



AUSTRALIAN COMPETITION
& CONSUMER COMMISSION

COVID-19-related authorisations

April 2021

Australian Competition and Consumer Commission
23 Marcus Clarke Street, Canberra, Australian Capital Territory, 2601
© Commonwealth of Australia 2020

This work is copyright. In addition to any use permitted under the *Copyright Act 1968*, all material contained within this work is provided under a Creative Commons Attribution 3.0 Australia licence, with the exception of:

- the Commonwealth Coat of Arms
- the ACCC and AER logos
- any illustration, diagram, photograph or graphic over which the Australian Competition and Consumer Commission does not hold copyright, but which may be part of or contained within this publication.

The details of the relevant licence conditions are available on the Creative Commons website, as is the full legal code for the CC BY 3.0 AU licence.

Requests and inquiries concerning reproduction and rights should be addressed to the Director, Content and Digital Services, ACCC, GPO Box 3131, Canberra ACT 2601.

Important notice

The information in this publication is for general guidance only. It does not constitute legal or other professional advice, and should not be relied on as a statement of the law in any jurisdiction. Because it is intended only as a general guide, it may contain generalisations. You should obtain professional advice if you have any specific concern.

The ACCC has made every reasonable effort to provide current and accurate information, but it does not make any guarantees regarding the accuracy, currency or completeness of that information.

Parties who wish to re-publish or otherwise use the information in this publication must check this information for currency and accuracy prior to publication. This should be done prior to each publication edition, as ACCC guidance and relevant transitional legislation frequently change. Any queries parties have should be addressed to the Director, Content and Digital Services, ACCC, GPO Box 3131, Canberra ACT 2601.

ACCC 04/21_21-39

www.accc.gov.au

Contents

Authorising competitor collaborations during the pandemic	1
ACCC response to authorisation applications linked to the pandemic	1
Patterns that emerged in authorised competitor collaborations	4
Rationale for authorising these competitor collaborations	7
Uncertainty	7
Temporary	7
International comparison	7
Responses in other jurisdictions	7
Advantages of the Australian approach	8

Authorising competitor collaborations during the pandemic

Competition promotes economic wellbeing and the interests of consumers. Businesses competing to win and retain customers by offering better products at lower prices is necessary for the efficient functioning of markets and to increase economic prosperity. Formal or informal agreements between competitors that substitute cooperation for competition usually undermine those benefits. Competition law, which the ACCC enforces, is designed to ensure this does not occur.

There are however some circumstances where cooperation among competitors can promote the public interest. This was the case during the COVID-19 pandemic. The rapid onset of the economic challenges caused by the pandemic, the size of these challenges and the time-critical nature of the responses created exceptions to the usual economic rules.

This became evident when businesses and government agencies, motivated by a desire to solve industry-wide problems in the public interest, acted with a unity of purpose in responding to the challenges of the COVID-19 pandemic. This extended to constructive engagement with the ACCC, which moved swiftly to provide legal protection for wide-ranging competitor collaborations that were justified given the risks and uncertainty being faced. This report provides an overview of the approach the ACCC took to authorising competitor collaborations and how that approach served the Australian economy and community at a time of crisis.

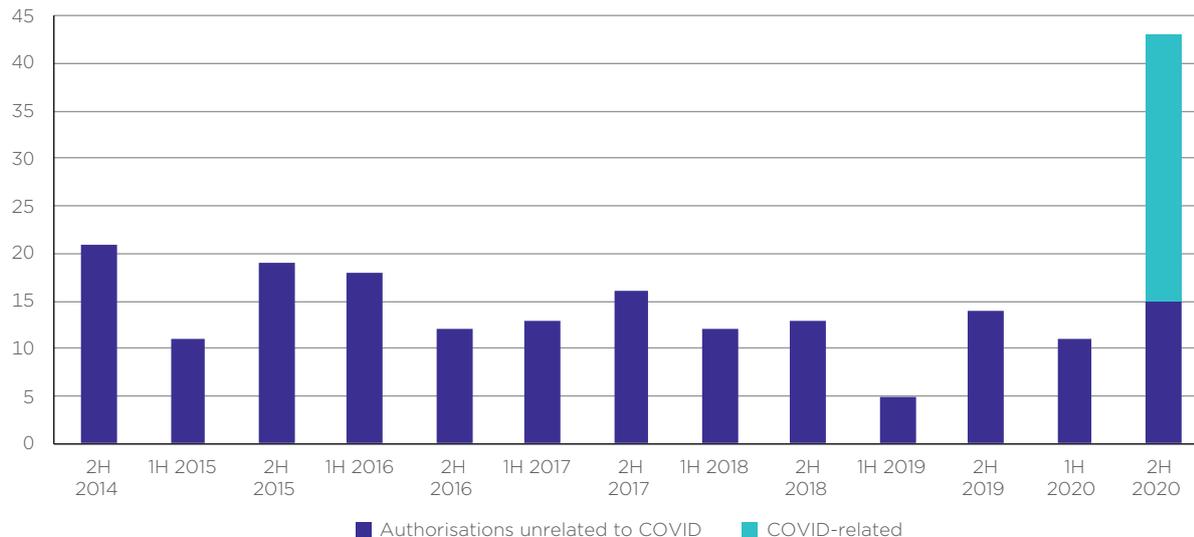
The ACCC has also produced a report on another area of its operations: [The impact of COVID-19 on consumers and fair trading](#).

