



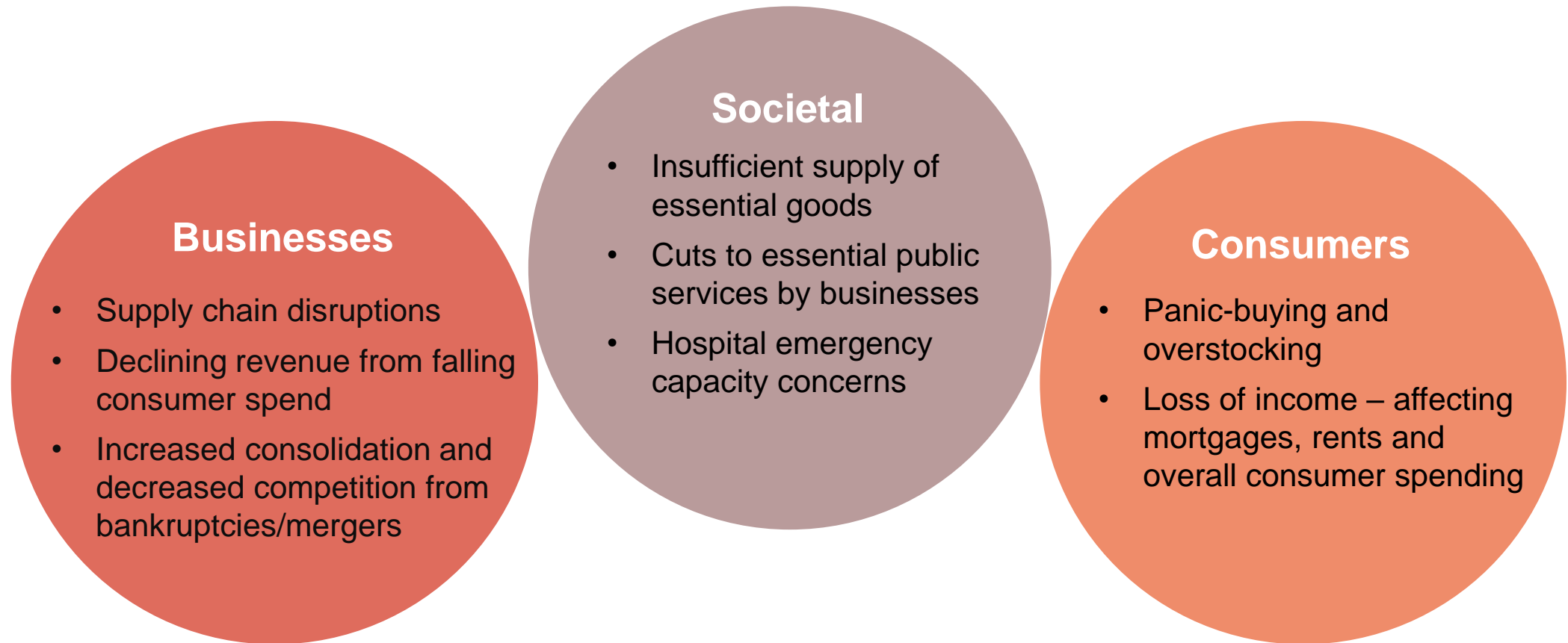
The Rise of the Visible Hand

COMPETITION LAW AND COVID-19

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Market Issues Posed by COVID-19

