

AUSTRALIAN MERGER AND COMPETITION POLICY REFORM PROPOSALS: BUILDING A BRIDGE OUT OF THE CORONAVIRUS

In the face of the coronavirus pandemic, the Australian Government has implemented unprecedented business support programs, such as the AUD130 billion JobKeeper wage subsidy scheme, to seek to support businesses and employees during the "hibernation" occurring as a consequence of Government imposed business and social distancing restrictions. Despite the JobKeeper program and the provision of other Government support, an Australian independent public policy think tank, the Grattan Institute, is forecasting that the unemployment level in Australia may possibly reach between 14% and 26%. An unemployment rate at the higher end of this spectrum would be similar to levels last seen during the Great Depression of the 1930s.

1. INTRODUCTION

To their credit, the Australian Prime Minister and Treasurer have recognized the need to embrace broad economic reform to address the economic impact of the Government imposed restrictions. An ambitious reform agenda is being considered by the "National Cabinet" that has been formed between the Federal and State/Territory Governments to work cohesively to deal with the coronavirus pandemic. This reform agenda is intended to assist the business community in reinvigorating the economy. The highly respected Australian Reserve Bank Governor, Dr Philip Lowe has indicated that in light of these difficult economic times it is important the Government embraces economic reforms to increase productivity and growth. Dr Lowe stated:

"I think the overall question is to make Australia a great place where businesses want to expand, innovate, invest and hire people, and if we can do that, then we will drive higher living standards for all Australians."

Australia's competition legislation, the Competition and Consumer Act 2010 (Cth) (**CCA**), from its origins in the 1974 Trade Practices Act and the amendments that were implemented in 1993 as part of the National Competition Policy Review (which came to be known as the Hilmer Review), is actually well equipped to rise to the challenge of a robust reform agenda. Indeed, the Hilmer Review, and competition reforms implemented as a result,

Key issues

- With the onset of the coronavirus pandemic, the ACCC has, through its interim authorisation power, sensibly facilitated businesses (including competitors), working together to ensure essential goods and services are available to communities.
- The ACCC has also issued a warning that it will critically look at any merger activity during the time of the coronavirus from a structural perspective.
- It is appropriate that the ACCC take into account the:
 - speed with which industries have fundamentally changed;
 - extent to which consumers now purchase online products, in what may simply be a speeding up of an existing trend, which is resulting in a seismic impact on physical stores; and
 - public and social benefits of transactions which increase employment and efficiency opportunities.

has been credited by the Productivity Commission with driving a boost to Australian GDP by 2.5% over levels it would otherwise have been. Under the CCA, Australia's competition regulator, the Australian Competition and Consumer Commission (**ACCC**) has sensibly facilitated businesses to work together during the crisis using its interim authorisation powers to authorise certain types of coordinated conduct. The ACCC has also indicated it will keep a watching brief to ensure that, from a structural perspective, mergers are reviewed so competition thrives as Australia emerges from this crisis.

This Briefing examines the areas of competition reform that may assist the business community in building, with Australian Federal and State/Territory Governments, an "economic bridge" to recovery.

2. THE ECONOMIC IMPACT OF THE CORONAVIRUS IN AUSTRALIA

An Australian independent public policy think tank, the Grattan Institute, is forecasting that despite the JobKeeper program and other Government support programs, unemployment in Australia is set to possibly reach between 14% and 26%, with the latter levels not being seen since the Great Depression of the 1930s. The extent of Australia's looming unemployment crisis is said to depend on how long the Government imposed COVID-19 restrictions continue in Australia and how long consumer confidence takes to recover.

To illustrate the impact of the restrictions on business and the reaction of Australian consumers, an Australian Chamber of Commerce and Industry survey of 1,497 businesses across Australia carried out between March 30 and April 17 2020 found that the Government restrictions had greatly affected their businesses. Over one third of the businesses surveyed experienced an 80 percent reduction in revenue and half experienced a 50% percent decrease in revenue. While half of those businesses said they have been able to adapt their business models by increasing online trading, unfortunately 18% of businesses were forced to close and one third have been forced to limit their businesses to essential operations only.

