

## 2024 Annual Bannerman Competition Lecture

Transcript

PAMELA HANRAHAN:

Treasurer, Assistant Treasurer, distinguished guests and colleagues, hello, and welcome to the 10th Annual Bannerman Lecture. I begin in the spirit of reconciliation by acknowledging the Gadigal People of the Eora Nation, traditional custodians of Tallawoladah where the beautiful Museum of Contemporary Art is located and where we're meeting today. We also have several hundred people listening to the lecture on online from traditional lands all around Australia. I pay my respects to Elders past, present, and emerging, and extend my respects to all Aboriginal and Torres Strait Islander people in attendance today.

I'm Professor Pamela Hanrahan and I'm Chair of the Business Law Section of the Law Council of Australia. The Business Law Section co-convenes the Bannerman Lecture with the Australian Competition and Consumer Commission. The ACCC is represented here today by its chair, Gina Cass-Gottlieb, who I will introduce in a moment, and by Commissioners and Senior Officers. Welcome. The Business Law section of the Law Council of Australia comprises a thousand of Australia's most senior commercial lawyers drawn from private practice, in-house legal practice, the Bar, and the Academy. Our members are appointed to 14 specialist committees. These cover the large and varied terrain of Federal Business Law. Our committees also include experts from related disciplines, even economists, many of whom are here with us today. The work of the 14 BLS committees covers Corporations, Financial Services, Taxation, SME Law, Construction and Infrastructure, Digital Commerce, Privacy, Customs and International Transactions, Foreign Investment, Foreign Corrupt Practices and Integrity, Intellectual Property, Media and Communications, and Insolvency and Reconstruction Law and, of course, Competition and Consumer Law. Last year the 14 specialist committees between them reviewed and made submissions on more than 80 major pieces of legislation or policy related to Federal Business Law, many of these, Treasurer, were in your portfolio. Committee members undertake this important pro bono work to help improve the quality and efficacy of business law in Australia. Laws that create a disproportionate compliance burden or that are too granular or complicated to enforce are a drag on Innovation and growth and they won't effectively protect the people they were intended to benefit. The complexity of Australia's business laws means that we all need to work together on confronting this challenge, and that includes keeping the lines of communication and trust between lawmakers and expert lawyers open.

That brings me, of course, to today's event. The mission of the BLS also includes providing a forum for debate on current issues in business law through a schedule of regular conferences, workshops, and seminars. The Bannerman Lecture is an annual highlight of that schedule. The Bannerman Lecture was instigated in 2015 to honour the contribution of Mr Ron Bannerman, AO, the first Chair of the ACCC's predecessor, the Trade Practices Commission. His work established a solid foundation in Australia for modern competition, fair trading, and consumer protection policies and laws. Gina will say something about Ron Bannerman in a moment, but let me first say the BLS is honoured once again to have many members of the Bannerman family here with us today, and online even from Switzerland. As a key event in the Australian Competition and Consumer Law calendar, the Bannerman has always attracted distinguished speakers. So far they include three Justices of the High Court of Australia, three distinguished economists, and the heads of the Competition Authorities in the United States, the United Kingdom, and France. What a way to honour Ron. Today they are joined by our 10th Bannerman Lecturer, the Treasurer of Australia, The Honourable Dr Jim Chalmers MP. Treasurer, Gina will introduce you in a moment but may I say on behalf of the BLS how glad we are to have you with us today, particularly as this is the 50th anniversary of the enactment of the Trade Practices Act, one of the most significant and durable pieces of business law reform in Australian history.

So the format for this morning is that we'll hear the Treasurer's lecture and then we'll have a fireside chat between the Chair of the ACCC and Peter Stevenson who is a partner at King & Wood Mallesons and Deputy chair of the BLS's Competition and Consumer Committee. Just two reminders, we do have media present today, and you're very welcome, and could you turn off your mobile phones.

Now let me first welcome the chair of the ACCC, Gina Cass-Gottlieb, to introduce the Bannerman lecturer for 2024. Thanks, Gina.

GINA CASS-GOTTLIEB:

Thanks very much, Pamela. Firstly, Treasurer Jim Chalmers, Minister for Competition Andrew Leigh, the wonderful members of the Bannerman family who are here and online, distinguished former and current heads of agencies within the Treasury portfolio, members of Treasury and the Competition Task Force and members of the Law Council who I know have been lifetime advisers in Competition Law, good morning to everyone.

