="list-style-type: none"> <li>• share information regarding available stock and inventory levels, quantities, potential new sources of supply and opportunities to increase domestic manufacturing;</li> <li>• coordinate and allocate the fulfilment of orders and supply requests for critical medicines and critical devices;</li> <li>• prioritise certain requests for supply for Critical Medicines and Critical Devices as nominated by Federal, State and Territory Governments and relevant health authorities; and</li> <li>• coordinate responses to tenders or requests for supply of critical medicines and devices.</li> </ul>	<p>Regular updates to be provided: Applicants must regularly update the ACCC regarding any material developments in relation to the Proposed Conduct, including:</p> <ul style="list-style-type: none"> <li>• any material recommendation or decision made by the Applicant group; and</li> <li>• any changes to the Applicant group.</li> </ul>

## FUEL

Sector and Date	Applicant(s)	Proposed Conduct	Conditions
<p><b>Fuel</b> Interim authorisation granted 3 April 2020</p>	<p>Australian Institute of Petroleum (<b>AIP</b>) on behalf of itself, its members and approved future parties which engage in the conduct authorised</p>	<p>To discuss, enter into or give effect to, any contract, arrangement or understanding (including between customers for wholesale fuel, suppliers of crude oil and finished Fuel Products, suppliers of import and storage facilities, and suppliers of trucking and delivery services), that has the purpose of:</p> <ul style="list-style-type: none"> <li>• ensuring security of supply of Fuel Products to Australian businesses and consumers;</li> <li>• minimising the risk of Fuel Product shortages by coordinating scheduling and supply chain activities;</li> <li>• maintaining or increasing the supplies of Fuel Products;</li> <li>• facilitating efficient use of refining capacity and capability;</li> <li>• facilitating efficient use of fuel storage capacity.</li> </ul>	<ul style="list-style-type: none"> <li>• <b>Reporting requirements:</b> AIP must notify the ACCC of any material arrangements entered into by the Applicants pursuant to the Proposed Conduct not less than 24 hours before the arrangement is implemented.</li> <li>• <b>Provision of information to ACCC on request:</b> ACCC may request information or clarification from AIP in relation to the Proposed Conduct.</li> <li>• <b>Approval of future parties:</b> Any other party that wishes to obtain the protection of the interim authorisation must follow the process outlined in the interim authorisation.</li> </ul>

## HEALTHCARE (HOSPITALS)

Sector and Date	Applicant(s)	Proposed Conduct	Conditions
<p><b>Healthcare (Hospitals)</b> Interim authorisation granted 7 April 2020</p>	<p>State of Victoria as represented by the Department of Health and Human Services (<b>DHHS</b>), on behalf of specified private hospitals and public hospitals</p>	<p>The Applicants may:</p> <ul style="list-style-type: none"> <li>• negotiate and enter into agreements between the DHHS and each of the participating providers to ensure sufficient funding, resources and services in response to the Pandemic (the <b>Agreements</b>);</li> <li>• engage in conduct to give effect to the Agreements, including coordinated group discussions and activities and sharing information relevant to the Agreements; and</li> <li>• engage in any other conduct that is necessary or desirable to facilitate a number of objectives identified in the authorisation. Broadly, the objective is to maximise healthcare capacity and ensure effective, efficient and equitable State-wide coordination of healthcare services during the pandemic.</li> </ul>	<ul style="list-style-type: none"> <li>• <b>Reporting requirements:</b> Applicants must provide regular updates to the ACCC and provide any additional information reasonably requested by the ACCC.</li> <li>• <b>Approval of future parties:</b> Applicants must notify the ACCC of any other private healthcare provider(s) intended to participate in the Proposed Conduct.</li> </ul>
<p><b>Healthcare (Hospitals)</b> Interim authorisation granted 7 April 2020</p>	<p>State of Queensland as represented by Queensland Health, on behalf of specified private hospitals and public hospitals</p>	<p>As above.</p>	<p>As above.</p>