ACCC response to authorisation applications linked to the pandemic

In general, Australia's prohibitions against anticompetitive conduct mean many collaborations between competitors will breach competition laws, even if potentially beneficial to society. Because of this, the Competition and Consumer Act gives the ACCC broad powers to give exemptions to businesses so they can collaborate if the likely benefits to the public outweigh the likely detriments; this power is called authorisation.

Australia's authorisation regime proved to be flexible and resilient in the face of the challenges of the pandemic. The ACCC received 33 applications for authorisation of collaborations linked to the pandemic, across key sectors of the economy and covering multiple elements of Australia's health services. This is approximately as many authorisation applications as the ACCC receives in a typical year, and most of them arrived in a 6-week period from mid-March 2020.

Figure 1: Authorisations decided



The ACCC granted authorisation to 28 of the applications. The other 5 were withdrawn by the applicants before a final determination.

Australia’s authorisation regime

Australia’s authorisation regime is a statutory process that gives the ACCC a 6-month time limit to make a determination. However, the ACCC has the ability to grant ‘interim authorisation’ during those 6 months ahead of making a final determination.

The ACCC can grant interim authorisation when it considers it ‘appropriate’ to do so; a different test to the net public benefit required on final authorisation. The ACCC applies a range of factors in determining this question, including the urgency of the conduct, potential harm to the applicant and others, and whether interim authorisation would result in irreversible changes to the market pending the ACCC’s final decision on authorisation.

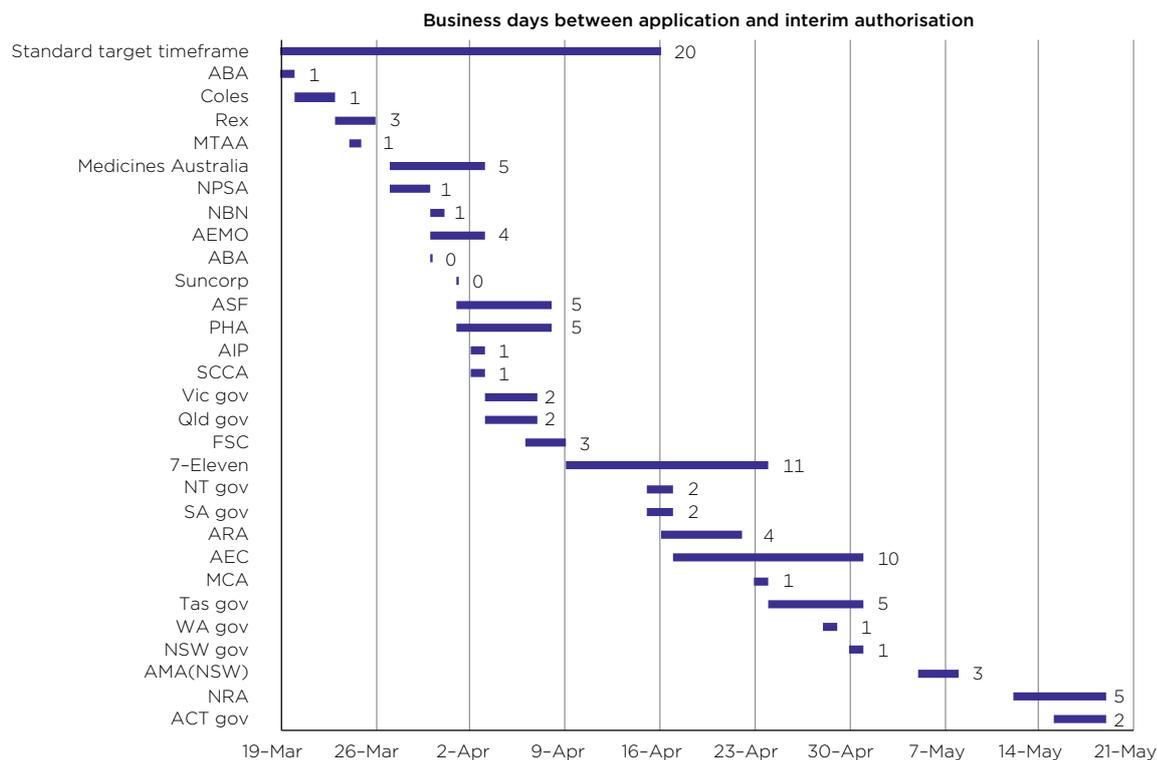
Every COVID-19-related authorisation application included a request for urgent interim authorisation. In many senses, it was these interim authorisations that were the critical decision point for the ACCC in relation to these applications.