I acknowledge the Aboriginal and Torres Strait Islander people who are traditional custodians of the lands, waterways, and skies across Australia. Today I am joining this group from the land of the Gadigal and I pay my respects to them, their culture, and their Elders. We at the ACCC do sincerely thank the Law Council for their assistance in continuing to host and support this important lecture. 2024 happens to be a very important year for us all; it marks the 10th year anniversary of the Bannerman Lecture held in Ron's honour, and 50 years since the introduction of the Trade Practices Act. I'm delighted to be sharing this event with the Bannerman family members Marilyn, Sarah Sally, Warren, Graham, and Bruce, who are here with us, and Lisa who is joining us online. A number of those who are in this room have been friends or colleagues of Ron and, of course, family, and all of us have been guided and benefited by his work and legacy. We asked Ron's family for their recollections of his contribution professionally and personally. As we can all attest they describe Ron as well respected for his principles and ethics, and modest, which contributed to his high standing in the legal and business community and across the APS. They remember him always as very thorough and prepared no matter whether it was in his professional work, laying a concrete path, or building a garage with his brother-in-law, teaching his children to drive, winding the grandmother clock that was in the hallway, or redeveloping his local Lawn Bowls Club. As one example, Marilyn recalls that before she was allowed to get behind the wheel of a car she had to learn about the main features of the internal combustion engine. Ron was particular as to accuracy, including when he urged his granddaughter Sarah, who is here, to correct one of her University lecturers who told the students that Commonwealth Regulations could be made prescribing matters that were necessary and convenient, when the correct wording of the provision is providing matters that are necessary or convenient. All lawyers and lawmakers in this room here will understand Ron’s attention to this detail. When Ron wrote his 17th, just note that, 17th, and last Trade Practices Commission Report in 1984 after seven years as a sole Commissioner under the 1965 Trade Practices Act and 10 years as the first Chair of the TPC, he noted key points from his experience. I have been rereading them; all of them are valuable for me today, and I want to draw attention to two of them. The first is the important reinforcing strength of the combination of the promotion of competition together with the protection of consumers in our act ,and in the powers and decision making of the ACCC. Informed and confident consumers benefit and are benefited by increased choice, quality, and lower prices from effective competition. This is what Ron said, “Indeed it is sometimes said that competition is the best consumer protection so a well-judged competition law “ and I know the Treasurer is going to speak more about that this morning “-and its proper Administration are matters of real concern.” Secondly, Ron advised Regulators, and I think this is really important to take into account, it is a fundamental mistake to regard the mere passage of law as curing problems. Law gathers respect only through acceptance or enforcement. It is a task for public administration in a new field to build support for the law and to develop acceptance for it from those directly affected. The ACCC engenders respect and trust in our law through guidance, education, spurring compliance, and, undoubtedly, through strong enforcement. We are grateful to the members of the Law Council over the life of our act as allies building knowledge of and support for our law. Over the 50 years of the ACT there have been regular reviews and important reviews of its fitness for purpose, and in August last year the Treasurer, together with Minister Andrew Leigh, announced the current two-year review of the competition policy settings for a modern and changing economy.

This morning we're delighted to welcome the Treasurer, The Honourable Dr Jim Chalmers, to present the 10th Annual Bannerman Lecture. Thank you.

THE HONOURABLE DR JIM CHALMERS:

Hello everybody and thanks, Pamela and Gina, for those wonderful introductions, and to the ACCC and to the Law Council for the invitation to speak here on Gadigal Country. I pay my respects to elders and customs and traditions, and I thank all of you for being here this morning in Sydney. I know that there are people from right across the Competition Policy landscape, lawyers, economists and others. I know, as Gina said, that there are a range of current and former Commissioners and indeed Chairs who have joined us today and I also saw that the Head of the Productivity Commission – new ish Head of the Productivity Commission Danielle Wood is here, and I mention that because I'm really looking forward to really the first opportunity since this raft of new new ish appointments to gather together really all of the absolute superstars that are the heads of the major agencies in the Treasury portfolio, and we'll have some time to spend with each other later on today and I'm looking forward to that. I also wanted to acknowledge, as Gina did, my outstanding colleague Andrew Leigh, the Minister for Competition. He brings, as you know, a heap of heft and horsepower to our thinking on Competition Policy, all of our work on Competition Policy primarily at the moment when it comes to those non-compete clauses, but not exclusively in that area, really right across the board. Andrew is such a tremendous, thoughtful, considered and influential colleague and I wondered if you wouldn't mind putting your hands together for him. Now I was going to tell you that he gave a really thoughtful speech on non-competes last week but I figure if there's any room in Australia that knows that already, it's probably this one. If you haven't read that speech on non-compete clauses, I encourage you to do that.

To the Bannerman family, it was so lovely to spend a little bit of time with you a moment ago. Thank you for this opportunity to pay tribute to Ron, but thank you also for your stewardship not just of Ron's Legacy, but the legacy of the wonderful institution that Gina now heads up. Thank you so much for this chance and I promise to try at least to give the Bannerman name a mention on Insiders on Sunday. I took that feedback to heart that you gave me a moment ago.

