



Public Competition Assessment

23 October 2008

Ramsay Health Care Limited - proposed acquisition of the Coolenberg Clinic day surgery (currently closed) at Port Macquarie, NSW

Introduction

1. On 16 September 2008, the Australian Competition and Consumer Commission (ACCC) announced its decision not to oppose the proposed acquisition of the Coolenberg Clinic day surgery (currently closed) at Port Macquarie, NSW, by Ramsay Health Care Limited (**Ramsay**) (**proposed acquisition**). The ACCC was of the view that the proposed acquisition would be unlikely to have the effect of substantially lessening competition in the relevant markets in contravention of section 50 of the *Trade Practices Act 1974* (the **Act**).
2. The ACCC formed its view on the basis of the information provided by the merger parties and information arising from its market inquiries. This Public Competition Assessment outlines the basis on which the ACCC has reached its decision on the proposed acquisition, subject to confidentiality considerations.

Public Competition Assessment

3. To provide an enhanced level of transparency and procedural fairness in its decision making process, the ACCC issues a Public Competition Assessment for all transaction proposals where:
 - a merger is opposed;
 - a merger is subject to enforceable undertakings;
 - the merger parties seek such disclosure; or
 - a merger is not opposed but raises important issues that the ACCC considers should be made public.
4. This Public Competition Assessment has been issued because Ramsay's proposed acquisition of the Coolenberg Clinic at Port Macquarie, NSW (the **Coolenberg Clinic**) is considered to raise issues of interest to the public.
5. By issuing Public Competition Assessments, the ACCC aims to provide the public with a better understanding of the ACCC's analysis of various markets and the associated merger and competition issues. It also alerts the public to the

circumstances where the ACCC's assessment of the competition conditions in particular markets is changing, or likely to change, because of developments.

6. Each Public Competition Assessment is specific to the particular transaction under review by the ACCC. While some transaction proposals may involve the same or related markets, it should not be assumed that the analysis and decision outlined in one Public Competition Assessment will be conclusive of the ACCC's view in respect of other transaction proposals, as each matter will be considered on its own merits.
7. Many of the ACCC's decisions will involve consideration of both non-confidential and confidential information provided by the merger parties and market participants. In order to maintain the confidentiality of particular information, Public Competition Assessments do not contain any confidential information or its sources. While the ACCC aims to provide an appropriately detailed explanation of the basis for the ACCC decision, where this is not possible, maintaining confidentiality will be the ACCC's paramount concern, and accordingly a Public Competition Assessment may not definitively explain all issues and the ACCC's analysis of such issues.

The parties

The acquirer: Ramsay Health Care Limited

8. Ramsay Health Care Limited (**Ramsay**) is a private hospital operator, with facilities catering for a broad range of health care needs from day surgery procedures to highly complex surgery, as well as psychiatric care and rehabilitation. In Australia, Ramsay has over 65 hospitals and day surgery units and admits over 750 000 patients and conducts over 450 000 procedures per annum.
9. Ramsay owns the Port Macquarie Private Hospital (PMPH), a four operating theatre, 76 bed facility, and the Hastings Day Surgery (HDS), both located in Port Macquarie.

The target: Coolenberg Clinic day surgery (currently closed) at Port Macquarie NSW

10. The Coolenberg Clinic is a privately owned, freestanding day surgery facility with two operating theatres and two treatment rooms. It is licensed to operate four day beds and six recovery chairs. It has been closed since July 2008. Prior to its closure, the main focus of work carried out at the Coolenberg Clinic was cosmetic procedures and, to a lesser degree, orthopaedic surgery, general and urological surgery.

Other industry participants

11. The nearest alternative provider of private day surgery procedures is the Mayo Private Hospital in Taree, a 45 bed facility. Taree is located around 86 km from Port Macquarie (approximately 75 mins drive).

The proposed transaction

12. Ramsay proposes to acquire the land, building and equipment associated with the Coolenberg Clinic. Post acquisition, Ramsay proposes to re-open the facility and to use it as a surgical day procedure centre.

Industry Background

How services provided by day surgeries differ from hospitals

13. Hospitals provide procedures that require overnight recovery as well as day surgery procedures. In contrast, day surgeries provide only surgery procedures where the patient does not require overnight recovery. In a day surgery, patients recover in a recovery chair or bed and are discharged on the same day.