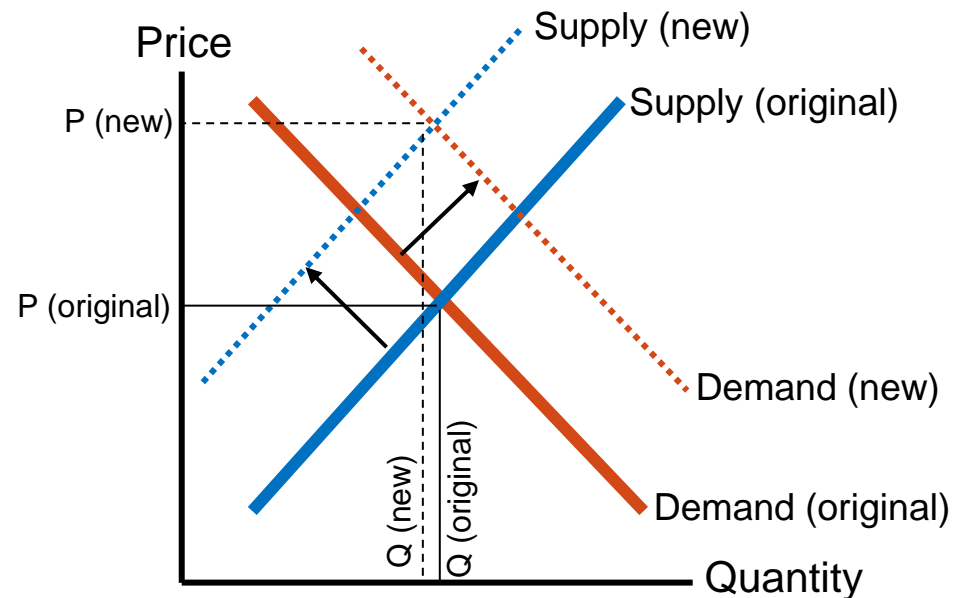
COVID-19 has created a significant number of market issues which cut across consumers, businesses and society as a whole



The COVID-19 Economic Landscape

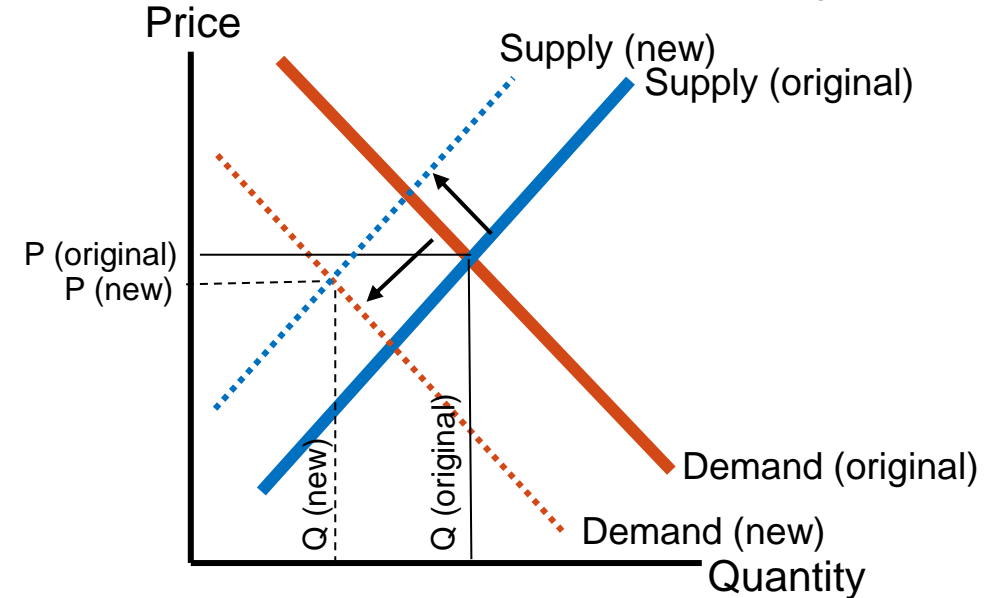
As a result of these market issues, the COVID-19 economy can be characterised by two tendencies

Sharp rise in demand and fall in supply



- Consider markets for food and groceries.
- During confinement, people are obliged to buy their shopping next door.
- Markets become defined geographically in a narrow way.
- Local shops may become dominant during the crisis and gaining considerable market power.

Sharp fall in demand and supply



- Consider travel and offline entertainment industry.
- During the period of restrictions and confinement, the supply is restricted by the Government.
- Demand is falling due to health precautions.
- Online entertainment is gaining considerable market power as a substitute for both, travel and offline entertainment.