Now I'm told - which is consistent with the humility that Gina conveyed a moment ago - I'm told that Ron was anxious about his first appointment as the first and only Commissioner of Trade Practices, which is hard to imagine now given he went on to build the very foundations of Competition Law by helping to establish a consensus, which seems a no-brainer now but may not have been then, that our markets should be competitive markets. And you can see how this reforming spirit survives him in today's ACCC, and here I wanted to specifically acknowledge Gina's quite remarkable leadership of the ACCC. Hers was a wonderful appointment that I can take absolutely no credit for. It was an inspired decision by my predecessor Josh Frydenberg, former Treasurer of Australia, to appoint Gina to this role, and it means that she now follows Ron, of course, but also a couple of Bobs and Allan and Graham and Rod Sims, who is here in the crowd today, in one of the most important jobs in our whole economy. And one of the many things or among the many things that I'm grateful to Gina for are her efforts to get Mergers and Acquisitions really firmly on the national Policy agenda, and this has helped ensure that we can announce today, Andrew and I can announce today, the reforms which will make the merger regime faster and stronger and simpler as part of what we hope will be a new wave of Competition Policy to modernise our economy. And so I wanted to thank Gina and I wanted to thank everyone who helped take what was a balanced, consultative, and methodical approach to mergers so that we could get it right.

I think it's fair to say and safe to say that we are all in this room believers in competition and in competition policy. Competition is a defining feature of our national culture, our identity, and we wanted to make it a more central and defining feature of our economy as well. And you know why that's important, because competition means more and higher quality choices for consumers at fairer prices, competition supports full employment; it means workers are more likely to earn higher wages which lifts living standards, and competition makes our businesses more dynamic, more innovative and more productive, and as a consequence, that expands our economy.

So these are our goals and today I want to tell you about the next steps we're taking and why, and how what we see as a fifth wave of Competition Policy fits quite neatly into a much broader and much more ambitious suite of economic policy reforms. But first I wanted to go over some familiar history. So far there have been, I think, four major waves of competition reform across the last five decades. The first came precisely 50 years ago with Lionel Murphy's Trade Practices Act of 1974 and this followed what Ron called the ‘toe in the water’ legislation which was the earlier Trade Practices Act of 1965. The Act helped transform the Australian economy, shifting the emphasis from protecting ingrained profits to promoting competition. It prevented anti-competitive behaviour, it made firms accountable for price fixing, collusion, and false advertising, and it also banned anti-competitive mergers. The Trade Practices Act and the Trade Practices Commission that it established are the foundations on which modern competition policy and regulation has been built. The second wave came two decades later with the Hilmer inquiry International Competition Policy in 1993. The Hilmer Reforms came at a time of massive economic transformation that saw the global economy becoming increasingly interconnected. The Hilmer Reforms helped underpin the three decades of continuous economic growth which followed. The Productivity Commission attributes a 2 and a half per cent lift in our GDP to the Hilmer Reforms, which boosted household incomes by around $5,000 per person in today's dollars. The third wave came through the work of Chris Bowen and Craig Emerson when they were in Andrew's job as Competition Ministers. Craig introduced legislation to deal with creeping acquisitions to limit the market power of the major supermarkets. This legislation empowered the ACCC to review acquisitions of Greenfield sites and reject acquisitions that would reduce competition. He oversaw legislation that created the Australian consumer Law, unifying 17 different national, state, and territory laws, and he passed an important law which was first introduced by Chris, criminalising serious cartel conduct to better protect small businesses and consumers. The fourth set of changes followed the Harper review from 2014 to 2017. It led to competition reforms that brought changes to cartel operations, it broadened the misuse of market power prohibition, and it introduced Concerted practices provisions that changed the ways businesses communicate with competitors in the market. But the core recommendations that would have led to a reinvigoration of national competition policy were never really implemented, and we see that as a lost opportunity that we're determined not to repeat, because we know how important the earlier waves of reform were to our prospects and to our prosperity, and we also know that competition policy should evolve as our economy evolves. It should respond to new players and new markets and new disruptions so that it continues to drive the dynamism that we all want to see. But Australia's competitiveness has been declining since the early 2000s. We see this in increasing market concentration across industries, and how price composition has changed. Growth in total market concentration measured by the market share of the top four businesses in industry sectors has nearly doubled from 1.7% in 2010 to almost 3% in 2020, according to the e61institute. Around a third of industries including mining, utilities, and retail trade, saw increased concentration of more than 5%, which more than offset the quarter of industries which saw a decrease in in concentration, and the rate of entry of new companies is falling as the average age of businesses rises. Over recent decades the markups that businesses apply to goods and services have increased by more than 2 percentage points. Reforms that address the decline in competition can therefore deliver big economic benefits. Recent analysis by Treasury and The Reserve Bank found that even just returning competitions to levels Australia experienced in the early 2000s would lift GDP between one and 3%, so Competition Policy is a growth strategy, because competition moves capital to new growth opportunities in the economy. It helps wages grow as workers move to better opportunities and businesses, raising living standards as well as productivity. And for consumers, competition provides more choice and better quality and cheaper prices. So the economic imperative for competition reform could not be clearer and our other colleague Daniel Mulino, his House Economics Committee quite recently in the Competition Report that they released last month, reinforced the point that competition and dynamism are the pivotal drivers of productivity in our economy. So it's clear that we need more competition, not less, if we want more competitive and more dynamic businesses and modern Competition Policy is absolutely central to how we get there.

