

GOVERNMENT RESPONDS TO HARPER REVIEW

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Legal Briefings

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IN BRIEF

The Treasurer has released the Government's response to the Competition Policy Review (**Harper Review**).

Of the 56 recommendations made in the final report for reform across competition law, policy and institutions, the Government has supported 39 in full or in principle, 5 in part and notes or remains open to a further 12 recommendations.

Even where recommendations are endorsed, the specifics of any legislative reform are uncertain. Many of the Competition Policy recommendations will require ongoing discussions and negotiations between the Commonwealth and the state and territory governments, and will need to be refined following additional consultations and studies (including by the Productivity Commission).

The Government has accepted that the drafting of the *Competition and Consumer Act 2010* (Cth) (**Act**) needs to be simplified and has indicated that it will release exposure draft legislation designed to implement many of the Panel's recommendations. The Government has not endorsed the recommended changes to the misuse of market power provision. It has indicated that it will consult further on options to reform section 46 and release a discussion paper on this topic.

The Government supports the creation of a new competition body, the Australian Council for Competition Policy, which is intended to provide leadership in developing and implementing a broad competition policy agenda. However, it has not, at this time, endorsed the creation of a new Access and Pricing Regulator which would involve removing access and pricing functions in regulated industries from the ACCC.

BACKGROUND

On 24 November 2015, the Treasurer released the Government's response to the Competition Policy Review (Harper Review).

This response is the culmination of a long process that began on 4 December 2013 when the Prime Minister and the Minister for Small Business announced a broad-sweeping review of the *Competition and Consumer Act 2010* (Cth) (Act) and competition policy. The Harper Review panel (Panel) released the Competition Policy Review Draft Report on 22 September 2014 (discussed in our update.¹

The Panel released the Competition Policy Review Final Report (the Final Report) on 31 March 2015, discussed in our update.²

OBSERVATIONS

The Government has, for the most part, signalled a pro-reform stance in its response to the Final Report. The Treasurer has declared an intention to 'reboot competition reform policy'. This is an important first step. However, the scope of key reforms remain uncertain and certain issues have been deferred.

For many recommendations Government support is high level and prone to 'motherhood' statements. It is long on support for reform as a concept, but short on detail. For example, the Government's response fails to consider the model legislative provisions included within the Final Report. This is not surprising given the nature of the document. However, at least in respect of the competition law recommendations, it means that the precise nature of any reform will not be apparent until after future rounds of consultation and exposure draft legislation is released.

The Harper Review targeted three main areas: Competition Law, Competition Policy and Competition Institutions.

Competition Law

The Government has supported the simplification of the legislation. This is a good thing although the extent of the simplification will depend on the specific wording of the proposed exposure drafts. The Government has sensibly pressed pause in respect of the Panel's recommendations to introduce an effects test to the misuse of market power provisions. Other significant recommendations endorsed by the Government include the removal of the price signalling prohibitions and the introduction of a 'concerted practices' concept into the legislation. Not surprisingly, but disappointingly, the Government endorsed the Panel's approach to merger authorisation and agreed that the ACCC, rather than the Australian Competition Tribunal, should consider merger authorisation applications in the first instance.

Competition Policy

While supporting many of the Panel's Competition Policy recommendations, the Government's responses are, for the most part, expressed at a high level of generality. The Government's response suggests a general direction for reform. The Government supports working with the states and territories to develop and secure their agreement to a new competition principles and reform agreement, which is to be considered by the Council of Australian Governments (COAG) within 12 months. Depending on the ultimate result of these negotiations and the final terms of the principles, this could be a significant development.

Where the Government has supported the Panel's agenda, for example, in respect of the adoption of competition principles into the provision of human services, the specific details of any government policy will be deferred following additional studies and consultations, including following Productivity Commission reviews. The Government's response correctly notes that many of the recommendations, for example, in respect of taxi and ride-sharing, retail trading hours, and planning and zoning, are not areas where the Commonwealth has a direct responsibility and will require discussions and negotiations with the state and territory governments before any reform agenda is implemented.

Competition Institutions

The Government has agreed to the creation of a new competition law institution, the Australian Council for Competition Policy, which will replace the National Competition Council. However, many of the significant institutional recommendations have been rejected or deferred. For example, the Government did not agree with the Panel's recommendation to abolish the requirement for sector-specific ACCC Commissioners and indeed indicates a specialist agricultural Commissioner will be appointed. The Government also appears to have endorsed an ongoing role for the ACCC in respect of market studies. Finally, while noting that the Government remains open to the recommendation, it has not endorsed the creation of a new Access and Pricing Regulator which would involve removing these powers from the ACCC. While the creation of a new Access and Pricing Regulator was broadly supported by relevant business interests, it was strongly objected to by the ACCC.

Further details regarding the Government's approach to key recommendations are provided below.