The Law: Prohibitions

Under Part IV of the *Competition and Consumer Act 2010 (Cth)*, competitors are prohibited from engaging in anti-competitive conduct

- A person must not engage in cartel conduct by making an agreement, arrangement or understanding with a competitor (or potential competitor) that has:
 - purpose, effect or likely effect of price fixing (s 45AD(2));
 - purpose of restricting output (s 45AD(3)(a));
 - purpose of market sharing (s 45AD(3)(b)); or
 - purpose of bid rigging (s 45AD(3)(c)).
- Whether dealing with competitors or any other industry participants, a person (s 45):
 - Must not make or give effect to any agreement, arrangement or understanding that has the purpose, effect or likely effect of substantially lessening competition (SLC);
 - Must not engage in “concerted practices”, which include any form of cooperation (or conduct likely to lead to cooperation) that has the purpose, effect or likely effect of SLC.

The ACCC's Response to COVID-19

“At the time of crisis such as in war or with a pandemic, where there is a common enemy to fight for the nation’s survival, and so a sense of national purpose, co-ordination is both efficient and carries little or no downside” (Rod Sims)

Authorisations (s 88 of CCA)

- The ACCC may authorise cartel conduct if it is satisfied that the benefit to the public from the conduct outweighs any public detriment, including from a lessening of competition. (s 90(8))
- The ACCC may authorise other conducts (concerted practices, SLC agreements) if it is satisfied that the the conduct would not have the effect or likely effect of SLC or that the public from the conduct outweighs any public detriment (s 90(7)).
- The ACCC proactively adjusted the focus of its regulatory activities in light of COVID-19 – in particular, through establishing a COVID-19 Taskforce and fast-tracking potential authorisations to support coordination between competitors that are in the ‘public interest’.

Class Exemptions (s 95AA of CCA)

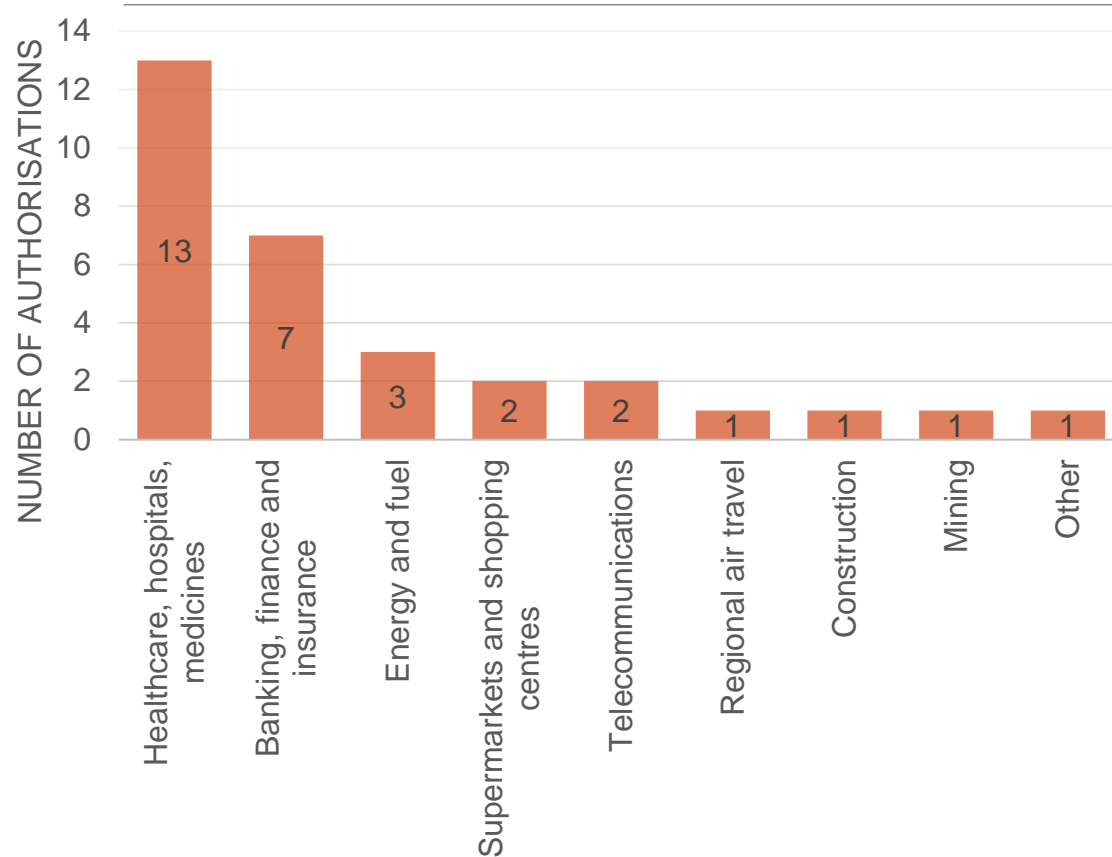
- No class exemptions have been granted yet.
- The ACCC is currently considering a possible class exemption for ocean liner shipping and issued a discussion paper in December 2019 – however, this was prior to (and is unrelated) to COVID-19. Due to COVID-19, the ACCC has postponed public consultation on this until further notice.