Competition is about leveling the playing field so that businesses create the most value and don't face unfair barriers to growth. The emerging barriers to competition are different today and they call for different solutions. Across digital marketplaces and new products categories we've seen new winner take all market dynamics and new barriers as well to consumer choice. So the next wave of competition reform needs to come from understanding these new anti-competitive dynamics and delivering those targeted reforms to help address them. Last year the intergenerational report laid out the big shifts that we face in our society and in our economy. Our economy is becoming more services oriented, more digital, and more shaped by the fragmentation that we're seeing in the global economy, so we need to ensure that competitive forces promote cleaner and cheaper and more reliable energy as well, and empower consumers as the historic energy transformation gathers pace. That digital markets expand choice rather than limit choice, and that care services improve affordability and increase quality, especially for the most vulnerable Australians.

Now if we don't do these things the transitions occurring in our economy will be more costly, they will be slower, and they will be less fair, so getting Competition Policy right can help make economic change fairer and smoother and, ultimately, more prosperous, which is key to building a more modern economy. It will encourage greater innovation and agility and world-class business practices that mean we can maximise, and not just manage, these big shifts that are coming at us.

So our Government already has a lot of competition reform on the go. This week Craig Emerson released his interim report on the Food and Grocery Code, with a number of important recommendations, including that we make it mandatory, which is appealing to us. We've empowered the ACCC to undertake valuable work on supermarkets, aviation, early childhood education, and retail deposits. We know there are a range of views on addressing supermarket dynamics. We want a more competitive sector that delivers a fair go for farmers and families, so we ask the ACCC to focus on how we make that sector work better for customers and for suppliers. Now as Gina and others have made clear, this evidence-based work combined with the focus on the Food and Grocery Code and the merger laws that I'll talk about in a moment, they are the priority here, but they're not the only reforms that we are progressing when it comes to competition. Last year our Government and all the states and territories agreed to revitalise National Competition Policy. Treasurers will seek to agree new competition principles by the end of the year. Andrew and I also established the Competition Task Force and this is progressing some welcome work on new frontiers including the much better use of data.

The idea to abolish almost 500 nuisance tariffs was worked up by the Task Force building on work of Danielle's Productivity Commission. This is the biggest unilateral tariff reform in two decades to reduce compliance cost for businesses and boost productivity. The work on non-compete clauses is being done in that part of the shop as well. Around one in five Australian workers are subject to these clauses including in non-executive roles, such as early childhood education, medical specialists, even yoga instructors. Now these clauses can reduce job mobility and wages growth, and that's why Andrew, with my support and my encouragement, is examining the impact of non-competes on dynamism and competition. We're also boosting competition in the financial system by modernising the payment system, the Clearing and Settlement Services, and the Australian Stock Exchange, and through our Financial Sector Regulatory Initiative Grid to make it simpler for smaller banks to comply and compete. All of these pro competition efforts demonstrate our commitment to a strong economy that benefits consumers and businesses and industry at the same time. And merger reform is the next and arguably most important new step that we can take in that direction.

So if I turn to mergers more specifically now, I want to start by saying that, as you know, most mergers in our economy aren't bad, they're an important feature of any healthy open economy. But market concentration has trended up across advanced economies since the early 1980s, especially among publicly listed companies. New analysis by the Competition Task Force shows that merger activity by big firms has increased in Australia over the last decade. The key to capturing the benefits of this trend is being able to differentiate properly between harmful and beneficial mergers. Most mergers have genuine economic benefits, we acknowledge that. They attract capital they retool businesses, they improve the uptake of new technologies. This is particularly important in parts of the economy undergoing the quickest structural change. They allow businesses to achieve greater economies of scale and scope, to access new resources and technology and expertise, and this can flow through to consumers through greater product choice and quality, as well as lower prices. But some mergers can cause serious economic harm. This happens when players aren't interested in improving profitability by lifting productivity, when they're solely focused on squeezing out competitors to ensure a bigger percentage of the market, and this can strangle innovation, it can reduce productivity in our economy, and it can punish consumers with reduced choice. Now the Competition Task Force has spent a lot of its time hearing about and thinking about these issues, and from that, it's really clear to us that Australia's approach to mergers is no longer fit for purpose. Australia is only one of three OECD countries that doesn't require compulsory notification of mergers. Right now merging businesses don't have to notify the ACCC or wait for the ACCC's view before completing a merger. Our voluntary system means the ACCC isn't properly equipped to detect and act against anti-competitive mergers. It has limited visibility of merger activity, it doesn't always see the ones that present the greatest risks to competition. Last year over 1,400 mergers were recorded at a value of about $300 billion, and the ACCC looked at an average of 330 mergers a year over the past decade, around a quarter of that total. But we don't know whether these are the right 330, or the mergers with the greatest potential to cause the most harm. When the ACCC does assess mergers, the current approach is not transparent enough for businesses or the community, and the clearance, despite the best efforts of the great people at the ACCC, it can be too slow and it can cause expensive delays for some businesses as they wait for an outcome.

