



Law Council
OF AUSTRALIA

Business Law Section

3 April 2020

Stephen Ridgeway
Commissioner
Adjudication and Notification Branch
Australian Competition & Consumer Commission

By email: stephen.ridgeway@accc.gov.au

Dear Mr Ridgeway,

Government's COVID-19 response and possible Class Exemption

The Competition & Consumer Committee of the Business Law Section of the Law Council of Australia (the **Committee**) welcomes the Australian Competition & Consumer Commission's (**ACCC**) recent statement regarding its response to the COVID-19 pandemic and the speed at which it has assessed applications for urgent interim authorisations to date.

Key Points

1. In the coming weeks, there may be merit in giving consideration to whether a class exemption could be a somewhat faster and more flexible competition law exemption to facilitate industry cooperation where it is carried out for the purposes of the whole of government response to the COVID-19 pandemic.
2. The government may increasingly turn to the private sector to facilitate the supply and distribution of essential goods and services to patients, consumers and communities more generally. This may require industry to work together.
3. While the current urgent interim ACCC authorisation process is working well, and the Committee appreciates the ACCC's efforts to date, the Committee suggests giving consideration to whether a class exemption issued by the ACCC under s 95AA of the CCA might be a useful vehicle to exempt certain critical, government directed industry cooperation from competition laws on a temporary basis. This is particularly the case if due to COVID-19 risks federal parliament is unable to resume and pass emergency legislation for the purposes of the exception in s 51(1)(a) of the CCA. This could apply where that cooperation was the subject of a government request or direction or alternatively a request, direction or approval of a government established body such as the National COVID-19 Cooperation Commission. Businesses wishing to engage in other industry cooperation would continue to seek ACCC authorisation as currently.
4. The Committee is ready and willing to assist the ACCC in the event that the ACCC believes that further consideration of using a class exemption is worthwhile.

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Issue

There may be merit in giving consideration to whether a class exemption could be a somewhat faster and more flexible competition law exemption for some conduct.

5. In order to effectively respond to the rapidly escalating risk in Australia associated with COVID-19, state and federal governments may increasingly require a range of urgent assistance from industry to facilitate the supply of essential goods and services to patients, consumers and communities generally. Overseas experience suggests that governments have, for example, engaged with industry in relation to the supply of medical supplies and devices, protective equipment, transport, accommodation and other essential services. We expect that carrying out these government directions will often require competitors within an industry to collaborate and work together.
6. In the absence of specific legislative exemption for the purposes of s 51(1)(c) of the CCA, collaboration between competitors as part of the government's COVID-19 response will usually require ACCC authorisation. The Committee welcomes the [ACCC's recent statement](#) regarding its response to the COVID-19 pandemic, including its approach to urgent interim authorisations. Over the fortnight, the ACCC has granted a number of urgent interim authorisations, as quickly as within 2 business days of receiving the application. The ACCC is to be commended for this speed. In the Committee's experience, it takes a further 1 – 5 business days, depending on the context, to prepare the authorisation application, consult with the ACCC in relation to a draft and submit a final application.
7. While the current authorisation process is working well, in the event that current circumstances escalate quickly, it is possible that exemption from competition laws may be required in an even shorter time frame. From a practical perspective, this of course could pose difficulties for both clients and the ACCC, particularly if the number of urgent authorisation applications continues to increase.
8. While government could in theory pass urgent legislation to exempt certain conduct for the purposes of the exception in s 51(1)(a) of the CCA, we understand that parliament may not reconvene in the coming months due to COVID-19 risks.

Proposal

If circumstances escalate, a class exemption issued by the ACCC might provide a faster exemption for certain critical, government directed business coordination.