ACCC’s rapid interim authorisations

The ACCC’s standard target is to make a decision on interim authorisation within 28 days if the request is urgent. But in the context of the immediate disruption being caused by the pandemic, this standard timeframe was too long. Through rapid adjustments to its processes and analysis, in most cases the ACCC was able to achieve turnaround times of between a few hours and a few days.

The ACCC responded quickly to inquiries about interim authorisation, and proactively engaged in informal discussions with applicants before they applied for authorisation. The table below shows the time taken to grant interim authorisation for the first 29 applications, including a comparison against the standard 28 day (20 business day) timeframe.

Figure 2: Time taken to process first 29 interim authorisations



In order to achieve these outcomes, the ACCC redirected substantial resources and focus to the COVID-19-related authorisation applications.

Non-urgent work was deprioritised. As with so many businesses and government agencies at the time, project teams at the ACCC worked through weekends and late into the night. Experts across the agency contributed their insights in various industries such as telecommunications, energy, small business and fuel. The ACCC rearranged its internal scheduling so that it could hold Commission meetings – ordinarily a weekly occurrence – multiple times a week, enabling it to make decisions on interim authorisation rapidly.

Risk-based approach

The ACCC granted interim authorisations that were broader in scope than it would ordinarily grant, recognising that businesses were unable to predict with certainty precisely the types of collaboration that would be needed. The ACCC did so without the breadth of consultation that it would ordinarily undertake, since there was strong justification for most authorisation applications, and a genuine need to respond as quickly as possible.

The ACCC ensured that the fundamental purpose of the conduct authorised was legitimately linked to a public need arising from the pandemic and that the bounds of that conduct served that purpose. Generally the conduct authorised:

- was in direct response to the effects of the pandemic
- addressed an existing or realistic future need, particularly of patients or consumers, and particularly relating to essential goods and services
- would be more efficient or quicker in addressing this need than unilateral actions or government action.

The ACCC excluded conduct that would clearly not be merited, such as price-fixing. The price for goods and services is the most visible field of rivalry between competitors, and was not something that businesses needed to agree on to overcome the challenges raised by the pandemic. At a time when many were facing financial hardship, price competition was as important as ever.

Importantly, the ACCC retained the ability to revoke or replace interim authorisations at any time if needed. This provided additional comfort when the ACCC was granting broad authorisations. To complement this ability, the ACCC imposed stringent monitoring and reporting obligations on the applicants so that it would be aware of emerging issues or problems with the conduct as it was implemented.

Patterns that emerged in authorised competitor collaborations

There were multiple challenges involved in meeting the medical needs of patients during the pandemic. There were concerns that hospital capacity might not be sufficient, and that global demand for essential medical supplies – including face masks – would cause uncertainties and disruptions to the global supply chain for these items.

Government measures to limit movement and person-to-person contact (generally referred to as lockdowns) meant that workers rapidly shifted to working from home, while many others lost their employment and businesses lost their revenue streams. This physical movement of people from offices and other workplaces to homes had direct impacts on the location and magnitude of demand for internet services and energy. The loss of employment and revenue meant that many individuals and small businesses faced financial stress.

Lockdown announcements also caused many consumers to rush to supermarkets at the same time to purchase essential goods at levels far above usual trading, and during lockdowns many consumers increased their demand for home-delivery services.