Consumer Complaints

- The ACCC has intervened to resolve consumer complaints over issues such as cancellations of services, price gouging, product claims and private health insurance coverage.
- The ACCC formed a COVID-19 Taskforce.

ACCC Authorisations in COVID-19

The ACCC has authorised coordination between competitors in a number of strategic industries for the purpose of fighting COVID-19



Key Insights

- Nearly all states and territories have applied for and been granted authorisation for **private hospitals and healthcare facilities** to coordinate for the purpose of maximising healthcare capacity.
- Most applications for interim authorisation were made **in response to government calls** for a coordinated response to specific issues.
- On average, the ACCC has approved interim authorisations within **one week**.
- To date, **the ACCC has not rejected any application for interim authorisation** of proposed conduct in light of COVID-19.

Limits to Authorisations

However, the ACCC has imposed limits and safeguards on coordination, and have otherwise begun to review earlier interim authorisations

- **The ACCC is imposing increasingly strict conditions on collaborative activity when granting interim authorisations. Notable conditions in the current authorisations are (*Howarth and Alexander, 2020*):**
 - Time limits of 6-12 months.
 - Restrictions on price-fixing behaviour, increasing prices and sharing confidential information on pricing, margins or profits.
 - Monitoring and oversight by government and regulatory bodies.
 - Arrangements being open to other applicants wishing to participate.
 - Participants being able to opt out of arrangements.
 - Requirement that ACCC be notified of material agreements.
- **A number of the interim authorisations granted at the height of the crisis have since been revoked or varied:**
 - Coles, Woolworths, Metcash and ALDI authorisation – On 9 June 2020, the interim authorisation dated 26 March 2020 was revoked and substituted with a narrower interim authorisation limited to conduct related to select Australian Government COVID-19 taskforces.
 - Scentre Group and Shopping Centre Council of Australia authorisation – On 19 May 2020, the ACCC revoked the interim authorisation dated 3 April 2020 given a change in circumstances since the interim authorisation was issued.

Approach to Horizontal Collaboration

Competition authorities worldwide are also encouraging horizontal collaboration between competitors in response to COVID-19



Australia

- Individual authorisation in required.
- No class exemptions have been granted yet.
- The ACCC formed a COVID-19 Taskforce.



United Kingdom

- Individual authorisation is not required/available.
- CMA has adopted the general approach that it will not take any action in respect of coordination undertaken solely to address COVID-19.
- The application of the Competition Act 1998 was suspended in selective circumstances, for instance to allow supermarkets to collaborate on supply.



European Union

- Individual authorisation is not required/available.
- Collaborative agreements can be exempt if they have positive economic effects and/or benefit consumers.
- EU authorities have expressed willingness to provide guidance and comfort letters in respect of whether conduct contravenes EU competition law.



