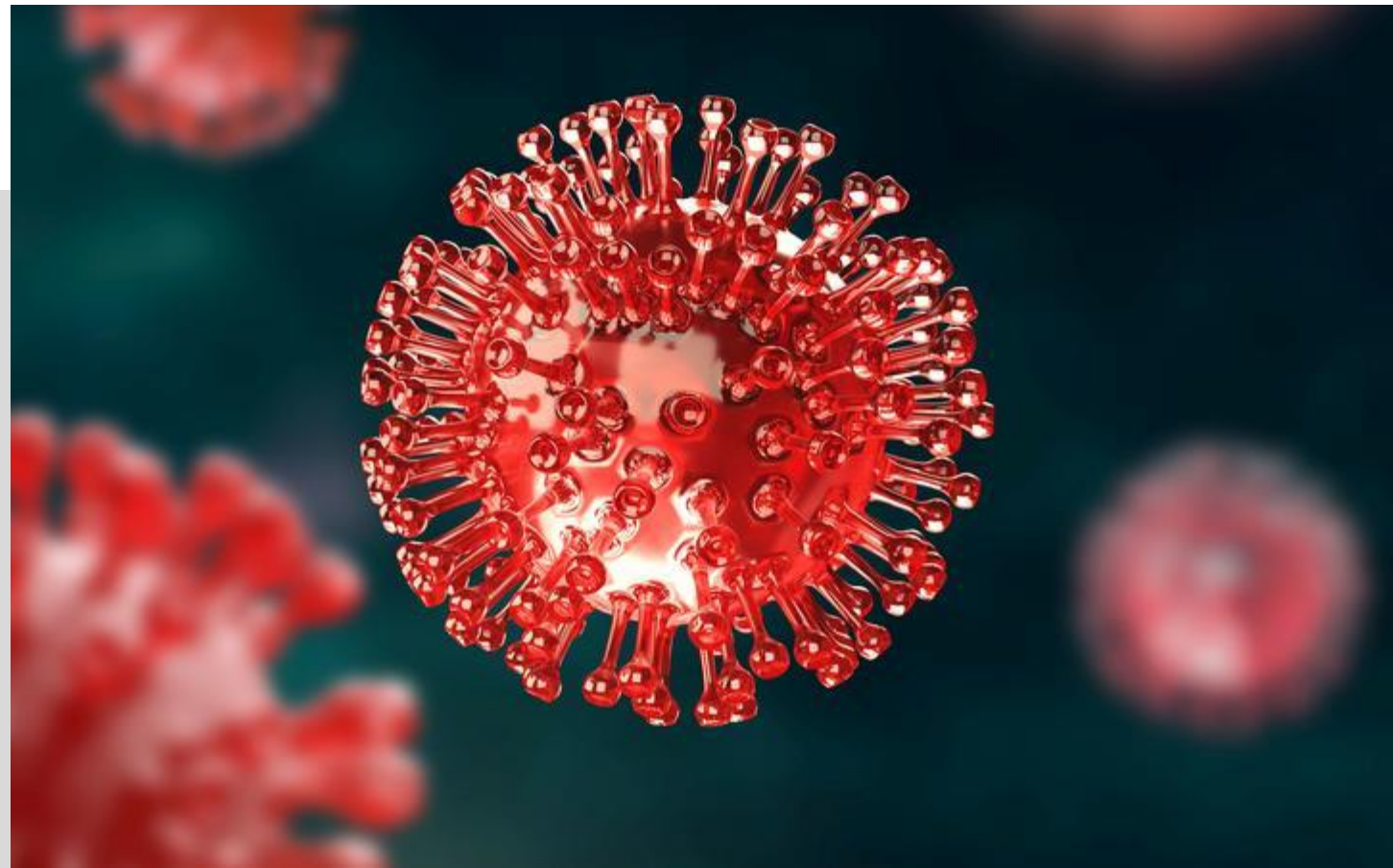


Competition law in the age of COVID-19

6 October 2020



Matthews Law

COMPETITION · REGULATION · POLICY · STRATEGY

Cartels

– *per se prohibition*

PRICE FIXING

Fixing / controlling / maintaining:

- price, discount, allowance, rebate or credit
- for/in relation to goods or services
- supplied or acquired by 2 or more parties in competition.

RESTRICTING OUTPUT

Preventing / restricting / limiting:

- the (likely) production of goods;
- the (likely) capacity to supply services;
- the (likely) supply of goods/services; or
- the (likely) acquisition of goods/services
- supplied or acquired (as applicable) by 2 or more parties to the CAU in competition with each other.

MARKET ALLOCATING

Allocating between parties:

- the persons or classes of persons to/from whom the parties supply/acquire goods/services; or
- the geographic areas in which the parties supply/acquire goods/services
- in competition with each other.

New Zealand experience

- lead up to lockdown

2020 EVENT

- 21 MARCH** • Government introduces four level alert system, places country at alert level 2
- 22 MARCH** • Minister of Commerce and Consumer Affairs asks NZCC “to take account of the exceptional circumstances created by COVID-19 when monitoring business behaviour”
 - *“Now is not the time for strict competition rules to get in the way of common sense and legitimate collaboration as business responds to COVID-19”*
 - NZCC’s response –
 - *“no intention of taking enforcement action under the Commerce Act against businesses who are cooperating to ensure NZers continue to be supplied with essential goods and services during this unprecedented time. If you need to work with your competitors to share staff or distribution networks or take other measures to ensure security of supply, you are able to do this”*
- 23 MARCH** • Alert level raised to 3, announcement country will be alert level 4 in two days
• NZCC sends newsletter of their response to COVID-19 to stakeholders
- 24 MARCH** • **“Government Policy Statement** on Essential Goods and Services Such as Grocery Products in Response to COVID-19” issued

New Zealand experience

- lockdown and beyond

2020 EVENT

- | | |
|-----------------|--|
| 25 MARCH | <ul style="list-style-type: none">• Alert level 4 LOCKDOWN – all business closed except for essential services<ul style="list-style-type: none">○ price gouging complaints against the essential businesses allowed to continue operating<ul style="list-style-type: none">▪ MBIE sets up email to send complaints to |
| 1 MAY | <ul style="list-style-type: none">• NZCC publishes Business collaboration under COVID-19 guidelines<ul style="list-style-type: none">○ Pragmatic approach but no substantive change to the law |
| 15 MAY | <ul style="list-style-type: none">• COVID-19 Response (Further Management Measures) Legislation Act<ul style="list-style-type: none">○ Passed under urgency – 10 days from introduction to royal assent○ Temporarily streamlines authorisation process for cartels and agreements that SLC, NZCC may<ul style="list-style-type: none">▪ issue provisional authorisations▪ dispense with draft determinations and conferences▪ waive application fee○ Same authorisation test: public benefit > detriment |
| 27 MAY | <ul style="list-style-type: none">• NZCC publishes guidelines for authorisation under the temporary amendments |

Observations

– *thoughts for the future*

- **Timeframe**

- Short run/medium run/long run

- **Industry**

- Essential/non-essential
- Level affected (and timeframe) – aviation, hospitality et cetera versus grocery

- **Type of collaboration**

- Information sharing – coordination – supply chain/logistics, staffing, safety issues

- **What we can expect based on past events**

- GFC – banking mergers permitted it – then needed regulation
 - But COVID-19 not like a normal recession
- Mergers to enable cost sharing when revenue has dropped and unlikely to be regained in the short – medium (possibly long) term

- **No reason to depart from traditional anti-trust analysis – it is the industry/counterfactual/timing**