Health funds and the Department of Veterans Affairs (DVA)

14. Health funds negotiate Hospital Purchaser Provider Agreements (**HPPA**) with hospital and day surgery owners. These HPPA's are revised periodically and determine the rate that the health fund pays to the hospital or day surgery facility for each procedure.
15. From a competition perspective, health funds act as an agent for their members and collectively negotiate HPPA rates on behalf of their members. Health funds pay a benefit for most procedures, which is a contribution to the HPPA rate and limits the patient's out-of pocket expenses (and in some cases covers all costs).
16. The DVA enters into arrangements with private hospital and day surgery operators for the provision of hospital and day surgery services to veterans and entitled persons. These agreements are similar to HPPAs in the sense that the agreements deal with pricing and service issues, and the DVA is contracting on behalf of a large number of patients.

Timing

17. The following table outlines the timeline of key events in this matter.

Date	Event
22-Aug-2008	ACCC commenced review under the Merger Review Process Guidelines.
29-Aug-2008	Closing date for submissions from interested parties.
04-Sep-2008	Former proposed date for announcement of ACCC's findings of 9 September 2008 amended to 16 September 2008 - to allow for further market inquiries.
16-Sep-2008	ACCC announced it would not oppose the proposed acquisition.

Market inquiries

18. The ACCC conducted market inquiries with a range of industry participants, including potential competitors, specialists, general practitioners, health funds, and other interested parties. Submissions were sought in relation to the substantive competition issues.

With/without test

19. In assessing a merger pursuant to section 50 of the Act, the ACCC must consider the effects of the transaction by comparing the likely future state of competition if the transaction proceeds (the “with” or “factual” position) to the likely future state of competition if the transaction does not proceed (the “without” or “counterfactual” position).
20. The with and without test was critical to the ACCC’s assessment in this matter. As noted earlier, the Coolenberg Clinic has been closed since July 2008 and the facility had been progressively wound down prior to this, with the owner seeking to sell the business for personal reasons.
21. It was put to the ACCC that absent the proposed acquisition, there is a substantial risk that the property will not operate again as a day surgery because it would remain closed or it may be sold - either to a purchaser who would operate it as a medical facility offering different services which would not compete with day surgery providers, or a purchaser who would use it for non-medical purposes.
22. The approach to analysing this matter has a number of similarities to the ACCC’s approach to analysing the impact of a ‘failing firm’ on the relevant counterfactual. In a failing firm scenario, the state of competition prevailing at the time of a merger may overstate the future state of competition without the merger where one of the merger parties is likely to fail and exit the market in the foreseeable future. Therefore, the relevant test is whether the future state of competition with the merger would be substantially less than the future state of competition without the merger where the firm fails.

23. However, the circumstances in this case differ from a standard failing firm scenario - the target firm has not exited the market due to financial losses but as a result of personal reasons detailed to the ACCC confidentially by the owner of the Coolenberg Clinic. Also, the exit has already occurred, rather than being a likely event in the foreseeable future. The issue for consideration then is whether re-entry by the Coolenberg Clinic in the provision of day surgery services (either under current ownership or new ownership independent of Ramsay) is likely absent the acquisition. If it is, the ACCC's assessment would proceed on the basis of a different counterfactual, namely the ACCC would assess the likely effects on competition of the acquisition of the Coolenberg Clinic as a going concern.
24. As is the case with the ACCC's analysis of failing firm arguments, mere speculation that the firm to be acquired will not re-enter or be purchased by another independent buyer is insufficient to establish that an absence of competition between the merger parties is the relevant counterfactual. In the present case, the ACCC considered it was necessary to determine:
- in the absence of the acquisition, whether the assets associated with the relevant firm would be unlikely to re-enter the market (in terms of the provision of day surgery services)
 - whether the merger would be likely to result in a substantial lessening of competition, based on analysis of the likely future state of competition with the acquisition compared to the likely future state of competition without the acquisition (i.e. after the target has exited).
25. In investigating the arguments put to the ACCC and determining the relevant counterfactual, the ACCC specifically sought:
- information to verify that re-entry by the current owner of the Coolenberg Clinic was unlikely in the event that the sale to Ramsay did not proceed
 - evidence that the current owner of the Coolenberg Clinic had made all reasonable attempts over a sustained period to find an alternative purchaser, and that there are no other likely bidders for the Coolenberg Clinic, including any who would re-open the Clinic in competition with Ramsay.