The Federal Government and the Premiers of the Australian States and Territories have formed a "National Cabinet" that is considered to be working well in responding to the coronavirus. In fact, there are indications it could be working so well that it may replace the Council of Australian Governments (**COAG**) process that has governed Federal and State/Territory interaction since the time of the Hilmer Review. The Hilmer Review has been credited by the Productivity Commission as driving a boost to Australian GDP by 2.5% above what it would have been through productivity increases. This new Cabinet is considered to be a positive development to push through economic reforms at both Australian Federal and State/Territory levels.

Faced with the difficult economic environment created by the Government's unprecedented restrictions, on April 21 the Governor of the Reserve Bank of Australia gave a very sensible speech noting both the difficulties and opportunities faced by Australia:¹

It is highly probable that the severe shocks we are now experiencing will change the mindsets of some people and businesses. Even after the restrictions are lifted, it is likely that some of the precautionary

¹ <https://www.rba.gov.au/speeches/2020/sp-gov-2020-04-21.html>

behaviour will persist. And in the months ahead, we are likely to lose some businesses, despite best efforts, and some of these businesses will not reopen. There will also be a higher level of debt and some households might reevaluate the risks of having highly leveraged balance sheets. It is also probable that there will be structural changes in the economy. We are all learning to work, shop and travel differently. Some of these changes will probably stay with us, requiring a rethinking of business models. So the crisis will have reverberations through our economy for some time to come.

The best way of dealing with these reverberations is to reinvigorate the country's growth and productivity agenda. As we look forward to the recovery, there is an opportunity to build on the cooperative spirit that is now serving us so well to push forward with reforms that would move us out of the shadows cast by the crisis. A strong focus on making Australia a great place for businesses to expand, invest, innovate and hire people is the best way of extending the recovery into a new period of strong and sustainable growth and rising living standards for all Australians.

3. THE PLATFORM FOR REFORM

The CCA is robust enough for reforms and while the ACCC has fulfilled a generally impressive role, it needs to accept dynamic changes have occurred and, by no stretch of the imagination, is it "business as usual"

Australia's competition legislation, the CCA, from its origins in the 1974 Trade Practices Act and amendments that were implemented in 1993 following the Hilmer Review, is well equipped to respond to the Government reform agenda. Both the Government and, importantly, the ACCC will however need to accept this is not a "business as usual" situation. A proactive, but still considered, approach is required from the ACCC. Greater focus will need to be given by the ACCC to recognizing that the way businesses will need to operate going forward has in many industries fundamentally changed – and may not change back. The dramatic changes that have occurred with online shopping and the relaxation of opening hour restrictions for essential businesses such as grocery stores and pharmacies during the period of the Government imposed restrictions are just some examples.

The coronavirus pandemic has fundamentally changed the nature of retail competition with the significant move to online sales

The relevant question though is whether the ACCC has grasped the extent of business change that has resulted from the economic lockdowns and the change in business practices. For example, the ASX listed Accent Group announced on April 27 that it planned to shut stores and shift major parts of its business online as part of a full re-evaluation of its 522 strong store network after its digital sales shifted dramatically. The Accent Group CEO stated:

"It is clear that there has been a seismic and most likely enduring shift in consumer behaviour away from traditional shopping centres to shopping online."

It is not clear the ACCC's merger analysis has grasped the change to online shopping as opposed to the pre-coronavirus analysis where the ACCC in retail mergers focused on requiring there to be physical stores constraining competition in traditional local geographic markets of 5 or 10 kms.

The coronavirus has led to an unquestionably large change to online sales and for many retailers is likely to lead them to consider the cost of retail stores where leases are expensive. This cost has increased even further with social distancing and other occupational health and safety requirements.

The economic changes are likely to need complex merger transactions to be assessed in faster commercial timeframes than 6 months

While it is accepted that the ACCC reviews the vast majority of mergers under the pre clearance process in an expeditious manner, as the economy moves out of lockdown some significant mergers are likely, arising from the significant structural changes that have occurred to industries.