COMPETITION LAW

Market power: arguably the most controversial recommendation of the Panel was that an 'effects' test be introduced into section 46 of the Act. In response, the Government has agreed to release a discussion paper on this topic. This effectively 'presses pause' on the issue for now, which is a sensible approach. A principal concern of the inclusion of the effects test was the potential to chill pro-competitive conduct. In addition, the substantial change to the law recommended by the Panel would have effectively abandoned the last 40 years of case law. As a consequence of the Government's approach it appears that the debate regarding reform to section 46 will continue for some time yet.

Cartels and joint venture exemption reform: the Government supports the Panel's recommendation to simplify the overly complex prohibitions on cartel conduct. The Government will develop draft legislation for consultation to simplify definitions to improve clarity of the cartel provisions. The exposure draft legislation will also aim to broaden the joint venture exemption so that it does not limit legitimate commercial transactions (such as through vertical supply arrangements). It remains to be seen whether the model legislative provisions set out in the final report will be adopted by the Government.

These are sensible recommendations that should provide greater certainty in respect of the cartel provisions and for joint venture participants in circumstances where substantial time and effort is often dedicated to satisfying technical legal requirements, rather than managing output expanding joint venture operations.

Merger process: The key recommendation from the Panel that merger parties should no longer have the ability to go directly to the Australian Competition Tribunal for merger authorisations has been accepted by the Government. The amendments effectively combine the formal merger clearance and merger authorisation processes, with the ACCC being the decision maker at first instance. The proposed change is disappointing. Recent experience with the Tribunal, including in respect of the AGL matter, shows that the Tribunal can effectively deal with complex merger matters. Delay can kill a merger. Removing the option to go directly to the Tribunal may, in certain circumstances, mean that a beneficial merger does not proceed.

Price signalling: the Panel's recommendation to remove the existing price signalling provisions and introduce a regime based on the European concept of 'concerted practices' was supported by the Government. The removal of price signalling prohibitions is a positive step. However, it remains to be seen how the concerted practices concept will be codified in the Government's exposure draft legislation.

Clarify the drafting of exclusive dealing or repeal altogether: the Government has not outright supported the Panel's recommendation that section 47 of the Act be repealed and vertical restrictions and associated refusals to supply be addressed by amendments to sections 45 and 46. Instead, the Government will consider simplification of section 47 following further consultation on amendments to 46.

Third line forcing should not be per se illegal: the Government supports the Panel's recommendation that third line forcing should only be illegal subject to a competition test and will develop exposure draft legislation for consultation with the public and states and territories. This reform has been proposed in prior reviews of Australian competition policy and is in line with international approaches.

Notification process for resale price maintenance: the Government supports the Panel's recommendation to maintain a per se prohibition on Resale Price Maintenance (RPM). The Government will introduce a notification process, whereby notified conduct will not contravene the Act. There will also be an exemption for RPM for related bodies corporate.

The burden of section 155 Notices: the Government supports the Panel's recommended changes to the section 155 power, and will develop exposure draft legislation for consultation with the public and states and territories. Significantly, the Government has stated that it "expects" the ACCC will take into account the recommendation to make compliance with mandatory section 155 notices subject to a 'reasonable search' qualification and review its guidelines on section 155 notices having regard to the increasing burden imposed by such notices in the digital age.

National access regime: the Government's response to the Panel's recommendations also incorporates its response to the 2013 Productivity Commission inquiry into the National Access Regime. The government has largely ignored the recommendations of the Panel and instead adopted the recommendations of the Productivity Commission. Notably, this includes recommendations that criterion (a) be a comparison of competition with and without access on reasonable terms and conditions through declaration; and (the most controversial recommendation) that criterion (b) include a 'natural monopoly' test rather than a 'private profitability' test, which is likely to make it easier for parties to obtain regulated access to significant infrastructure. The Government will adopt the recommendation of both the Productivity Commission and Panel that criterion (f) be reshaped as a positive test that declaration be in the public interest. The Government will develop exposure draft legislation for consultation to give effect to this response.

The extraterritorial reach of the law: the Panel's recommendation that the competition law should apply to overseas conduct insofar as the conduct relates to trade or commerce within Australia or between Australia and places outside Australia was met with partial support from the Government. The Government supports removing the requirement for private parties to seek ministerial consent before relying on extra-territorial conduct in private competition law actions, noting that the *Competition and Consumer Amendment (Deregulatory and Other Measures) Bill 2015* will give effect to this recommendation. The Government does not support removing the requirement for a contravening firm to have a connection with Australia in the nature of residence, incorporation or business presence. The Government will consider the best way to address overseas conduct that harms competition in an Australian market in light of international law and policy considerations.

Secondary boycotts: the Government supports the Panel's recommendation that the ACCC more strongly enforce the prohibitions on secondary boycotts, and that the maximum penalty level for secondary boycotts be aligned with those for other breaches of the Act. The Government will develop exposure draft legislation for consultation with the public and states and territories.