Future of the Coolenberg Clinic if the sale to Ramsay does not proceed

26. The ACCC formed the view that absent the proposed acquisition, it was unlikely that the current owner of the business would seek to re-enter in the provision of day surgery services. The personal reasons for the closure of the Clinic, detailed to the ACCC confidentially by the owner of the Coolenberg Clinic, and the fact the Clinic had already closed were important factors in forming this view.
27. The ACCC concluded that, if the sale to Ramsay does not proceed, the most likely counterfactual was that the Coolenberg Clinic would continue to be closed, pending a potential future sale to another party. The ACCC then considered whether there were other likely bidders for the Coolenberg Clinic who may provide an alternative counterfactual.

Likelihood of other bidders acquiring the Coolenberg Clinic

28. Initial information provided to the ACCC during market inquiries suggested that the vendor had undertaken a thorough sale process over a number of years in an attempt to sell the Coolenberg Clinic, but had attracted very limited interest from other potential buyers. The ACCC tested this information to verify the lack of interest from the marketplace, including by seeking written evidence from the vendor and the vendor's agents on:
- the price sought for the facility and how this had been established (e.g. whether it was based on an independent assessment of the value of the facility)
 - the sale strategy undertaken, including when and where the Coolenberg facility had been advertised, and potential buyers approached by the vendor in relation to the sale of the facility
 - the results of the sales campaign, and where interest had been shown, information on negotiations and why the expressions of interest did not proceed to a sale.

Sale and pricing strategy adopted by the vendor of the Coolenberg Clinic

29. The ACCC's inquiries indicated that the vendor had undertaken a very thorough attempt to sell the Coolenberg Clinic over several years. Steps taken included:
- engaging a specialist firm to initially extensively market the property
 - an active marketing campaign, which included advertising the Coolenberg Clinic in major national newspapers and providing a wide range of potential bidders with an information memorandum. Those targeted with the information memorandum included operators of medical clinics, day surgeries and private hospitals, institutional investors and local doctors.
30. The ACCC found that while there had been several expressions of interest following this campaign, leading to prolonged negotiations in some cases, these had not resulted in a sale.
31. The ACCC contacted a number of potential bidders, including firms who had entered into initial negotiations with the vendor but not proceeded with bids, to independently verify that they continued to have no interest in purchasing the clinic. These inquiries confirmed that there were no other bidders who were likely to purchase the Coolenberg Clinic, maintaining it as a day surgery in competition with Ramsay.
32. The ACCC also examined the pricing strategy adopted by the vendor during attempts to sell the Coolenberg Clinic. For example, if the vendor had been seeking a price above market rates, this may explain the lack of interest in the facility. Offering of a business for sale at an unreasonably high price does not constitute evidence that the business is a failing firm or is otherwise unlikely to re-enter the market without the acquisition.

33. However, the information before the ACCC suggested that the Coolenberg Clinic had been independently valued at market rates, and the vendor had shown flexibility regarding price during negotiations with interested parties. On the basis of information arising from market inquiries, the ACCC considered that it was unlikely that the pricing strategy adopted by the vendor had significantly impeded efforts to sell the Coolenberg Clinic.

Conclusion reached in relation to the counterfactual

34. As a result of these inquiries, the ACCC formed the view that, absent the acquisition by Ramsay
- there were no other serious bidders for the Coolenberg Clinic who would operate the clinic as a competing day surgery
 - in the foreseeable future, there was no evidence to suggest that there was a likelihood that the Coolenberg Clinic would be acquired and operated as a day surgery by an independent operator, either at the independently valued price or some lower figure. In particular, the facility was offered to a number of private hospital and day surgery owners over a period of several years at a price well below the independent valuation. At that time the Coolenberg Clinic was a going concern. While the possibility of the facility re-entering the market at some point cannot be ruled out, the ACCC's considered there was no evidence to show there was a likelihood that this would occur.
35. In this situation, the ACCC considered it appropriate to assess the proposed acquisition on the basis that the relevant counterfactual is not dissimilar to the current status quo (in which the Coolenberg Clinic is non-operational and there is no competition between the merger parties).
36. The ACCC considered that the proposed acquisition would be unlikely to result in a substantial lessening of competition when compared to the relevant counterfactual, in which the Coolenberg Clinic no longer provides day surgery services, having exited the market.

Conclusion

37. On the basis of the above, the ACCC formed the view that the proposed acquisition by Ramsay of the Coolenberg Clinic day surgery (currently closed) at Port Macquarie would be unlikely to result in a substantial lessening of competition in the relevant markets in contravention of section 50 of the Act.