In this context, the ACCC found that the types of conduct it authorised fell into 5 categories. The first were related to the provision of health services, where each state and territory government wanted to coordinate the capacity of its public and private hospitals, so that for example one hospital might be used exclusively for COVID-19 patients and other hospitals might then be used for non-COVID-19 patients.

► Case study: Victorian hospitals

On 3 April 2020 the Victorian Department of Health and Human Services (the DHHS), on behalf of the State of Victoria, applied for authorisation on behalf of itself, specified owners of private healthcare facilities, and public hospitals and healthcare facilities. The DHHS sought authorisation to discuss, enter and give effect to contracts, arrangements or understandings which have the broad purpose of maximising healthcare capacity and ensuring the state-wide coordination of healthcare services to facilitate the most efficient and effective allocation of healthcare during the period of the COVID-19 pandemic.

On 7 April 2020, the ACCC granted interim authorisation, subject to conditions which required the DHHS to provide regular updates to the ACCC regarding the implementation of the conduct, and notify the ACCC of any other private healthcare providers who were to engage in the conduct.

Following an application from the DHHS, on 17 June 2020 the ACCC revoked the conditional interim authorisation granted on 7 April 2020 and granted a replacement interim authorisation so that the authorised conduct included the formation of ‘cluster groups’. These groups would plan for, and if necessary, coordinate responses to COVID-19 outbreaks in particular geographic regions of Victoria.

On 9 July 2020, the ACCC issued a draft determination proposing to grant conditional authorisation until 30 September 2021. On 13 August 2020, the ACCC granted conditional authorisation to the DHHS until 30 September 2021.

The relevant government agency in each other state and territory applied for – and the ACCC granted – authorisation equivalent to that obtained by the DHHS in Victoria.

The second type of conduct related to the supply of medicines and other essential items, in the context of disrupted global supply chains. Businesses sought authorisation so that they could exchange information about stock availability and if necessary, to share inventory and coordinate the distribution of supplies. For example, the ACCC granted the National Pharmaceutical Services Association authorisation to enable its members to cooperate in ensuring continued and equitable access to medicines in the event of any supply shortages due to the pandemic.

The third category arose from disruptions to ordinary market operations and consumer demand as a result of lockdowns and other restrictions on movement. Supermarkets sought authorisation to collaborate for example to respond to panic-buying and to rapidly increase their home delivery capability. As people moved in huge numbers to working from home, the ACCC authorised telecommunications companies to collaborate to ensure sufficient network capacity was available to users. Energy companies also sought authorisation to collaborate to ensure grid stability.

On the other hand, the collapse in demand for aviation prompted Rex to seek authorisation to collaborate with other airlines on domestic air services, and fuel companies to seek authorisation to collaborate in response to the flow-on effects on global fuel supply chains.

► **Case study: Coles supermarkets**

On 20 March 2020, Coles Group Limited lodged an application for authorisation, including requesting urgent interim authorisation, for Coles, Woolworths, ALDI and Metcash to cooperate in response to the COVID-19 pandemic, to ensure the supply and fair and equitable distribution of groceries to Australian consumers. On 23 March 2020, the ACCC granted interim authorisation.

The authorised conduct was linked to “authorised meetings”, primarily being meetings of the Supermarket Taskforce established by the Department of Home Affairs. The ACCC attended these meetings and so was able to monitor and participate in discussions about potential measures. The supermarkets, government agencies and other meeting participants showed genuine willingness to engage constructively to solve the many challenges that arose, and the ACCC was satisfied that the associated collaborations were formulated and implemented in the best interests of the Australian economy and consumers.

On 15 July 2020, the ACCC issued a draft determination proposing to grant conditional authorisation until 31 March 2021. On 3 September 2020, the ACCC issued a final determination granting conditional authorisation until 31 March 2021.

The fourth category related to relief measures or benefits being extended to consumers and businesses facing financial difficulties due to the economic and health disruptions being caused by the pandemic. For example, the ACCC authorised the Australian Banking Association’s members to agree on small business relief measures in the form of deferred loan repayments.

The fifth category captures a broad range of conduct responding to issues resulting from the medical, economic or social consequences of the COVID-19 pandemic. This included collaboration to promote efficient actions in response to the financial issues caused by COVID-19, such as collective bargaining by tenants with landlords.