United States

- Individual authorization is not required/available.
- DOJ and FTC may provide their opinion on whether conduct contravenes the antitrust laws (although conduct may still be challenged).
- In COVID-19, DOJ and FTC set out an expedited process for considering requests and noted that they will consider the exigent circumstances of COVID-19 in reviewing collaborations.



New Zealand

- Individual authorization is not required/available.
- Collaborative conduct can be exempt if it is not for the dominant purpose of lessening competition.
- NZCC issued guidelines on its approach to collaborative conduct during the COVID-19 and announced that it has no intention of talking enforcement action against business who are cooperating.

Historical Lessons on Collaboration

Past historical examples of horizontal collaboration cast doubt on its effectiveness in achieving public interest objectives

- **Germany (1890s – 1930s):** private cartels were encouraged by the government and then were solely replaced by government-run arrangements because of their incline in pursuing their own interests.
- **USA, the Great Depression (1930s):** economic research on the impact of periods of permissiveness toward collusion suggests that firms allowed to cooperate in the early 1930s were more effective at colluding tacitly when antitrust laws were again actively enforced (*Taylor, 2002*).
- **Japanese depression cartels (1950s – 1980s):** research demonstrates that cartels were almost never found in Japan's most successful industries. This casts doubt on any claims that crisis cartels can positively correlate with the competitive performance (*Porter, Takeuchi and Sakakibara, 2000*).

Pros & Cons to Horizontal Collaboration

Is practising collusion good for perfecting it?

PROS

- Scarcity may lead to **parallel markets, fraud and criminality**.
- Urgency of production (achieved by supply coordination).
- Fairness of allocation (facilitating fairer access, access for those most in need and access in remote or rural areas).
- The coordination between some competitors of essential products or services is necessary to **limit the spread of the virus** or to treat it or to discover a vaccine against it.
- In times of a rapid and short increase in demand, the companies may be reluctant to invest to increase supply **if they expect this newly increased demand will go away** (*Ercolano, 2020*).

CONS

- Where supply falls short of increased demand, **firms have all the incentive to arbitrage excess stock from elsewhere**, increase production and expand capacity (*Schinkel and d'Ailly, 2020*).
- Prices above average cost soon attract new production. Margins dissipate when supply and demand converge again at a price equal to the marginal cost of production (*Schinkel and d'Ailly, 2020*).
- **It is not clear that all that competitors can coordinate on better solutions faster**. It requires a lot of communication and contracting hindered by conflicting incentives and different information (*Schinkel and d'Ailly, 2020*).
- There is a risk that **legitimate collaboration may unintentionally go beyond** what is necessary to achieve the beneficial aims.
- Competitors will not be trying to outperform the others on **reliability of supply** (*Ormosi and Stephan, 2020*).
- Shortages in supermarkets resulted not from any **fundamental problems with supply but from panic buying and stockpiling** (*Ormosi and Stephan, 2020*).

Price Gouging During COVID-19

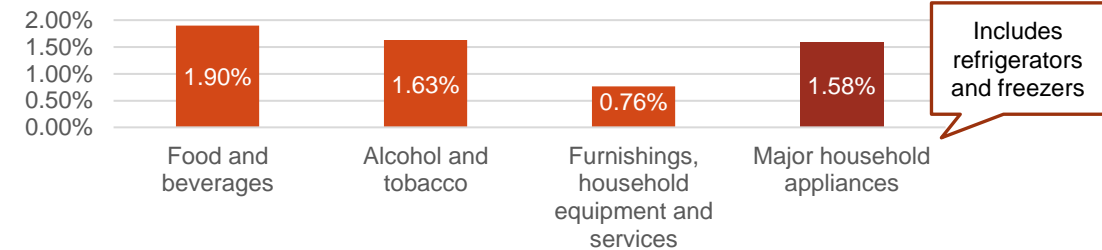
There have been a number of instances of price gouging behaviour since the onset of COVID-19

Defining 'Price Gouging'

