
Harper Review into Competition Policy – final report

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In brief

- The Final Report of the Federal Government's independent review of competition policy in Australia – the so called “Harper Review” - was released yesterday.
- The Final Report of over 500 pages contains 56 recommendations including:
 - proposed changes to the Competition and Consumer Act (2010) (CCA) (Cth) including the provisions relating to misuse of market power, cartels, third line forcing, resale price maintenance, mergers, industrial agreements, procedure and Part IIIA (the national access regime);
 - broader based recommendations seeking to bring competition to areas such as human services, infrastructure, taxis/ride sharing, pharmacies, retail trading, planning and zoning and product standards; and
 - changes to the structure of the competition law institutions, particularly establishing a single national access and pricing regulator, taking such functions away from the ACCC.
- Clients with concerns that these changes may adversely impact their business or future transactions or, alternatively, that they may bring business opportunities, should consider engaging with the consultation process on the recommendations. **Written submissions are due by 26 May 2015.**

In detail

Recommendations on amendments to the Competition and Consumer Act

- **Misuse of market power:** As anticipated the Final Report has made recommendations which significantly alter s.46 of the CCA from a test of anti-competitive purpose to one of purpose, effect or likely effect of substantially lessening competition in a market. **These amendments should be of interest to all clients with market power.** The proposed test includes two factors the courts must have regard to: the extent to which the conduct has the purpose or effect of increasing

competition including by enhancing efficiency, innovation, product quality or price competitiveness in the market; and the extent to which the conduct has the purpose or effect of lessening competition by preventing, restricting or deterring the potential for competitive conduct in the market or new entry into the market.

Query how each of these directions to the court will add to the concept of substantially lessening competition and interact with each other. Irrespective, the jurisprudence on s.46 that has developed over decades would be largely dismantled by these recommendations providing uncertainty for clients with market power. In an attempt to mitigate concerns about business uncertainty, the recommendations include making authorisation available to exempt conduct from s.46 and guidelines from the ACCC on its approach to enforcement. With respect, the first is likely to cause delay and an abundance of caution from business and practitioners while the second is unlikely to provide the degree of comfort envisaged.

- **Cartel Provisions:** The existing cartel provisions have been criticised for their complexity and prescriptiveness. The Final Report makes a number of recommendations which, if adopted, should provide greater territorial nexus with Australia; clarify that the provisions apply to likely competitors where “likely” is to be determined on the balance of probability and provides a broad joint venture exemption. The recommended amendments also attempt to deal with the current overlap between the cartel provisions, the exclusionary conduct provisions and section 45. Moreover, the price signalling provisions have been recommended for repeal while at the same time a prohibition on “concerted practices” has been recommended subject to a test of substantially lessening competition.
- **Third line forcing (TLF) and resale price maintenance (RPM):** The recommendations on TLF and RPM should be welcomed by business: a move from a per se prohibition on TLF to one based on a substantial lessening of competition (a complete repeal of section 47 would occur if the recommendations on s.45/s.46 are accepted); and retaining a per se prohibition on RPM but with a notification mechanism and exemption for related bodies corporate.
- **Merger Review:** The Final Report recommends that the little used formal merger clearance process and the merger authorisation process currently before the Australian Competition Tribunal be combined, with the ACCC to become the decision maker at first instance. This would strip merger parties of the ability to effectively by-pass the ACCC in respect of mergers where the public benefit outweighs the anti-competitive detriment (such as in the recent AGL case). The recommended process would be subject to strict timeframes and review by the tribunal. These recommendations do not affect the existing informal merger clearance process used in most mergers in Australia. The recommendations include an amendment to the definition of competition to encompass competition from goods *capable* of being imported or services *capable* of being rendered in Australia by person not resident or carrying on business in Australia, thus clarifying that potential and not just actual imports are to be considered in an evaluation of whether or not there is a substantial lessening of competition.
- **Industrial agreements:** The Final Report recommends that the provisions that prevent restricting the freedom of the employer to supply or acquire goods or services from another person be extended to awards and industrial agreements and that the ACCC should be able to intervene in proceedings before the Fair Work Commission and make relevant submissions.
- **Procedure:** The Final Report recommends simplifications to the authorisation and notification processes together with the introduction of a block exemption. The Final Report also calls for greater flexibility for small business in the notification processes to enable a notification to cover future unnamed members, multiple counterparties and varying timeframes. With respect to section 155 notices, the Final Report recommends that these be extended to cover the investigation of alleged contraventions of court-enforceable undertakings and it recommends that a person is able to comply

with a section 155 notice if they can demonstrate that a reasonable search was undertaken.

- **National Access Regime:** The Final Report recommends changes to the following declaration criteria: (a) should require that access through declaration promote a substantial increase in competition in a dependent market that is nationally significant; (b) should require that it be uneconomic for anyone to develop another facility to provide the service; and (f) should require that access on reasonable terms and conditions through declaration promote the public interest. The recommendations also provide for the tribunal to undertake a merits review of access decisions.

Broader industry based recommendations

The broader industry based recommendations include:

- introducing choice and competition in the provision of human services;
- introducing cost-reflective road pricing with the aid of new technologies;
- the Productivity Commission to undertake an overarching review of intellectual property;
- all Australian Governments should review regulations to ensure that unnecessary restrictions on competition are removed;
- restrictions on competition in planning and zoning rules should be subject to a public interest test;
- regulations that restrict numbers of taxi licences and competition in the taxi industry should be reviewed;
- mandatory product standards should be reviewed;
- the remaining restrictions on retail trading should be removed;
- restrictions on parallel imports should be removed unless it can be shown that the benefits outweigh the costs and the objectives of restriction can only be achieved by restricting competition. Parallel imports on books and second hand cars should be removed;
- pharmacy ownership and location rules should be removed;
- all Australian governments should review their competitive neutrality policies;
- government procurement and privatisation policies should not restrict competition unless the benefits outweigh the costs and the objectives of restriction can only be achieved by restricting competition;
- deregulation of electricity and gas retail prices; and
- increased private participation in the water sector through improved pricing practices

Recommendations on institutions

The Final Report recommends the dissolution of the National Competition Council (NCC) and the formation of the Australian Council for Competition Policy (ACCP). It should have a broad role encompassing advocacy, independently monitoring process in implementing agreed reforms, identifying potential areas of competition reform, making recommendations to government, undertaking research and ex-post evaluation of some merger decisions. It is recommended that it should have the power to undertake competition studies of markets in Australia and make recommendations on changes to regulation or investigation of potential breaches by the ACCC.

The Final Report recommends that the access and pricing functions of the ACCC and NCC be transferred to a single national Access and Pricing Regulator including the telecommunications access and pricing functions; price regulation and advisory under the Water Act 2007 (Cth); powers under the National Access Regime; functions by the Australian Energy Regulator and NCC under the National Electricity Law, the National Gas Law and the National Energy Retail Law. Unsurprisingly, the ACCC has already questioned the merit of these recommendations.

The takeaway

The recommendations in the Final Report are broad ranging and contain something of interest for all clients irrespective of size or industry. Accordingly, clients should carefully consider which

recommendations they support for implementation or prefer were disregarded by government, once it moves to its implementation phase, and whether they wish to engage with the consultation process which concludes on 26 May 2015.

Let's talk

For a deeper discussion of how these issues might affect your business, please contact:

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