



HARPER RESPONSE: LONG ON SUPPORT, SHORT ON DETAIL

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Legal Briefings - By **Patrick Gay and Liza Carver, Herbert Smith Freehills**

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This is an important first step. However, the scope of key reforms remains uncertain and some issues have been deferred.

For many recommendations, Government support is high 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 Harper. This is not surprising given the nature of the document. However, 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 areas: competition policy, competition law and competition institutions.

Support for the competition policy reforms may be more equivocal than the authors of the Harper report had hoped for.

With regards to the liberalisation of human services markets, a significant area of focus for Harper, the Government has proposed a Productivity Commission review. Decisive reform may be some way off. The Government has 'noted' the Harper recommendations with respect to issues surrounding coastal shipping and pharmacies.

In terms of competition law, the Government has committed itself to the simplification of overly complicated legislation, where wording is surplus to requirements and 'technical' traps abound.

For example, the Government has accepted that the prohibitions on cartel conduct are too complex and that the current joint venture exception to cartel conduct is overly narrow and potentially restrictive. We will need to wait for the exposure drafts before we can be certain that a simpler and ultimately more efficient legislative regime is put in place. That said, the Government is to be commended on its position.

Harper's most controversial competition law recommendation is in respect of the misuse of market power provisions. The Government has, correctly, pressed pause on these reforms. The necessity for a change to current law is not well made out in Harper. Harper and the ACCC instinctively dismiss concerns about a 'chilling effect' on vigorous if ruthless competition. If for no other reason, abandoning 40 years of case law and the guidance it provides should not be undertaken unless the benefits of reform are clear.

The Government has supported Harper's recommendations that merger parties should no longer have the ability to go directly to the Australian Competition Tribunal for merger authorisations. While this is not surprising, this is disappointing.

The ACCC has been vocal in its support for this recommendation. However, recent experience with the tribunal, as seen in the decision to oppose AGL's proposed acquisition of Macquarie Generation, 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.

The Government has side-stepped some of the key governance issues in Harper.

Harper made a number of significant recommendations for policy institutions and governance of those institutions. Many of these recommendations reflected concerns within the business community that the conflation of policy advocacy, law enforcement and sectoral regulatory responsibilities within the ACCC could distort decision-making.

Harper addressed these concerns by recommending that the ACCC focus on its core law enforcement functions. Harper also recommended the creation of an Australian Council for Competition Policy, giving it the national policy advocacy role and the power to conduct 'market studies'.

On sectorial regulation (access, energy, telecommunications) Harper recommended these functions be removed from the ACCC and given to a new access & pricing regulator.

This recommendation has been echoed by the October review of governance arrangements for Australian Energy Markets, carried out by Dr Michael Vertigan for the COAG Energy Council. Vertigan recommends that the Australian Energy Regulator (responsible to energy regulation and currently housed within the ACCC) be separated into a standalone agency.

Harper also sought to address concerns about sectoral interests by proposing that the requirement for one full-time Commissioner to represent consumer interests and other small business interests be abolished.

While the Harper review recognises the need for the Commission to have the benefit of a cross-section of interests and perspectives, it recommends this is achieved by the appointment of part-time members rather than by full time members with portfolios.

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.

On the composition of the Commission the Government intends to expand the 'commissioner with a portfolio' approach with the appointment of a new commissioner with 'specialist agricultural knowledge and skills'. The recommendation for an access and pricing regulator has been deferred pending discussions with the states and territories and the ACCC is to retain its market studies function.

KEY CONTACTS

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



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