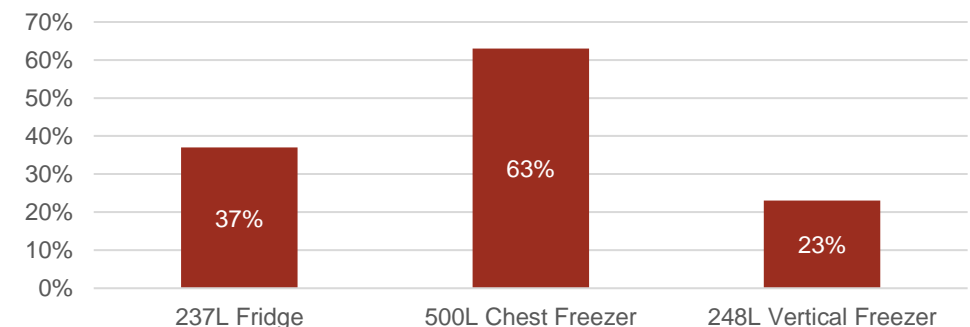
- Price gouging is not the same as price increases from the normal operation of market mechanisms.
- Generally, occurs where company **significantly increases** prices beyond what is **reasonable or fair**, potentially alongside an **abuse of market power**.
- In practice, difficult to clearly define 'price gouging'.
- During COVID-19, has been observed in prices of face masks, hand sanitiser, 'whitegoods', etc.
- One potential indicator of price gouging is if prices increase significantly beyond the average (see fridges case study)

Case Study: Fridges

Changes in CPI of selected product groups between Dec 2019 Quarter and Mar 2020 Quarter¹



Price Increase of selected fridges between ~Oct 2019 and ~Mar 2020²



Sources: ¹ ABS 6401.0 Consumer Price Index, Australia, March 2020 dataset; ² CHOICE whitegoods price hikes between October 2019 and March 2020 analysis.

Approach to Price Gouging in COVID-19

In Australia, price gouging is not illegal under competition law, whereas some other jurisdictions prohibit the charging of ‘excessive prices’



Australia

- Generally, price gouging is not illegal. Misleading the customers is.
- “Prices (speaking about prices for petrol) should at worst be below 120 cpl and heading considerably lower. The ACCC will continue to apply pressure to achieve this pricing” (Rod Sims, 2020)
- Order under Biosecurity Act on 30 March 2020 prohibited price gouging on ‘essential goods’.



United Kingdom

- Charging excessive and unfair prices for products is prohibited.
- CMA has recently opened an investigation into suspected unfair price increases of hand sanitizer
- CMA will assess whether it should advise Government to consider taking direct action to regulate prices.



European Union

- Under EU competition law, an abuse may consist of imposing unfair purchase or selling prices, for instance through excessively high prices.
- However, prohibitions apply only to dominant firms.



United States

- Price gouging is not illegal in the US.
- The FTC has explicitly criticised proposals to address price gouging and has avoided intervening in crises such as Hurricane Katrina, where there were alleged instances of price gouging.



New Zealand

- Price gouging is not illegal. However, misleading customers is.
- Ministry of Business, Innovation and Employment (MBIE) established a ‘Price Watch’ inbox in March 2020 to allow public to report price gouging.
- MBIE is monitoring price increases and liaising with industry to understand reasons.

Pros & Cons of Australian Approach

Is Australia's non-interventionist approach to price gouging justifiable?

PROS

- Price ceiling interferes with the **regular functioning of the market**.
- Price ceiling may “expropriate” firms of the fruits of their investment and innovation.
- Price ceiling does not solve the problem of excess demand. If prices rise, firms may increase (or start) production, attracted by the possibility of high profits. Suppressing such price signals **weakens the possibility of a supply response** (*Motta, 2020*).
- Price gouging is close to **impossible to define** in a way that creates any kind of regulatory certainty. If defined vaguely and poorly, it can discourage efficient functioning of markets (*Montgomery, Baron & Weisskopf, 2020*).
- Loss in supply puts upward pressure on prices. Higher prices lead to less consumption of products, which can have a positive effect on **stabilising the overstocking behaviour**.