## COORDINATION FOR THE PURPOSE OF FACILITATING THE SUPPLY OF EMERGENCY RELIEF

**BANKS**

Sector and Date	Applicant(s)	Proposed Conduct	Conditions
<p><b>Banks</b> Interim authorisation granted 20 March 2020</p>	<p>Australian Banking Association (<b>ABA</b>) on behalf of its retail member banks, their subsidiaries, and future ABA member banks</p>	<p>The interim authorisation allows the Applicants to agree and implement a small business relief package that contains minimum features and consistent messaging. Specifically, members banks may:</p> <ul style="list-style-type: none"> <li>• agree to the terms of the small business relief package;</li> <li>• make changes and enhancements to systems and processes required for the package; and</li> <li>• implement the package as soon as possible.</li> </ul>	<p>The interim authorisation was granted without condition.</p>
<p><b>Banks</b> Interim authorisation granted 30 March 2020</p>	<p>Australian Banking Association (<b>ABA</b>) on behalf of its retail member banks and their subsidiaries</p>	<p>This second interim authorisation enables the Applicants to discuss and share information, agree and give effect to, any contract, arrangement or understanding between them (and third party suppliers and/or agents) that has the purpose of:</p> <ul style="list-style-type: none"> <li>• deferring or varying loan facilities for customers in any sector of the economy or any customer segment impacted by COVID-19;</li> <li>• supporting Government initiatives to provide emergency fiscal stimulus and cost relief for individuals and businesses; or</li> <li>• ensuring continued high levels of customer service and access to banking services.</li> </ul>	<ul style="list-style-type: none"> <li>• <b>Proposed supplier conduct:</b> ABA must seek ACCC approval for conduct that involves third-party suppliers and/or agents, and in doing so, must provide to the ACCC detail on the Proposed Conduct and reasons for it.</li> <li>• <b>Particular conduct:</b> ABA must notify the ACCC of any financial relief programs or other arrangements arising from the Proposed Conduct.</li> </ul>

# INSURANCE

Sector and Date	Applicant(s)	Proposed Conduct	Conditions
<p><b>Insurance</b> Interim authorisation granted 2 April 2020</p>	<p>Suncorp Group Limited (<b>Suncorp</b>) on behalf of itself, Allianz Australia Limited, QBE Insurance and other insurers or insurance brokers seeking to engage in the Proposed Conduct in the future</p>	<p>To discuss, enter into or give effect to any contract, arrangement or understanding, or engage in any conduct, in respect of policyholders affected by the impact of the COVID-19 crisis, which has the purpose, effect or likely effect of:</p> <ul style="list-style-type: none"> <li>• offering Small and Medium Enterprise (<b>SME</b>) policyholders the ability to elect to defer premium payments for up to 6 months;</li> <li>• offering SME policyholders a refund of all unused premium with no administration or cancellation fees applying, where the policyholder has elected to cancel their insurance;</li> <li>• offering SME policyholders who need to close premises of insured businesses continuing cover on the premises, with no changes to premium;</li> <li>• offering all policyholders who can no longer travel due to the impact of COVID-19, a credit or refund for any unused travel insurance premium with no administration or cancellation fees applying;</li> </ul> <p>or</p> <ul style="list-style-type: none"> <li>• reducing payment times to no more than 15 business days for SME suppliers and contractors involved in servicing claims.</li> </ul>	<p>The interim authorisation was granted without condition.</p>



# RETAIL SHOPPING

Sector and Date	Applicant(s)	Proposed Conduct	Conditions
<p><b>Retail shopping</b> Interim authorisation granted 3 April 2020</p>	<p>Scentre Group and Shopping Centre Council of Australia (<b>SCCA</b>) on behalf of its members</p>	<p>To discuss, share information, agree, and give effect to arrangements and understandings between SCCA members that have the purpose of providing rent relief to SME tenants, being tenants with a group wide annual turnover of up to \$50 million.</p> <p>This authorisation permits SCCA Members to:</p> <ul style="list-style-type: none"> <li>• discuss and share information regarding financial difficulties faced by tenants and which tenants would benefit from relief measures;</li> <li>• provisionally enter into agreements to provide relief to tenants; and</li> <li>• give effect to those agreements.</li> </ul> <p>Examples of relief measures SCCA members may discuss and agree to include:</p> <ul style="list-style-type: none"> <li>• deferral of rent due for a number of months for SME tenants who suffer financial hardship from COVID-19;</li> <li>• repayment of deferred rent over an agreed longer term, pursuant to a payment plan that may be tailored to individual tenants;</li> <li>• waiver or partial waiver of interest or finance charges on the deferred rent; and</li> <li>• SME tenants given an option of extending their lease terms for the length of any rent deferment period.</li> </ul>	<p><b>Notification requirement:</b> Applicants must notify the ACCC of any rent relief measure arising from the Proposed Conduct as soon as practicable after the terms of the measure are agreed, but not less than 24 hours before the measure(s) being implemented.</p>