9. The Committee suggests that the ACCC may wish to further consider the possibility of issuing a class exemption under s 95AA of the CCA for the purposes of exempting **critical, government directed industry coordination** from competition laws on a temporary basis.
10. As the ACCC is aware, s 95AA enables the ACCC to create a 'safe harbour' for businesses by issuing a legislative instrument specifying that one or more provisions of the CCA do not apply to conduct specified in the determination. The ACCC can only issue a class exemption where the conduct would not have the effect of substantially lessening competition, or alternatively, where there is a net public benefit (s95AA(1)). The ACCC can limit the conduct which is exempt in a number of ways, including by specifying the class of persons affected, the circumstances which must apply or by imposing conditions on the conduct (see s95AA(2)(b)).
11. For conduct within its scope, a class exemption obviously removes the need for businesses to lodge individual applications for authorisation. Once the exemption is

in place, businesses are able to self-assess whether their proposed conduct falls within the class exemption so that they can proceed without authorisation.

12. A number of safeguards apply:

- First, class exemptions are legislative instruments and so are subject to parliamentary scrutiny and to disallowance (see s95AA(6)).
- Second, the ACCC has the power to impose conditions on any class exemption, which might include ACCC notification requirements for example and/or a reporting obligation to the relevant government or government entity.
- Third, the ACCC has the power to withdraw the benefit of a class exemption in a particular case by issuing a notice under s95AB.

What might a class exemption look like?

13. The Federal Government is coordinating a whole of government response to COVID19, which may increasingly involve directing or requesting that certain industries assist with urgent goods or services for government operations (including treatment of COVID-19 patients), consumers or communities generally. The Committee suggests that consideration could be given to whether a class exemption might be an efficient mechanism to create a safe harbour for businesses complying with such a government direction or request. For example, the class exemption could potentially operate as follows:

- where the [National COVID19 Coordination Committee](#) (or potentially a relevant Minister such as the Minister for Home Affairs or the Minister for Health) has issued a ***direction or request (or otherwise approved)*** a class of industry participants to work together to supply goods or services for the purposes of the government's COVID-19 response
- and the goods or services are ***necessary*** to assist patients, consumers or communities during the pandemic
- then any ***conduct*** carried out pursuant to, and for the purposes of, that direction would be exempt
- from all provisions in ***Part IV*** of the CCA.
- providing that the proposed cooperation is first notified to the ACCC

14. Notification to the ACCC would provide the ACCC with transparency about the kinds of industry participants and conduct that would become exempt pursuant to the class exemption. If the ACCC had concerns in a particular case, it would be open to the ACCC to issue a written notice under s 95AB of the CCA withdrawing the benefit of the class exemption in that particular case.

15. A similar structure has been used in the context of legislative exemptions of s 51(1)(a) of the CCA. See for example the [Liquid Fuel Emergency Act 1984 \(Cth\)](#) which allows the Minister to direct industry participants to do certain things in the event of a national liquid fuel emergency and authorises, for the purposes of s 51(1)(a) of the CCA, any conduct done in compliance with such a direction (see s 43).

16. Importantly, if this concept were developed further, the Committee does not consider that all COVID-19 related industry collaboration should be subject a class

exemption, but only specified critical industry collaboration which is the subject of a government direction, request or approval. Other industry collaborations which are initiated by industry would continue to be dealt with through the urgent interim authorisation process.

Next Steps

17. The Committee notes and welcomes the formation of the ACCC's COVID-19 taskforce and the range of measures the ACCC has already taken in light of the pandemic. This proposal is intended to assist the ACCC in its ongoing consideration of how it can best engage with businesses and governments about potential coordination that supports Australia's response to the pandemic. In the event that the ACCC considers further consideration of a class exemption to be desirable, the Committee is ready and willing to assist the ACCC and/or Treasury in any way with the preparation of such a class exemption.
18. If you have any questions please contact the Chair of the Competition and Consumer Committee Geoff Carter (geoff.carter@minterellison.com or +61 3 8608 2090) in the first instance.

Yours sincerely,

A handwritten signature in black ink that reads "Greg Rodgers". The signature is written in a cursive, flowing style.

Greg Rodgers
Chair, Business Law Section