Having three current paths to merger approval is inefficient and it can mean that some businesses, a minority of businesses, can game the system to effectively avoid the proper assessment. And certain kinds of acquisitions, serial acquisitions by large firms, and acquisitions that entrench the power of market leaders, they're not adequately captured, in my view, by our Competition Laws. So the changes I announced today are designed to address all of these deficiencies in the current system, and together what I'm announcing today with Andrew represents the biggest reforms to the merger settings in almost 50 years.

These changes mean the ACCC will more efficiently and effectively target mergers that are anti-competitive while allowing mergers that are pro competitive to proceed faster. This will bring our merger settings into the 21st century and these changes are the product of really detailed discussions over some months now led, by the Competition Task Force and by Gina and the ACCC, and overseen by an expert advisory panel, which I thank. Kerry Schott, David Gonski, John Asker, Sharon Henrick, John Fingleton, Danielle Wood and Rod Sims, two participants here, and through them I thank everyone who gave us a hand with this task, because in consulting with industry and with the ACCC a wide range of views were expressed.

The Business Council of Australia started from a position that only very limited change was required and the ACCC started the process advocating for changes that some in the business community found excessive, and I’m genuinely grateful for the way that the views evolved and coalesced the more we consulted. So we won't be changing the ACCC’s test to reverse the onus of proof, but we will adopt a mandatory notification system and streamline the appeal mechanisms, and the result of all of that consultative work means the package that we announced today has attracted quite broad support and we’re really pleased, we're really grateful for that; that doesn't always happen. And we will seek the same common ground now as we implement the reforms that we're announcing today.

Now the new system that will be created will help deliver what we all want, that stronger economy, more competitive, and more productive at the same time, and that's because the new reforms will make our approval regime faster and stronger and simpler and more targeted and more transparent, as I said a moment ago. It will be faster because most will now be approved within 30 working days, where the ACCC is satisfied a merger poses no threat to competition. It will be stronger, because we're legislating a mandatory notification system and empowering the ACCC as the single decision maker on all mergers. Mergers above monetary thresholds, and which would significantly change market concentration will need to be notified to the ACCC and be approved before they can proceed, and the thresholds will be based on international practice and we will set them through a further round of consultation. The new regime will be simpler, because we are reducing three streams to a single streamlined path to approval that removes duplication and standardises notification requirements for all mergers. It will be more targeted because mergers that create, strengthen, or entrench substantial market power will be identified and stopped, while those consistent with our National economic interest will be fast-tracked.

Finally the merger regime will be more transparent by ensuring the ACCC has better visibility of merger activity and we're creating a public register of all Mergers and Acquisitions notified to the ACCC to promote this transparency and this accountability. Reviews of ACCC decisions will be the responsibility of the Competition Tribunal made up of a Federal Court Judge, an economist, and a business leader. These changes will make it easier for the majority of mergers to be approved quickly so the ACCC can focus on the minority of cases that give rise to genuine competition concerns, and we will consult more, as I said, as we finalise the details in advance of this new system beginning on the first day of 2026.

Now that's plenty of time and that's deliberate, because we recognise that these changes require a significant shift in the way that the ACCC does business. Cost recovery fees will be introduced so the ACCC is sustainably resourced to meet the timelines, expectations, and requirements that we are establishing. Fees will be scaled to reflect complexity and risk, with higher risk mergers facing higher fees. Treasury expects fees to be somewhere between 50 and $100,000 for most mergers, but we want to be clear that small businesses will be exempt.

Now along with additional resourcing, the implementation of the new regime will require a new set of skills at the ACCC. The more comprehensive examination of mergers that a mandatory system creates will provide the ACCC with more evidence to build the case for and against proposed mergers. We want to back in this increasing economic focus with additional economic expertise. Merger experts have always been a feature at the ACCC but to bolster this expertise we're proposing the appointment of Dr Philip Williams AM. Now Dr Williams, a former professor of Law and Economics at the University of Melbourne, has extensive experience analysing and explaining the economic impact of mergers. I've written to the states and territories recommending his appointment as a Commissioner from the 27th of June 2024.

Today we're also releasing the updated ACCC Statement of Expectations. It reflects the government's priority areas, an ambitious competition agenda with a particular focus on the cost of living. Now in the past, as I understand it, different ministers set out their own uncoordinated expectations reflecting different interests in ACCC activities, but the document that we're releasing today outlines the whole Government's expectations for consumer matters, for competition enforcement, including telecommunications sector oversight, to set out clearly what we expect of this really high quality institution led by its high quality Chair.

Now the merger reform that I'm announcing today sits really neatly within a broader ambitious economic reform agenda. We are reforming our markets and our financial system across payments, financial market infrastructure, and crypto. We're reforming the taxation of multinationals, super, and the gas industry, and cutting taxes for workers and small businesses. We are reforming disclosure laws for climate change and Net Zero. We're reforming superannuation and the way that capital flows in our economy. We're reforming our skills base, our industrial base, our energy base. We're reforming environmental approvals and Regulatory processes making it easier for businesses to operate. We're reforming our investment strategy to better attract and absorb and deploy capital in our economy. We're reforming and renewing our key institutions like The Reserve Bank and like the Productivity Commission. We're reforming our policy foundations, releasing the intergenerational report differently, the well-being framework for the first time, and the first employment white paper in 30 years. And as we've shown today we're reforming our competition settings to make our economy more dynamic as well, because by making the merger regime stronger and simpler and faster and more targeted and more transparent, we expand choices, and we lift living standards, and we grow our economy to ensure that our people, our businesses, and our industries are beneficiaries of the big changes before us in what we can probably all agree will be a defining decade.