## INSURANCE

Sector and Date	Applicant(s)	Proposed Conduct	Conditions
<p><b>Insurance</b> Interim authorisation granted 8 April 2020</p>	<p>Private Healthcare Australia Limited (<b>PHA</b>), on behalf of itself, its members, and Members Health Fund Alliance and its members</p>	<p>To make, and give effect to, any contract, arrangement or understanding between them, and to share information with each other, in relation to:</p> <ul style="list-style-type: none"> <li>• broadening coverage under health insurance policies to include treatment for policyholders who contract COVID-19;</li> <li>• broadening health insurance cover for other modes of treatment that substitute for face-to-face interaction (eg telephone);</li> <li>• providing treatment in policyholders homes as a substitute for admission to hospital;</li> <li>• providing financial relief to policyholders from paying health insurance premiums; and</li> <li>• any other measure as notified to the ACCC.</li> </ul>	<ul style="list-style-type: none"> <li>• <b>Notification requirement:</b> PHA must notify the ACCC of any measure formulated as part of the Proposed Conduct prior to implementation.</li> <li>• <b>Pricing:</b> Proposed Conduct must not have the effect or indirect effect of increasing health insurance premiums to consumers.</li> <li>• <b>Termination of contracts:</b> Any agreement reached must provide for immediate termination if the Proposed Conduct is no longer authorised.</li> </ul>

## SECURITISATION

Sector and Date	Applicant(s)	Proposed Conduct	Conditions
<p><b>Securitisatio n</b> Interim authorisation granted 8 April 2020</p>	<p>Australian Securitisation Forum (<b>ASF</b>) on behalf of its current and future members</p>	<p>On 24 March 2020, the Federal Government announced a \$15 billion Structured Finance Support Fund (<b>SFSF</b>) to support funding to smaller lenders that provide affordable credit to Australian consumers and SMEs. The SFSF will be administered by the Australian Office of Financial Management (<b>AOFM</b>).</p> <p>The interim authorisation allows ASF members to develop and provide a coordinated industry response for the implementation of the SFSF.</p> <p>The ASF, its members and the AOFM may exchange information, discuss, enter into or give effect to any arrangement that relates to the terms, conditions and mechanisms for SFSF relief. This does not extend to the exchange of information relating to margins and cost data, or the specific terms of offer or supply to customers.</p>	<p>The interim authorisation was granted without condition.</p>

**COORDINATION FOR THE PURPOSE OF MAINTAINING COMPETITION IN POST-PANDEMIC MARKETS**

## DOMESTIC AIRLINES

Sector and Date	Applicant(s)	Proposed Conduct	Conditions
<b>Domestic airlines</b> Interim authorisation granted 26 March 2020	Regional Express Pty Ltd on behalf of Qantas Airways Ltd and Virgin Australia Holdings Ltd	The Applicants may: <ul style="list-style-type: none"><li>• coordinate flight schedules in order to reduce capacity and achieve sustainable load factors; and</li><li>• enter into agreements to share revenue,</li><li>• along 10 regional routes.</li></ul>	The interim authorisation was granted without condition.

## ENDNOTES

1. <https://www.accc.gov.au/media-release/competition-will-be-key-to-driving-economic-recovery>.



## KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



**PATRICK GAY**  
PARTNER, SYDNEY

+61 2 9322 4378  
Patrick.Gay@hsf.com



**SARAH BENBOW**  
PARTNER,  
MELBOURNE

+61 3 9288 1252  
Sarah.Benbow@hsf.com



**PHILIP AITKEN**  
SENIOR ASSOCIATE,  
MELBOURNE

+61 3 9288 1026  
philip.aitken@hsf.com

---

## LEGAL NOTICE

The contents of this publication are for reference purposes only and may not be current as at the date of accessing this publication. They do not constitute legal advice and should not be relied upon as such. Specific legal advice about your specific circumstances should always be sought separately before taking any action based on this publication.

© Herbert Smith Freehills 2022

---

**SUBSCRIBE TO STAY UP-TO-DATE WITH INSIGHTS, LEGAL UPDATES, EVENTS, AND MORE**

Close