► Case study: Rent relief

On 2 April 2020, Scentre Group and the Shopping Centre Council of Australia (SCCA) applied for authorisation on behalf of themselves and SCCA members to take urgent industry wide action to assist small and medium enterprise (SME) tenants adversely financially impacted by the outbreak of COVID-19.

On 3 April 2020, the ACCC granted conditional interim authorisation to enable SCCA members to discuss, share information, and agree and give effect to contracts, arrangements or understandings to benefit their SME tenants, which have the purpose of providing rent relief to SME tenants, including through the deferment or amelioration of the payments or rent and other payments which tenants might otherwise be obliged to pay to SCCA members. The condition required the applicants to notify the ACCC of any proposed rent relief measures not less than 24 hours before the measure is implemented.

On 17 April 2020, the Australian Retailers Association (ARA) applied for authorisation on behalf of itself and its current and future members to collectively negotiate with landlords regarding the support to be provided to retail tenants who are adversely impacted by COVID-19, including in relation to the appropriate information to be exchanged with landlords for that purpose. On 22 April 2020, the ACCC granted the ARA urgent interim authorisation.

On 12 May 2020, the National Retail Association Limited, 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 their current and future members. The NRA and these other groups applied for similar authorisation to the ARA, and also applied for authorisation to enable their landlord members to discuss and share information and make and give effect to agreements as to the nature of the relief to be offered to small and medium-sized enterprise tenants or classes of such tenants by landlords. On 19 May 2020, the ACCC granted the NRA urgent interim authorisation.

On 15 May 2020, the SCCA withdrew its application, citing the Mandatory Code of Conduct, 'SME Commercial Leasing Principles During COVID-19', introduced by the Commonwealth Government. The SCCA considered that, in light of that Code, there was not then a need for SCCA co-ordinated SME rent relief in response to the COVID-19 pandemic (of the nature proposed to be the subject of the SCCA's authorisation). On 19 May 2020, the ACCC revoked the interim authorisation granted to the SCCA.

On 2 July 2020, the ACCC issued draft determinations proposing to grant the ARA and the NRA authorisation, subject to record keeping and reporting conditions. On 6 August 2020, the ACCC issued a final determination granting conditional authorisation to the ARA and the NRA until 1 September 2021.

On the other hand, there were some types of collaboration where the ACCC was not willing to grant authorisation. The ACCC was able to foreshadow likely concerns in early discussions with businesses, in some cases before they formally applied for authorisation. This meant that businesses either revised potentially problematic collaborations or did not pursue them at all.

Some enquiries from businesses that did not result in authorisation appeared more opportunistic in seeking to obtain cover for conduct not in the best interests of consumers and the community. Other enquiries appeared more in the nature of a 'nice to have' - prompted by increasing awareness of the ACCC's flexibility in responding to COVID-19-related authorisation applications, rather than a genuine need.

Rationale for authorising these competitor collaborations

The types of collaboration authorised during the pandemic would not be conceivable during ordinary times. Their breadth was merited and justifiable, but symptomatic of an extreme situation.

Uncertainty

The effects of the pandemic on the economy and society, both immediate and longer-term are still emerging but were highly uncertain in the early days of the pandemic.

Fundamental to the ACCC's decision-making was a recognition that no one was able to predict with any certainty how the pandemic would affect Australians and the economy, and therefore exactly what types of collaboration would be needed.

This meant that businesses legitimately needed the flexibility to implement measures and to change their approach rapidly as it was needed. The ACCC therefore took a relatively flexible and risk-based approach to the conduct it authorised.

Temporary

The critical dimension to the authorisations, apart from their breadth, was their duration. While the ACCC was willing to move quickly and be flexible, it was also explicit that this breadth meant that their duration should be strictly limited so that businesses would return to competing on their merits as normal as early as practical, for the benefit of the economy and the community.

Although there were obvious difficulties predicting how long authorisations would need to remain in place, the ACCC aimed to identify a sensible end date.

As a result, the ACCC's final authorisations, which were delivered 4 or 5 months after the interim authorisations, were limited in duration to a year or less. For example, the first 2 authorisations expired on 31 December 2020, and the rest were scheduled to expire progressively during the year until 30 September 2021. Three extension applications received so far are summarised at the end of this report.

International comparison

The ACCC was far from unique in the world as a competition regulator faced with the dilemma of an apparent need for a breadth of competitor collaboration that it would ordinarily act strongly to prevent. However it was relatively unique in how it was able to respond to that dilemma.