It is not clear that the ACCC has fully grasped the extent of fast moving changes in industry dynamics. For example, looking at the media industry, the ACCC cleared in late March the Bauer Media/Pacific Magazine acquisition after a 5 month merger investigation as to whether it was actually constrained by online competitors, just as Bauer Media appeared to be closing its operations in Australia as a result of the decrease in advertising. Reduced advertising spend on traditional print publications is an ongoing trend in the media sector but it has been exacerbated by the coronavirus. The Bauer Media merger analysis was simply too slow.

Reform of institutions that, like COAG, have been superseded and red tape reform

The Federal and State/Territory Governments have been widely praised for keeping Australia's mining, construction and agriculture industries operating. But Governments need to embrace and facilitate export supply chain reforms in each of those sectors to assist in lowering costs and making export industries more efficient and productive for the benefit of the Australian economy, particularly employment in regional communities. A clear focus should be on looking at export bottlenecks and seeking to make Australia's export supply chains more efficient.

Just as the private sector is facing significant structural change, the public sector should also look to efficiencies.

Outdated institutions, with remits better undertaken by existing regulators should be abolished. A prime example of such a redundant institution is the National Competition Council (**NCC**). It is staffed by seconded ACCC officers and the ACCC has both the expertise and a sufficient broad remit to undertake the tasks that have been allocated to the NCC. Taking this step to limit the waste of public sector funds would require the Federal Government to reinvigorate its widely praised red tape reduction policy first implemented following the 2013 Federal election.

It will be equally important that the Federal and State/Territory Governments re-engage with the stalled COAG (or revamped National Cabinet) deregulation and red tape cutting agenda to allow the lowering of barriers to entry to competition. For example, removing planning law restrictions or opening hour

restrictions that impede small or large businesses opening or setting more flexible (but still sensible) opening hours is a well overdue reform.

Reform of merger processes and the need for greater account to be taken of public benefits such as employment, efficiencies and export industries in a meaningful manner

Again reflecting that neither Governments nor regulators should proceed on the basis of a "business as usual" framework, the ACCC's merger review processes and analysis should be reviewed to allow greater consideration of public benefits as part of a broader social compact, given high unemployment rates which are likely to continue for a considerable period of time.

Traditionally the ACCC has been very reluctant to accept increased employment or to accept merger efficiencies as matters that it takes into consideration on the positive side of the ledger when considering any negative competition effects of mergers. As well as ensuring mergers are reviewed by the ACCC in commercially appropriate timeframes in the new economic environment, the ACCC should change its mindset to reflect these issues. For example, the ACCC should look to take into consideration, in a more meaningful way, the impact of mergers where they increase or maintain employment, where mergers increase efficiencies or are consistent with the Government's aim to increase domestic production in key areas such as manufacturing or community health and safety. These matters should be considered as part of the merger process either as part of a much shorter merger authorisation process, or as part of the informal merger review process.

In addition the ACCC should be more accepting of the dynamic nature of competition and in particular that online competition is real and has grown exponentially in particular in relation to retail industries, so that the ACCC is more accepting that competition does not require close physical geographic location in order to be a meaningful constraint.

4. CONCLUSION

Consistent with the Government's focus on maintaining employment, it is appropriate that the ACCC should be mindful of broader economic issues going forward. This is particularly so as the Government may seek to ensure that a priority is given to increasing employment opportunities as Australia rebuilds its manufacturing (particularly in health and safety) and retail bases, coupled with improving the conditions of competition. For example, the ACCC should be supportive of the cutting of red tape (including in its own dealings with business) and advocating for reducing other restrictions which may impede small businesses ability to bring their operations out of hibernation.

State and Territory Governments have shown considerable flexibility during the crisis in allowing extended trading hours for essential services such as supermarkets and chemists. It will be important in Australia's recovery phase to reduce restrictions on competition that create competitive barriers for small and large businesses alike, as the economy regains momentum.

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