Thanks very much for the opportunity to pay tribute to Ron and to be with you today.

GINA CASS-GOTTLIEB:

So on behalf of everyone thank you very much, Treasurer, for that interesting announcement. I understand that you have to leave us now. Yeah, so let's express our thanks in the usual way. [Applause]

Very good. All right. So the next part of our event is the fireside chat, so we've just got a bit of furniture rearranging to do and then I might ask our two chatters to join us on stage. Thank you.

PETA STEVENSON:

Thank you. It's good to see that lawyers bring their legislation with them and as a Corporations and Financial Services Lawyer myself, I'd just like to say that your legislation is not nearly as large as ours, so thanks very much. Thank you.

More focused before we get into the Fireside Q&A and while the name may seem strange, I think the weather actually suggests that a fireplace could have been helpful today. We are going to be conducting a little quiz at the end hence the copy of the legislation, which is the prize from the quiz, because you don’t get any more competition geeky than that. So there should be a slide that's going up at the moment which has a QR code so you can use that with the code to sign in and we'll do the quiz at the end. You will need to enter a name, doesn't have to be your real name but if you want the prize that could help and please select polls once you get in there, because that's where the questions will appear. We're hoping for lots of vigorous competition.

So there's obviously a lot for us all to digest today and no doubt we'll all have questions and thoughts as we work through the detail of the paper that's been released and the detail that's been provided by the Treasurer today and how it will deliver a faster, stronger, and simpler merger reform system for us.

Q:

But I might start, Gina ,with a simple question, maybe deceptively simple; how does the ACCC feel about the reform announcements?

GINA CASS-GOTTLIEB:

A:

We welcome and are supportive of the reform announcements. Together we consider that they will deliver the outcomes and objectives that the commission has been advocating for. When you look at our mandate which is to promote competition for the welfare of Australians, you can see that a fit for purpose merger regime at a time of increasing concentration is very important. We agree with the conclusions of the Task Force supported by a lot of very careful analysis and data analysis that the case has been made for reform, that it is important that we join the peer jurisdictions and the OECD, and that while there are a number of critical details through the upcoming process that the Task Force will be running in which there'll be consultation, that together the objectives and key policy elements announced today do achieve key objectives. And in that, we're particularly looking at the ability to see the merges that matter, sorry, through mandatory notification, to be able to assess them without the threat of completion occurring, and certain number of notable instances completion occurring, so that it's suspensory as well as mandatory, that the thresholds will be set at a level that will ensure that we do see the mergers that matter, that then that the test is a test that is understood across this legal community, because it is a substantial lessening of competition test, but which does make clear that the creation, strengthening, or entrenchment of a position of substantial market power is treated as a substantial lessening of competition. The economists here, I think, would say that's always been the case but we do see the importance of that being expressed directly in the law, and in addition, that there will be express addressing of Serial Acquisitions so that for both the thresholds and the test there will be an accumulation of the impact of the mergers by merger parties of the previous three years.

Now looking at the critical points the Treasurer was emphasising, which were in addition greater certainty and greater transparency, so that every acquisition that is notified to us will go on a public register at the start of the process; this will allow transparency for third parties and for the community to be able to comment, if they wish to in, the process. That in addition we will be issuing written reasons in relation to each of the matters whether they have been approved or not approved, so they will build up very quickly for the business community for advisors and also for the broader community and consumer bodies, a clear visibility of the history of what is happening and the considerations. And that in addition there are legislated regulated time frames and as people have read the policy document, we'll see that in the absence of a decision within the required timeframes, the decision will be approval, so an ability to go forward. So we know we will be accountable in terms of our process and in terms of the time frames as well. So they are big changes, they're important changes, but we think seen together with workable implementation, that they will deliver the objectives that we and that the ACCC over a number of years including but led by Rod, particularly led by a number of our key team members who are in this room and joining online, that they are important and to recognise the issues that were raised.

PETA STEVENSON:

Q:

Thanks, Gina.

And I'd like to pick up on four of the elements that form part of the reform proposal the mandatory notification, the set time frames, the obligation to publish not just the fact that the application has been made for clearance but also reasons for decision for all notified mergers, and then the fact that there's a plan commencement date in January 2026.

