

26 March 2020

COSBOA Communique

Principles for COVID-19 Business Shutdown

BACKGROUND

On Sunday 22 March 2020, various Australian governments made a series of statements about an imminent shutdown. These statements were made in advance of a scheduled meeting of the National Cabinet later that day and reflected a lack of consistency in the approaches of individual states/territories to what is essentially a uniform – health threat to the Australian population.

Many of these statements were broadcast in mainstream media and lit up social media. Small business owners across the country made urgent calls to their industry associations, who were equally caught by surprise and unable to answer their questions about what it meant for them and their employees.

In subsequent days, COSBOA member associations reported that this confusion resulted in businesses closing prematurely and/or suffering avoidable economic loss. These events also prompted a national discussion about which businesses could reasonably be considered “essential services” – for the purposes of being excluded from future economic shutdowns – and which are deemed “non-essential”.

The fallout from these events prompted an emergency meeting of the COSBOA Board which sought to better understand the issues and suggest principles for the future advancement of progressive shutdown measures by the National Cabinet.

Since that meeting, the PM announced a series of additional lockdowns last night (24 March) which appeared to reflect a changed language but have unfortunately created additional confusion about specific businesses impacted by new directions on business closure.

KEY MESSAGES

The key points arising from this meeting are as follows:

1. Recent uncoordinated political statements foreshadowing compulsory closure of “non-essential” businesses created extreme concern in the small business community – and caused economic damage and job destruction that could reasonably have been avoided.
2. The discussion about whether a business is “essential” or “non-essential” is both confusing and unhelpful. Decisions on business closures should be solely grounded on assessment of contagion risk. Supermarkets, for example, with large numbers of people congregating in their premises constitute a far bigger contagion risk than small businesses

which typically have relatively low customer numbers in their workplace at a given point in time.

3. Directions requiring closure of specific business types do not appear to have taken due account of the potential knock-on effects for other businesses within relevant supply chains.
4. While recognising the independence afforded by Australia's federation model, state and territory governments have an absolute obligation to ensure that their approach to business closures are nationally consistent in order to minimise differential financial impacts on businesses operating in identical national markets.
5. Decisions on exclusion of businesses from closure directions must take due account of competition considerations, particularly in markets like Fast Moving Consumer Goods (FMCG) where business closure decisions will potentially cede additional market power to the large supermarkets – to the detriment of all smaller market participants.

SUGGESTED PRINCIPLES FOR ECONOMIC SHUTDOWN

COSBOA believes that the process of progressive business closures should be advanced in accordance with the following key principles:

- **Principle 1: CLEAR COMMUNICATION AND NATIONAL CONSISTENCY:** COSBOA notes that the health risk to the population is uniform across the country – it does not vary across state and territory borders. It therefore follows that measures advanced to reduce contagion must be nationally consistent and clearly communicated in terms of the specific scope of businesses impacted, their timing and their nature.
- **Principle 2: MEASURES REMAIN PROPORTIONAL TO CONTAGION RISK:** Directions on business and workplace closures should be solely based on contagion risk, as opposed to any other measure (e.g. type of business). Ideally, the government should set key Workplace Health Performance Measures (WHPMs) such as social distancing requirements, maximum group size and minimum hygiene practices that are proportional to the contagion risk presented by the business (i.e. customer facing vs non-customer facing and big workplace vs small workplace).
- **Principle 3: MINIMISATION OF ADVERSE COMPETITION IMPACTS** Any measures that force business closures must take account of the potential short-term and longer-term impacts on market competition (e.g. requiring a suburban bottle shop to close while continuing to allow a supermarket to sell alcohol distorts competition). Similarly, measures aimed at increasing community access to groceries in the face of surge demand from supermarkets must not result in the cannibalisation of supply for non-supermarket outlets (e.g. mixed businesses, newsagents and convenience stores).
- **Principle 4: ACCOMMODATE INNOVATIVE BUSINESS RESPONSES:** Where businesses can alter their operations to conform with required *Workplace Health Protection Measures* (as per Principle 2), they should be permitted to continue their operations (e.g. restaurant moving to valet meal pick-up or a pub selling convenience products).

Enforcement of compliance with these measures could be managed via the operation of existing workplace safety regulators.

- **Principle 5: EMPLOYMENT LAWS MUST CLEARLY PROVIDE FOR BUSINESS**

HIBERNATION: Business owners are receiving conflicting legal advice in respect of the application of the stand down provisions under Section 524.1(c) of the Fair Work Act (2009). This means that an employer, faced with need to stand down staff (or partially stand down staff) and unable to secure mutual agreement from their employees for same, is faced with the choice of making all staff redundant or running the risk of future employee claims for unpaid wages in the future. An immediate solution to this issue would be for the Fair Work Ombudsman to issue a clear statement of regulatory intent (or similar) that clearly states that the Regulator will not pursue actions against a business that has stood down staff (or partially stood down) staff owing to the market impact of COVID-19 – for a fixed period of 6 months.

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