COMPETITION POLICY

Competition principles reformulated: the Final Report proposed a reformulated set of competition principles and called for state and territory Governments to review key priority areas and remove restrictions on competition. The Government also supported the adoption of choice and competition principles into the provision of human services. The Government's response to the Final Report contains very significant approval of the wide ranging recommendations of the Panel on questions of policy.

Removal of anti-competitive regulation: the Government supports the Panel's recommendations that the area of taxis and ride-sharing should be reviewed immediately by state and territory governments and the Panel's recommendations for the introduction of direct, cost-reflective road pricing with the help of new technologies, so as to assist road investment decisions to become more efficient and responsive to the needs and preferences of road users.

In contrast, the Government remains open to the Panel's recommendation for a repeal of the exceptions for international liner cargo shipping and a substitution with a 'block exemption' for agreements that meet a minimum standard of pro-competitive features. The Government notes the Panel's recommendations that certain cabotage restrictions on shipping and aviation should be removed.

Removal of intellectual property licensing exception: the Government supports the recommendation for the Productivity Commission to undertake an overarching review of intellectual property. However, the Government does not support a separate independent review of the Australian Government processes for establishing negotiating mandates to incorporate intellectual property provisions in international trade agreements. We believe that the Government's decision to support this review and to avoid a separate independent review of processes for establishing mandates to incorporate intellectual property provisions in international trade agreements is both sensible and in line with developments in other jurisdictions.

Parallel imports: the Government supports in part the Panel's recommendation that the restrictions on parallel imports be removed. The Government supports the removal of parallel import restrictions on books and will progress this recommendation following the Productivity Commission's inquiry into Australia's intellectual property arrangements and consultations with the sector on transitional arrangements.

General class exemption power concerning liner shipping: the Government remains open to the Panel's recommendation that Part X of the CCA (which deals with the specific regulation of liner shipping) and stated that a general class exemption power will be introduced to the CCA, which will allow the ACCC to authorise broad classes of conduct. The Government will work with the ACCC and relevant stakeholders, including shipping lines and importers and exporters, to investigate options regarding how a class exemption could be applied to the liner shipping industry.

Competitive neutrality: the Government supports updating its competitive neutrality policies and will provide guidance to the states and territories. It encourages states and territories that do not yet have appropriate mechanisms in place to bring about the introduction of appropriate mechanisms.

COMPETITION INSTITUTIONS

A new competition advocate: the Panel made a number of significant recommendations in relation to policy institutions and governance of those institutions. This included the creation of a new body, the Australian Council for Competition Policy (**ACCP**), which would be tasked with leading and driving the implementation of the evolving competition policy agenda. These amendments were in part aimed at addressing concerns within the business community that the conflation of policy advocacy, law enforcement and sectoral regulatory responsibilities within the ACCC could distort decision making. While the Government has accepted the recommendation to create an Australian Council for Competition Policy, its response to various institution recommendations is to defer them or, in substance, reject them.

A new Access and Pricing Regulator: the Government is open to the Panel's recommendation that all access and pricing functions in regulated industries (including electricity, gas, telecommunications and water as well as the general access regime) be split from the ACCC to a new Access and Pricing Regulator. The Government will continue discussions with states and territories on how a new national framework could be developed between the Commonwealth, states and territories to promote economic growth, including the most appropriate institutional architecture to support reform. We see benefits in establishing an effective industry-specific economic regulator which will have specialised skills and should perform more effectively than the existing patchwork of regulators.

ACCC governance: Contrary to the Panel's recommendation that half of the ACCC Commissioners should be appointed on a part-time basis, the Government considers that full-time Commissioners are best placed to consider and take action on the varied and frequent decisions of the ACCC. The Government rejected the Panel's recommendation that requirements for small business and consumer protection Commissioners be abolished from the legislation and indicated an intention to appoint a new Commissioner with specialist agriculture expertise. The Government considers that a specific small business Commissioner is an important aspect of the Government's commitment to ensuring key regulatory bodies are enhanced by appointments with small business insights and experience, and also supports the ACCC taking steps to improve its communications with small businesses.

Market studies power: while the Panel recommended that the ACCP should have the power to undertake competition studies of markets in Australia, the Government supports the need for a body to oversee progress on competition reform and will discuss its design, role and mandate with the states and territories. The Government considers that the ACCC should continue to have scope to conduct market studies as it can better inform its broader enforcement and regulatory work.

ACCC as a player in the media: the Government supported the Panel's recommendation for an ACCC Code of Conduct for its dealings with the media to strengthen the appearance of impartiality.

ENDNOTES

1. [Harper Competition Policy Review – Draft Report.](#)
2. [Harper Review Final Report.](#)

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



LIZA CARVER
PARTNER, SYDNEY

+61 2 9225 5574
Liza.Carver@hsf.com



PATRICK GAY
PARTNER, SYDNEY

+61 2 9322 4378
Patrick.Gay@hsf.com



GRAEME PRESTON
REGIONAL HEAD OF
PRACTICE –
CORPORATE, TOKYO
+81 3 5412 5485
Graeme.Preston@hsf.com

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