So my question really is around resourcing and implementation because obviously implementing the regime once legislated will be a significant undertaking at a time at which the ACCC is already very busy. There are five inquiries underway. Many of us attended to hear your enforcement priorities when they were announced last month, looking at a lot of issues and obviously the workload of the Commission in relation to merger review and enforcement is already very significant with 305 mergers, I think, that were looked at last year. And we often talk about the burden that is on business for complying with these laws ,but obviously, the reality is that that workload operates on both sides as well, and for the regime to succeed and be effective according to the metrics that the Treasurer has laid out, the ACCC is going to need to be sufficiently resourced to make sure that it can deal with this new mandate and the new requirements, particularly around, you know, reasons for decision as well as the actual decision making itself.

It was interesting to hear that the Treasurer expects the number of notifications to be about the same, whether or not they're the same mergers that might have come forward beforehand or not. But obviously there'll inevitably be new workload for the Commission to comply with the processes and those new transparency requirements. So other than the lead in time required to finalise the details of the regime including the number of consultations that the Treasurer referred to, how will the ACCC be preparing internally in terms of the changes and upskilling and systems that you'll need?

GINA CASS-GOTTLIEB:

A:

So fortunately we will have additional resources and funding to be able to build ourselves and extend our capacity including in this time in which we'll continue to be running the informal system, and in that time we are going to build an expanded team, we're going to undertake great further training. We do currently run administrative processes both in conduct authorisations and in merger authorisations, but we will extend that capacity. We also are going to work upon guidance which we will consult on in advance, so we are grateful that the commencement date is in January 2026 because there's a lot of important work to be done in the interim at the same time as running the current system. And we will appreciate the close engagement with everyone in this room, and there are multiple different constituencies in this room, and we're thrilled to see the breadth of those constituencies, because our consultation on our own policies and processes and our guidance will be very important in setting the administrative regime up really effectively from day one.

PETA STEVENSON:

Q:

Thank you. And obviously today's announcement is very significant in its own right but it's a very significant time, and both Pamela and yourself have commented on this being 50 years since the legislation was passed. It's also 40 years since the earliest minuted record of there being the Competition and Consumer Committee, although I have it on good authority there were less formal meetings before that, and obviously the 10th Bannerman lecture here today to celebrate and reflect on the importance of Competition Law and the particular contributions that have been made.

So it's for those of us in the field it's a really exciting, energised time with this level of sustained interest in competition policy and regulation and merger clearance has obviously been a focus of the Commission for some time in terms of advocating for reform, and the announced plans today give effect to large parts of that. But there have been a significant program of consideration review and reform over the last decades, not all of which has reached legislation, so from The Hilmer Review 31 years ago, the Dawson Review 21 years ago, the Harper Review 11 years ago, there's a bit of a pattern through to the current Competition Task Force, there's been much consideration about the way that settings can be changed and I think that it's fair to say that there's been lots that over time has been left on the table and one of my particular areas of interest, cartel law, there were a number of proposals around simplification, for example, from the Harper Review that were not given effect to.

So my question is there's a lot in today's announcement and the ACCC’s task is never just in implementation, it's also a very significant role in the policy debate itself, so at this very important time of focus on Competition Law settings, what is on the ACCC’s wish list for the next round of reforms?

GINA CASS-GOTTLIEB:

A:

Peta, just to start in relation to cartels because the government has a very ambitious program in relation to competition reform, but I think I can safely say the ACCC has a more ambitious program. So in cartel sense we're currently conducting the review of the immunity policy but we are not currently proposing reform in relation to the cartel regulation, however, we do have a number of really important proposals that we have been putting out for some time that relate, firstly, to more informed and confident consumers, and also to promoting competition. So the first that in terms of informing consumers to be able to in actually make competitive and conscious choices we are very concerned and think it's extremely important that the current process of consultation on an unfair trading practices prohibition reaches conclusion and results in change to the law, in order to protect consumers against manipulation of the choices that they make. The second is we have been promoting including coming through various inquiries being able to better inform consumers through putting obligations on essential services providers, such as energy suppliers and retailers, and financial services institutions, to alert consumers particularly to the actual changes in terms that are occurring to policies and products, to new offers that are better than the legacy terms that they are were settled with originally, and to remove frictions that impede customer switching, which is very important to competition. One of the key areas that we are very concerned about to improve contestability and the competitiveness of the vast array of Australians services and products that are dependent upon critical digital platforms intermediaries are the reforms in terms of Competition Policy reforms relating to digital platforms. The Government has expressed in principle support to this, and we will continue to be very active in advocating for those changes to come into law to allow designation of critical digital platform intermediaries and targeted service specific codes. In our submission to the current Competition Task Force work in terms of renewal and revival of the national competition policy, we have noted that the efficient use of monopoly infrastructure in relation to our supply chains is essential to increase dynamism and productivity in our economy, and we are looking for better support in terms of regulatory tools. We've published that submission on our website. And finally, I'll go to the work in the National Anti-Scam Centre together with Government, together with other Regulators, together with the private sector in order to better prevent and detect the scourge of scams which are significantly causing losses not only at a personal level but across our economy.

PETA STEVENSON:

Thank you so much, Gina. I think that gives us all a good insight as to what to be looking for next.

It's time for the quiz and I should note that there may have been a more appropriate prize because I know that Minister Leigh has recently published a book as well, so we apologise for not having that on hand for the prize, but we're ready to get going with the slide.