CONS

- In **times of emergency** and scarcity created by fear, the **market forces may not work to achieve stable equilibrium**. If there is no prohibition on excessive pricing, it can lead to unstable and unsustainable price growth. Unsustainable price growth leads to a great panic and create an unfair distribution where only the rich have access to the scarce commodity.
- Price spikes are due to sudden increases in demand or captivity of consumers and bear **little relation to firms' investment or effort**. Thus, the government's intervention is justifiable (*Motta, 2020*).
- During the period of confinement, some shops may become **dominant** during the crisis and gain considerable market power. This can lead to some of those shops taking advantage of consumers' impossibility to shop around and set a high price on the scarce commodities.

Discussion Questions on Horizontal Collaboration

- What are the main benefits and detriments of the authorisation process?
- Should the ACCC make a class exemption determination? Would it be more efficient than authorisation?
- “Were our competition authorities right to pin their hopes for the urgently needed supply efforts on cooperation between competitors?” (*Schinkel and d’Ailly, 2020*)
- How can we be certain that coordination will not go beyond what is necessary and that it will stop once the crisis is over?
- What are the mechanisms that businesses should accept to avoid the risk of unintentional collaboration? What are the safeguards?
- Is the problem really about competition law? Peter Ormosi and Andreas Stephan argued that the shortages in supermarkets resulted not from fundamental issues with supply but from panic buying and stockpiling. Could it be the case that the intervention of the authority to balancing out stock is excessive and unnecessary measure?
- If output under competition was not sufficient, why would cartel output be any better?
- Is there a risk of a potential shift from pandemic cartels (supply constraints) cartels to post-pandemic cartels (demand contraction)? (*Howarth and Alexander, 2020*)

Discussion Questions on Australian Approach to Price Gouging

- In his speech in March 2020, Rod Sims confirmed a long-standing position that price gouging is not illegal in Australia. However, misleading the customers is. He then said: “We have, however, looked into allegations of price gouging and called it out when we have seen it.... Prices (speaking about prices for petrol) should at worst be below 120 cpl and heading considerably lower. The ACCC will continue to apply pressure to achieve this pricing”. Should the ACCC apply pressure against price gouging, if so, how?
- In circumstances of a strong imbalance between demand and supply whether the benefits of a temporary price ceilings outweigh the detriments?
- Whether the involvement of the competition authority is justified to make sure that excess in demand does not lead to excess in price and to avoid an unsustainable increase in price?

References

Patrick Ercolano, 'Can corporations be trusted after regulation are eased during the pandemic?', *John Hopkins University* (online), 5 June 2020 <<https://hub.jhu.edu/2020/06/04/can-corporate-cartels-be-trusted-after-deregulation/>>

David Howarth and Harriet Alexander, 'COVID Collaboration and Competition Policy: Authorisation vs Forbearance as Crises Responses' (2020) 48 *Australian Business Law Review* 189

Frederick Jenny, 'Market adjustments, Competition Law and the Covid-19 Pandemic' *Concurrentialiste Journal of Antitrust Law* (online), 6 July 2020 <<https://leconcurrentialiste.com/frederic-jenny-covid-competition/>>

Massimo Motta, 'Price regulation in times of crisis can be tricky', *Daily Maverick* (online), 22 April 2020 <<https://www.dailymaverick.co.za/opinionista/2020-04-22-price-regulation-in-times-of-crisis-can-be-tricky/#gsc.tab=0>>

Peter Ormosi and Andreas Stephan, 'The dangers of allowing greater coordination between competitors during the COVID-19 crisis' (2020) 8 *Journal of Antitrust Enforcement* 299

Maarten Pieter Schinkel and Abel d'Ailly, 'Corona Crisis Cartels: Sense and Sensibility' (2020) 31 *Amsterdam Law School Legal Studies Research Paper*

Rod Sims, 'Will Competition Survive the Current Crises?' (Speech delivered at the Australian Financial Review Banking and Wealth Summit Crisis Briefing, 30 March 2020) <<https://www.accc.gov.au/speech/will-competition-survive-the-current-crises>>

Questions?

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