COVID-19: (AUSTRALIA) GOVERNMENT BANS PRICE GOUGING, EXPLOITATIVE EXPORTS OF PERSONAL PROTECTIVE EQUIPMENT

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Antitrust, Competition & Trade Regulation Alert

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IN BRIEF

The COVID-19 pandemic has created extraordinary demand and led to shortages for personal protective equipment (PPE) such as masks, gowns, face protection as well as alcohol wipes and hand sanitiser.

There are no standing laws in Australia against sellers profiting from temporary demand and supply conditions. However, the needs of health care workers and public sentiment have required a response to the exploitation of the crisis as it has overseas.

This Insight outlines the recent statement in Australia by the Australian Competition and Consumer Commission (ACCC) on price gouging and unconscionability and recent laws enacted specifically to price gouging and exploitative exports of PPE and related products.

These changes mean that businesses buying and selling goods during the COVID-19 pandemic should take care in those commercial arrangements and consult with legal counsel to ensure compliance.

PRICE GOUGING AS UNCONSCIONABLE CONDUCT?

The Chairman of the ACCC, Rod Sims, this week explained the challenge that faces the ACCC in responding to exploitative pricing:

> "The ACCC cannot prevent or take action to stop excessive pricing, as it has no role in setting prices. But in some circumstances excessive pricing may be unconscionable, for example where the product is critical to the health or safety of vulnerable consumers. If a business makes misleading claims about the reason for price increases, it will be breaching the Australian Consumer Law."

It is clear that, if the ACCC could show that a supplier misinformed consumers about the price of an essential good or the reason for a price increase, it would have a strong case under the laws against misleading or deceptive conduct.

It will be more difficult to establish a claim of unconscionable conduct where the supplier openly charges a high price to well-informed purchasers, simply because demand is high and stocks are low.

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The Competition and Consumer Act 2010 (CCA) contains two prohibitions against unconscionable conduct. The first adopts the "unwritten law" notion of unconscionability into the statute. That concept requires a finding that the victim is particularly vulnerable or suffers a special disadvantage, which is exploited by the stronger party. That is unlikely to extend to setting a high price to everyone in a market for goods that are essential and in high demand.

The second provision expands the concept of unconscionability by listing matters the Court may take into account, which include:

- the relative strengths of the bargaining positions of the parties
- the amount for which, and the circumstances under which, the customer could have acquired similar goods and services from a person other than the supplier
- the extent to which the supplier acted in good faith.

Reference to some of those factors would create a reasonable basis for taking a case.

However, in a 2019 decision,[1] a narrow majority of the High Court took a more restrictive view of unconscionability than had previously been accepted. The core element was described as "conduct that is so far outside societal norms of acceptable commercial behaviour as to warrant condemnation as conduct that is offensive to conscience" (per Gageler J at [9]). There is no requirement for a "special disability" under the statutory form of unconscionability, but there remains a focus on the conduct and circumstances of the transaction, rather than the fairness of the deal itself, including the price.

A plaintiff/the ACCC would have to establish that a basic feature of a market economy - the price mechanism - could lead to unconscionability if relied upon in extreme circumstances. "Societal norms" would not deny a farmer a high price for grain if it is in short supply because of a drought or flood. The COVID-19 crisis may be more extreme, but the ACCC or Court would be called on to draw a line between a natural disaster and a pandemic, such that charging a high price for hand sanitiser in a crisis is unconscionable but a high price for grain is not.

PRICE GOUGING – MINISTERIAL DETERMINATION

On 30 March 2020, the Minister for Health made a *Determination under the Biosecurity Act 2015*, prohibiting price gouging on essential goods during the COVID-19 pandemic.

"Price gouging" is defined in the Determination as supplying or offering to supply essential goods at a price that is more than 120% of the initial purchase price, where the goods were initially purchased in a retail transaction after 30 January 2020. The "essential goods" covered include disposable face masks, gloves, gowns and goggles, protective glasses and eye visors, as well as alcohol wipes and hand sanitiser.

There is no simple definition of a "retail transaction". The Explanatory Statement says it should be interpreted "according to its ordinary meaning, generally meaning transactions that are 'consumer-facing' rather than wholesale purchases made by a major supplier or a manufacturer of the goods… [it] will apply to those who purchase goods directly from supermarkets, pharmacists, chemists or other retail stores (whether online or in person)..."

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The Determination is not limited to retail transactions in Australia, so it appears to cover circumstances where the goods were purchased overseas at retail and imported into Australia. Equally, it does not address instances where a merchant purchases products at wholesale and imposes a very large mark up.

The Australian Federal Police can require the essential goods to be surrendered if an officer suspects on reasonable grounds that the seller was engaged in price gouging. If the seller is unable to satisfy the officer that they had not engaged in price gouging within 21 days (by producing wholesale invoices, for example), the goods will be destroyed (if defective) or delivered into the National Medical Stockpile.

It is a criminal offence to engage in price gouging and fines of up to AUD63,000 apply, or five years imprisonment, or both.

EXPLOITATIVE EXPORTS

At the same time, an amendment to the Customs (Prohibited Exports) Regulations 1958 introduced new measures aimed at preventing the exploitative exportation of essential goods during the COVID-19 pandemic.

From 31 March 2020, exporting essential goods that contribute to controlling and preventing the spread of COVID-19 will be temporarily prohibited, with the exception of exports by legitimate businesses and humanitarian organisations, where the goods are for personal use, or where the intended recipient of the goods is a relative of the person.

The new measures also enable the Australian Border Force to require that essential goods already in their custody be surrendered for provision to the National Medical Stockpile, or for destruction if the goods are defective. A person who refuses to surrender the goods can face fines of up to AUD63,000 or five years imprisonment, or both.

While the measures are not designed to affect the commercial exportation of essential goods by established exporters of these products, individuals should be aware that engaging in bulk purchasing of essential goods from retail outlets in Australia with the intention of exporting these items overseas is now prohibited.

If you or your business require advice on how these new measures will affect you, please get in contact with the K&L Gates' Policy & Regulatory Team.

FOOTNOTES

[1] *Australian Securities and Investments Commission v Kobelt* [2019] HCA 18

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