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# Collaborating with competitors during COVID-19: is Commerce Commission authorisation required?

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Businesses in some industries will likely need to collaborate to effectively address the novel issues that arise as a result of COVID-19. Although competition law still applies during the pandemic, recent Commerce Commission guidance and proposed amendments to authorisation provisions will help businesses ensure that collaboration does not result in Commerce Act penalties. Examples from Australia also provide some guidance on the types of conduct that may require authorisation.

## Commerce Commission guidance

The Commerce Commission has released guidelines, Business collaboration under COVID-19, to explain how it will be assessing business collaboration during COVID-19.

As outlined in our previous update, a Government Policy Statement was issued in March stating that the Commerce Commission should have regard to the Government's objective of maintaining confidence in the market for essential goods and services while COVID-19 is affecting the New Zealand economy. The Commission 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.

### When will collaboration be acceptable?

For collaboration relating to essential goods and services, the guidelines set out factors that the Commission will take into account when considering whether to exercise its discretion not to take enforcement action. The guidelines will help suppliers of essential goods and services who are considering potential collaboration options. Relevant factors to consider include whether the collaboration:

- Cannot effectively be achieved by businesses acting alone
- Is directed at achieving an outcome that benefits consumers or is otherwise in the public interest
- Is limited in scope and duration – covering no more than necessary, for no longer than necessary, to deal with COVID-19 issues
- Includes ongoing and regular review of whether the collaboration remains necessary
- Ensures that any information sharing does not extend beyond what is necessary to address COVID-19 (eg, does not include sharing commercially sensitive information about future pricing or longer term business strategies)
- Includes reasonably available measures to minimise any lessening of competition or other harm
- Is inclusive (eg, does not exclude smaller businesses).

The Commission will also take into account the extent to which collaboration is supported by relevant government agencies and affected parties (eg, suppliers and consumers), and the extent to which participants have proactively engaged with the Commission.

The Commission makes it clear that it will not, however, tolerate anti-competitive conduct such as agreements between competitors to:

- Limit production in order to inflate prices
- Keep prices artificially high
- Allocate customers without reasonable excuse
- Coordinate in a manner that is wider in scope than what is needed to address the issue in question.

### Flexibility is good – but getting advice is better

We welcome the indications of flexibility and leniency by the Commission in what are difficult times. However, what is described above is not a blank cheque, and we strongly urge any firm considering entering into any arrangement with competitors that they might not enter into in normal times to seek legal advice before committing themselves to any arrangement. It is also important to ensure that any preliminary discussions are qualified by a commitment by all parties (preferably in writing) that nothing is agreed until Commerce Act advice has cleared what is proposed.

## Proposed changes to authorisation procedures

The COVID-19 Response (Further Management Measures) Legislation Bill introduced on 5 May includes proposed changes to the authorisation provisions under the Commerce Act to address issues that may arise when seeking Commerce Commission authorisation for COVID-19 collaboration.

The Bill provides for:

- Provisional authorisation to be granted by the Commerce Commission, so that parties can start collaboration before the formal authorisation procedure has been completed. For example, under the changes, the Commission would not be required to publish or consult on a draft authorisation decision before granting provisional authorisation. This is similar to the interim authorisation procedure in Australia, under which the Australian Competition and Consumer Commission (ACCC) has granted over 20 interim authorisations relating to COVID-19 since March
- The ability for the Commerce Commission to authorise cartel conduct (price fixing, market allocation, or output restriction arrangements between competitors) during COVID-19. This change addresses a quirk in the current authorisation provisions, which mean that authorisation cannot directly be sought for cartel conduct
- The Commerce Commission to waive the authorisation filing fee (which is currently $36,800).

## Examples of collaboration that may need authorisation

While the Commerce Commission's guidance may provide some comfort to businesses supplying essential goods and services, it does not provide the same degree of certainty that authorisation provides. Authorisation provides legal protection for the relevant conduct, and means that the conduct cannot be challenged by third parties or the Commission. The guidance also does not cover non-essential goods or services, so authorisation may be the only option available for some business collaborations if other existing exceptions in the Commerce Act do not apply.

Recent authorisation cases in Australia provide an indication of the types of conduct that may require authorisation (although there are some differences between the law in Australia and New Zealand, such as the legislative exceptions to cartel conduct). Key types of conduct for which authorisation has been sought are the coordination of financial relief for customers, and measures to ensure the supply of essential goods and services (eg, coordination of supply chains). The interim authorisation decisions are typically subject to conditions, such as regular reporting and transparency about proposed arrangements, and some also expressly exclude any arrangements relating to pricing.

The following table summarises some of the conduct that has been authorised on an interim basis in Australia:

| Industry | Types of conduct |
|---|---|
| **Telecommunications** | Retail service providers agreeing to a collective industry response to economic hardship to end users arising from COVID-19, and measures to ensure the continued operation of telecommunications networks |
| **Energy** | Cooperation to ensure secure and reliable energy supply, and the integrity of wholesale markets (eg, coordinating repairs and maintenance, sharing essential personnel and inputs, and managing system stability)<br><br>Retailers agreeing a consistent minimum approach to financial relief for customers |
| **Oil** | Arrangements between oil refiners to ensure security of fuel supply (eg, coordinating supply chain activities and facilitating efficient use of refining capacity and fuel storage capacity) |

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| **Banking** | Banks agreeing to a support package for small business customers (eg, deferral of repayments for loans) and further relief programs |
| **Supermarkets** | Coordinated activities to ensure the supply and fair/equitable distribution of products |
| **Health** | Medical equipment suppliers/pharmaceutical providers coordinating in relation to the supply of medical equipment/pharmaceuticals (eg, coordinated procurement)<br><br>Private hospitals and health agencies coordinating private healthcare services, such as the allocation of certain patients or services to particular providers |
| **Travel** | Airlines coordinating flight schedules and entering into revenue sharing agreements on certain routes |
| **Insurance** | Insurance companies agreeing on financial relief to be provided to customers (eg, deferred premium payments and credits or refunds on unused travel insurance premium)<br><br>Health insurers agreeing to broaden coverage of policies to include treatment relating to COVID-19 and treatment received by phone |
| **Real estate** | Shopping centre owners agreeing on rent relief for tenants who are small/medium businesses, and collective negotiations by retailers with landlords regarding support for retail tenants |

## Alternatives to authorisation

There are certain exceptions to cartel conduct that may apply to some business collaboration (and mean that authorisation is not required). These include an exception for 'collaborative activities', for which there is an existing clearance process under the Commerce Act. However, the definition of 'collaborative activity' (which includes a requirement that the activity be carried on in cooperation by the parties) means that it can be difficult in some cases to bring a proposed collaboration within the exception. For example, the Commerce Commission interprets the requirement for carrying on an activity in cooperation as meaning that "the parties need to be combining their businesses, assets, or operations in some way in a commercial activity, or otherwise operating a commercial activity jointly. They need to be doing something more than simply agreeing how to run their separate businesses".

Again, we urge anyone who proposes to enter into an arrangement that they think may fall within the exception for collaborative activities, to seek legal advice at the earliest possible stage.

The proposed new authorisation procedures discussed above will help to address concerns about the application of existing provisions in the Commerce Act to ensure that businesses can lawfully collaborate for the benefit of New Zealanders.

If you have any questions about the issues raised in this update or the need for competition law authorisation, please contact a member of our competition law team.

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