Responses in other jurisdictions

New Zealand is the country with the most comparable regime for authorising competitor collaborations. However a key difference is that New Zealand – at the outset of the pandemic – did not have the ability to grant interim authorisations, which was an essential foundation of the Australian response. New Zealand laws were later changed on a temporary basis to introduce interim authorisations, although the ACCC understands that these ultimately were not sought.

Many other jurisdictions exclude efficiency-enhancing collaborations from their prohibitions. This means they do not need to issue authorisations in the same way the ACCC needs to in specific circumstances. For example, the European Union's competition laws do not prohibit conduct that contributes to improving the production or distribution of goods or to promoting technical or economic progress. This means that businesses self-assess against the relevant criteria, without a system for the regulator to confirm they are not in breach of competition laws.

Some jurisdictions were able to – and did – draw on legislative provision for intervention at a government ministerial level to override competition laws in times of emergency.

In countries without an authorisation regime or where emergency government interventions were not available, businesses were left either to seek comfort from their legal advisers that their proposed collaborations fell within the carve-outs from competition law prohibitions, or to seek assurances from competition regulators that they would not pursue them for potential breaches.

Competition regulators in many of these countries issued statements regarding how they would exercise their enforcement discretion. These were intended to provide reassurance to businesses about what conduct they could engage in to respond to the pandemic, without being concerned about enforcement action by the regulator.

A key challenge was that the statements of enforcement discretion needed to be expressed at a sufficient level of generality or abstraction to be safe and satisfactory statements of principle, while still providing sufficient specificity for businesses to self-assess whether they meet the criteria.

In response to this challenge, some jurisdictions established informal routes for consultation with the competition regulator to confirm the applicability of the general statements of principle.

Advantages of the Australian approach

Set against this background, it can be seen that there are several advantages to the approach that the ACCC was able to take in Australia.

The ACCC authorisation process is tailor-made for assessing proposed competitor collaborations and there are established principles and practices that guide the ACCC through the complex process of identifying and weighing public benefits and public detriments.

The ability for the ACCC to grant interim authorisations meant that the ACCC could be flexible. It could tailor its authorisations – including the scope of the conduct authorised and the conditions it might impose – by reference to specific proposals. The ACCC could consider real-world examples as the basis for its decision-making, establishing and applying principles in an incremental way. Critically, the ACCC could impose conditions in its authorisations, thereby imposing reporting and monitoring obligations and express limits on the authorised conduct.

Another consequence of the ability for businesses to seek specific authorisation from the ACCC for proposed collaborations is that the ACCC was able to obtain an economy-wide view on the nature and extent of competitor collaboration occurring across Australia. This enabled the ACCC to identify patterns and to formulate and change its approach as-needed, and to keep government informed of emerging issues.

A final benefit of Australia's authorisation regime is that it gives applicants formal legal protection from potential enforcement action under competition laws. This includes preventing third parties from bringing actions. Even if the ACCC had issued a statement of regulatory forbearance, as was the approach in other jurisdictions, this would not have prevented third party actions, a real possibility that could not be ruled out considering the extent of disruption that the pandemic caused.

Postscript: Applications for extension

Around the time of publishing this report, the ACCC considered 3 applications to extend COVID-19-related authorisations that would otherwise have expired on 31 March 2021:

- from 7-Eleven in relation to arrangements to close or reduce the hours of some of its retail stores due to ongoing low levels of demand
- from Private Healthcare Australia in relation to broadening private health insurance and relief related to the pandemic, including particularly the release of deferred claims liability as health services resume
- from Coles on behalf of supermarkets to continue their preparedness for future lockdowns and other responses to the pandemic.

The ACCC granted interim authorisations to extend all 3 of these, however in the case of Private Healthcare Australia, the ACCC declined to grant interim authorisation for elements that would have broadened the scope of conduct authorised, including in relation to the release of deferred claims liability. The applicants were unable to satisfy the ACCC – for the purposes of its decision on interim authorisation – that such broadening was merited when set against the benefits from allowing competition and unilateral decision-making to determine outcomes. On 8 April 2021, PHA withdrew its application for extension of its authorisation.

The ACCC will now consider these 2 remaining extension applications and proceed to draft and final determinations according to its usual statutory processes. Twenty-one other authorisations remain, expiring by 30 September 2021.



AUSTRALIAN COMPETITION
& CONSUMER COMMISSION

