

## COVID-19 – Do competition and consumer laws still apply?

Anna Parker, Allan Yeoman, Amy Ryburn, Tony Dellow, Keri Johansson, Jessica White, Susie Kilty, Alex Chapman

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The escalation of the response to COVID-19 has raised questions about how competition and consumer laws apply in extraordinary and challenging circumstances such as this. The Commerce Commission has provided some comfort for businesses providing essential goods and services that competition law will not restrict legitimate and necessary collaboration, stating that “no New Zealand business should feel constrained from doing the right thing for their customers, the safety of their staff and New Zealanders” and indicating that it will take a pragmatic approach to enforcement.

This does not mean, however, that the Commerce Commission will not enforce the law if businesses engage in unauthorised anti-competitive behaviour or engage in misleading conduct. Businesses and consumers are facing unprecedented difficulties, and bespoke solutions to resolve consumer issues are likely to be needed. The below comments on some of the issues that businesses will be facing from a competition and consumer law perspective.

### **How will the Commerce Commission enforce the law in the current circumstances?**

The Minister of Commerce and Consumer Affairs has announced that the Government has asked the Commerce Commission to take account of the exceptional circumstances created by COVID-19 when monitoring business behaviour in coming weeks. The overall message from the Government is that now is not the time for strict competition rules to get in the way of common sense and legitimate collaboration as businesses in essential goods and services respond to COVID-19.

The Government’s announcement does not override the Commerce Commission’s statutory powers or independence. Even so, the Commission has responded by saying that it has no intention of taking enforcement action under the Commerce Act against businesses who are cooperating to ensure New Zealanders continue to be supplied with essential goods and services during this unprecedented time. Such cooperation may include working with competitors to share staff or distribution networks, or take other measures to ensure security of supply.

However, we expect that the Commission will continue to strictly enforce the law if businesses engage in unauthorised collusion and mislead consumers. This includes, for example:

- Colluding with competitors (eg, fixing prices or allocating markets) or engaging in other anti-competitive behaviour that is not necessary to ensure that New Zealanders continue to be supplied essential goods and services. The Commerce Act allows for some collaborative activities, and for conduct to be authorised by the Commission on public benefit grounds. For example, the Australian competition regulator has granted urgent interim authorisation for supermarkets in Australia to engage in coordinated activities with the broad purpose of ensuring the supply and fair, equitable distribution of certain retail products to consumers during the COVID-19 pandemic. Businesses should continue to seek legal advice before entering into arrangements with competitors.
- Engaging in misleading and deceptive conduct, and making unsubstantiated or misleading representations. For example, the United Kingdom's Advertising Standards Authority recently published two rulings regarding advertisements for face masks which claimed that they could protect wearers against coronavirus infection. Those claims were found to be misleading because they were not supported by clinical evidence. New Zealand's regulators are similarly likely to act swiftly against businesses who seek to exploit the outbreak and make misleading and unsubstantiated claims to sell products or services.

Businesses will also need to be vigilant about the fact that any arrangements that are entered into to respond to the COVID-19 pandemic must end after the pandemic if they are not compliant with the Commerce Act.

The Commission has indicated that it will release more guidance on its website in the coming days.

### **How does the Consumer Guarantees Act apply in the current circumstances?**

Cancelled events and travel, delayed deliveries and disruption to supply chains are just some of the issues that raise potential issues under the Consumer Guarantees Act. Businesses and consumers will likely need to take a pragmatic and patient approach to the issues that arise. Some of the key questions that have been raised to date include:

- **How does the Consumer Guarantees Act apply to cancelled consumer services?**

The Consumer Guarantees Act generally requires businesses that provide services to consumers to remedy any failure to provide the services within a reasonable time (if the time is not determined by agreement between the parties) – including, in some circumstances, to cancel the contract and obtain a refund.

There are, however, some exceptions under the Consumer Guarantees Act that allow businesses to cancel a service because of an act of another person or a cause independent of human control. In these circumstances, a business's obligations will depend on the particular situation (including, for example, the relevant terms and conditions). This is also the case if the completion time for the service (eg, an event date) is fixed under the relevant agreement – that is, the remedies available will depend on the terms of the contract and particular circumstances.

There are a number of examples of businesses who are responding to the pandemic by relaxing standard policies, for example, by allowing customers to change their ticket without a cancellation fee or by providing credit. The options that businesses can provide consumers will of course depend on what is viable and legally possible in these challenging circumstances, and both businesses and consumers will need to show some patience and understanding as issues are resolved. See also our update [here](#) on COVID-19 and contracts.

- **What about delays in delivering consumer goods?**

Under the Consumer Guarantees Act, where a business is responsible for delivering goods to consumers, there is a guarantee that the customer will receive the goods within an agreed time period or, if no time has been agreed, within a reasonable time. A failure to comply with this guarantee gives a consumer certain rights to a remedy – including, in some cases, a refund. Although there is no specific exception for situations such as the current pandemic, we expect that what is considered a 'reasonable time' for delivery of goods will differ to ordinary circumstances (to take into account, for example, unavoidable disruptions to businesses and supply chains).

We recommend that businesses maintain clear communication with customers to keep them updated on expected delivery times and the reasons for any delay.

- **Can businesses increase prices in response to COVID-19?**

Businesses may also face increased costs during the COVID-19 situation, and may be considering price increases. For consumer goods and services, the Consumer Guarantees Act provides that goods and services will be provided at a reasonable price if the price is not determined by contract or left to be determined between the parties to the contract.

Otherwise, businesses in New Zealand are generally free to price goods and services as they see fit (subject to any specific requirements such as contractually imposed maximum prices), meaning that increasing the prices of goods and services during an emergency situation will often not be illegal. However, businesses need to be careful about the reasons given for an increased price. In short, businesses cannot claim "because of COVID-19" as a reason for a price increase if that is not genuinely the case – or if only part of the price increase is attributable to COVID-19.

### **Auckland**

**PwC Tower  
188 Quay Street  
Auckland 1010**

**PO Box 1433  
Auckland 1140  
New Zealand**

**P: +64 9 358 2555  
F: +64 9 358 2055**

### **Wellington**

**Aon Centre  
1 Willis Street  
Wellington 6011**

**PO Box 2694  
Wellington 6140  
New Zealand**

**P: +64 4 499 4242  
F: +64 4 499 4141**

### **Christchurch**

**83 Victoria Street  
Christchurch 8013**

**PO Box 322  
Christchurch 8140  
New Zealand**

**P: +64 3 379 1747  
F: +64 3 379 5659**