



The Harper Review

Final Report recommendations

Key issues

The Harper Review Final Report (*the Harper Report*) was released on 31 March 2015.

1. Misuse of market power

Currently, the *Competition and Consumer Act 2010 (CCA)* prohibits companies from using their substantial market power for the purpose of harming competitors. The prohibition has been criticised by the ACCC on the basis that it is inherently difficult for it to establish a causal connection between the conduct and a corporation's market power.

The Harper Report recommends expanding the prohibition so that it captures any conduct engaged in by a corporation with substantial market power that has the purpose, effect or likely effect of substantially lessening competition. In assessing whether the conduct has the requisite purpose or effect, the Panel recommends that the court have regard to a range of matters, including whether the conduct would result in enhanced efficiency, innovation, product quality or price competitiveness. These changes, if implemented, are substantial and will require firms with market power to consider the purpose and competitive effects of all key marketing, pricing, and other strategic decisions.

2. Mergers

Concerns have been raised about the transparency and timeliness of existing merger review processes. The Harper Report recommends retaining the informal clearance process (subject to the ACCC working with business to improve timeliness of decisions) and introducing a new formal process whereby the ACCC would be the initial arbiter and parties would have the option of review by the Tribunal. The ACCC would approve a merger if it does not substantially lessen competition or the public benefits outweigh any detriment. This formal process would be subject to strict timelines, designed to increase its use. The authorisation process before the Tribunal would be replaced by this new formal clearance process.

The Harper Report also recommends that post-merger reviews be conducted by a new body, the Australian Council for Competition Policy, to assess the effectiveness of ACCC processes and whether the ACCC's views on the competitive impacts are borne out in practice.

3. Cartels, price signalling and joint ventures – streamlining the provisions

The prohibitions against cartel conduct have been criticised as overly complex and too broad reaching. The Harper Report recommends that the prohibitions be simplified and narrowed in two key respects. First, only agreements between actual or likely competitors (as opposed to 'possible' competitors) would be subject to the cartel laws. Second, the exemption for joint ventures be strengthened to cover joint ventures for production, supply, acquisition or marketing (the exception is currently

limited to production or supply joint ventures). The impact of the second amendment would be to exempt a broader range of joint ventures from the cartel provisions so that those arrangements would no longer involve an automatic breach of the CCA but would be subject to a substantially lessening of competition test.

The Harper Report also recommends repeal of the price signalling prohibitions (which currently apply to the banking sector) and the introduction of a prohibition (to apply across all sectors) against 'concerted practices' (e.g potentially information sharing) which have the purpose, effect or likely effect of substantially lessening competition.

4. Vertical restraints, third line forcing and resale price maintenance (RPM)

The Harper Report recommends that the prohibition against exclusive dealing (including third line forcing) be repealed and that vertical restraints be regulated by the prohibitions against anti-competitive agreements and misuse of market power. Third line forcing will therefore be subject to a competition test and no longer involve an automatic breach of the CCA. The Harper Report also recommends that RPM be permitted if it occurs between related bodies corporate or has been notified to the ACCC.

5. Exemption and authorisation

The Harper Report recommends simplifying the authorisation and notification procedures under which parties can gain exemption or 'immunity' for particular arrangements. The principal recommendation is that the ACCC be empowered to authorise conduct (excluding cartel conduct) if it is satisfied that the conduct is unlikely to substantially lessen competition or is likely to result in a net public benefit. Currently the ACCC is only able to grant an exemption/immunity (other than in the case of mergers) if it is satisfied that the conduct will result in a net public benefit. The Harper report also recommends that the ACCC be empowered to issue block exemptions, thereby creating safe harbours for particular courses of conduct.

6. Enforcement

The Harper Report recommends that the ACCC be required to frame section 155 notices in the narrowest form possible and that the obligation to search for documents be subject to a requirement of reasonableness. The Harper Report also recommends a number of changes to lower barriers for consumers and small business seeking to institute private actions for breach of the CCA. These include permitting private litigants to rely on admissions of fact as well as findings of fact from prior proceedings.

7. Extra territorial application

Conduct outside Australia is currently caught by the CCA where the corporation is incorporated or otherwise carrying on business in Australia. In relation to the cartel provisions, this is the only connection required with Australia. In relation to the other provisions in Part IV, the ACCC must also establish that the conduct relates to a 'market in Australia'.

The Harper Report recommends that the CCA apply to all corporations including foreign corporations, subject only to the following:

- > the conduct occurring outside Australia relate to trade or commerce (defined as trade or commerce within Australia or between places outside Australia and Australia);
- > in relation to the cartel provisions, the parties to the agreement are competitors in relation to goods or services supplied or acquired in trade or commerce; and
- > in relation to the other provisions of Part IV, the conduct relates to a market in Australia.

8. Institutional changes and the introduction of market studies

The Harper Report recommends a number of changes to the ACCC's role and governance structure. Specifically Harper recommends that the ACCC retain its function as a regulator of both competition and consumer laws but no longer undertake competition policy advocacy or access and pricing functions. In addition, the Harper Report recommends that the ACCC appoint part-time ACCC Commissioners to ensure a more diverse range of business, consumer and academic viewpoints within the ACCC, and develop a media code of conduct.

The Harper Report recommends the introduction of two new bodies: a National Access and Pricing Regulator to oversee access issues; and an Australian Council for Competition Policy to undertake competition policy advocacy, oversee policy reform and undertake market studies.

9. Access

The Harper Report makes a number of recommendations regarding the declaration criteria in Part IIIA to confine the scope of the National Access Regime to instances where declaration is in the public interest.

10. Policy

The Harper Report recommends changes to create efficiencies and increase competition in a number of industries and government sectors, including human services, road transport, taxis, electricity, gas and water as well as a review of Australia's intellectual property laws. Significant further reforms should be expected in these areas. The Harper Report also recommends a review by Australian governments of their policies on procurement and other commercial arrangements.

Meet the team

Please feel free to contact a member of the team to discuss the Harper Review in more detail.

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