So the first question is on what date in 1974 did the Trade Practices Act come into operation?

That's good. Excellent.

So this was a fantastic task that one of our summer clerks got to do, looking through the transitional provisions to when things actually took effect, so great exercise in statutory interpretation for any parliamentary drafters here today.

So the answer to this one was C; the 1st of October 1974.

The second question is how many Commissioners of the Trade Practices Commission were there on the 30th of June 1975?

There was some discussion of this in the introductory notes that Gina made about Ron Bannerman; could have been a hint. Can we see, yep, we've got a number of responses. So the answer to this one was unfortunately not that that was chosen by most respondents; it was C; six. There were six at that time.

GINA CASS-GOTTLIEB:

So this is before ’75. Ron was the only one.

PETA STEVENSON:

Yes. Okay.

The next question is as at the 10th of April 2024, today, how many editions of Millers have been published?

GINA CASS-GOTTLIEB:

This is truly for Competition Law, this one.

PETA STEVENSON:

Also has anyone read the preface to the latest issue of Millers yet? If you haven't got one and you're lucky enough to be the award winner there is another prize available. If you read the preface, there's a little competition that's running in there. Forty-six; that is correct. So obviously the people have very good eyesight and can read it on the cover there, which I didn't even think about, or we're all avid collectors of those.

Okay. The next one is a question for the economists amongst us, and Minister, we might actually ask if you want to give your answer to the audience, but who published the paper titled Competition as the Regulator in 1982, was it Maureen Brunt, Fred Hilmer, Neville Norman, or Ron Bannerman? Is this one that is on your bedside table by any chance?

HONOURABLE DR JIM CHALMERS: Many choices but the correct answer is Ron Bannerman.

PETA STEVENSON:

Excellent. Let's see how many, oh, close we all do hold Maureen Brunt’s work close to our heart, but it was in fact Ron Bannerman. Thank you. Minister. Okay.

The next one is in 1974 the year that the TPC was established, which movie won Best Motion Picture at the Oscars?

GINA CASS-GOTTLIEB:

What I like about this is it was exorcising price fixing from the from the business community. There were a number of people who could be considered Godfathers and Godmothers I think at the time, and really The Sting is just the most marvellous movie and whether you think it is showing a failure in law enforcement, which it does, or how hipster antitrust could actually achieve a sting, I think it's a great set of choices.

PETA STEVENSON:

I was thinking more about the Entertainer and how entertaining today has been.

The answer is in fact The Sting.

We might just check the leaderboard at that point if that is technically possible? Excellent. And look at that, we're testing for time as well which given the pace of the new time frames under the proposed reforms is completely appropriate.

Great to see good representation across the Competition Community there as well.

Okay. Question six. Please name the first female Commissioner of the TPC or ACCC? All names that will be familiar to all of us, some holding roles across many agencies. And the results are holy almost two, three correct. Well done everyone. Dr Rhonda Smith.

The next one just making sure no one has x-ray vision to see inside the Act but which quote correctly states the object of the Competition and Consumer Act as it stands now, not as you may wish it to be?

Bit of creative writing has been going on.

And the weight of opinion is correct. The third option actually states the object of the Act.

The eighth question is in 2023 where did the global competition review rank the ACCC in the world of its list of most effective competition agencies?

This list has been changing order in recent years so make sure you're thinking about the most recent year. This can be considered like a 360 review in the same way maybe Gina.

GINA CASS-GOTTLIEB:

The government is introducing more performance measures.

PETA STEVENSON:

Yes. So that is correct. We were equal second last year which was a move up the rankings for the Commission in the review period.

She second last question is, in Australia when did the merger test change from one of dominance back to a substantial lessening of competition?

When we wrote this one we didn't know what the government's answer was going to be either, so what year was that?

And the results show that half the audience got that right. It is 1993.

And then the last question, what percentage of merger matters that were considered by the commission under the informal review process were finalised by preassessment?

All significant figures but the results show that 93% is the right answer as well.

So well done everybody.

So thanks for indulging us with a little bit of fun just to round out today.

I think there are many elements from today's discussion that we will be speaking about in our communities for times to come but I'll hand back to you Gina to close.

GINA CASS GOTTLIEB:

Thank you very much to Peta, Pamela, and all members of the Law Council Committee for sharing and partnering with the ACCC over all the 10 years of the Bannerman Lecture.

Thank you to the Bannerman family for your deep engagement with Ron's work, with the continuing work in Competition Law, and with this lecture, and we really look forward to continuing together with you to do this into the future. It's been, I think, a brilliant tribute to Ron today. It's been an announcement of important proposed change and he was an incredibly dedicated public servant, always looking to achieve the objectives of the Act in the protection of consumers and competition. It's brought together a wonderful community of people who really care about this Act and this law and that we've been able to share also some fun in that time, and we look forward to the engagement in the coming months led by the consultation team within the taskforce in relation to the proposed change.

Thank you very much for joining us. Thank you.

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