HARPER REVIEW FINAL REPORT: HARPER REVIEW HOLDS ITS COURSE

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Video – By **Chris Jose** and **Patrick Gay**

The Harper Review Final Report has made 20 separate recommendations to simplify and clarify our competition laws.

In its much-anticipated final report the Harper Review has held its course and continues to advocate sweeping reforms to competition law and policy.

The Harper Panel was charged with very broad terms of reference targeting three main areas – competition policy, competition law and competition institutions.

Despite strong objections from some quarters, the Panel continues to target a shopping list of usual suspects for competition policy reform, including taxis, pharmacies, coastal shipping and parallel importation.

There will no doubt be further public and political debate in relation to these reforms. That said, we view the removal of restrictions to effective competition as a positive step.

In terms of competition law, the Panel continues to advocate the introduction of an effects test to the misuse of market power prohibition in section 46. This has understandably been the focus of major public debate and concern since the draft report. The principal concern is that the introduction of an effects test would chill pro-competitive conduct. The Panel has not been moved by this debate.

A limited concession in the Panel's report is that in assessing section 46 cases, Courts would be required to consider the extent to which the conduct enhances efficiency, innovation, product quality or price competitiveness in the market. Whether it fully answers concerns raised in the public debate remains to be seen. Such a substantial change to the law which abandons the last 40 years of case law will bring uncertainty. While the Panel acknowledges this, it likely underestimates it.

In a move that will impress both lawyers and the business community, the Panel has recommended a drafting approach which removes language which is surplus to requirements.

For example, vertical restraints would no longer be dealt with by technically drafted provisions, but treated the same way as other potentially anti-competitive conduct. This includes the removal of the per se prohibition against third line forcing.

Of particular relevance to those involved in collaborative activity, such as in the mining and resources industry, we have finally got to a position where we may have a single exception for joint venture conduct. This is to be welcomed.

Simplified drafting is not only of benefit to the business community but also of potential benefit to the ACCC. A simplified cartel regime may make it easier for the ACCC, in conjunction with the Commonwealth DPP, to bring criminal cartel proceedings.

The Panel has proposed that the merger review process be streamlined. We agree that the current formal clearance process is troublesome and unworkable. The Panel's recommendations should make formal merger clearance more user-friendly.

However, merger parties have lost the ability to go directly to the Australian Competition Tribunal for merger authorisations. This process, recently given life by Murray Goulburn and then successfully used by AGL, has been a viable and timely alternative to ACCC informal clearance. The AGL case showed that the Tribunal can, after testing witnesses and experts, come to a completely different view of competition issues to the ACCC. The loss of this merger approval option is disappointing.

The institutional reforms proposed by the Panel potentially have far-reaching consequences for the administration of competition law and policy.

While the Panel has abandoned its earlier recommendations to change the governance structure of the ACCC itself, it has maintained its view that the ACCC should only focus on competition and consumer law. Significantly, it recommends that the access regulation functions and powers be removed from the ACCC and the AER and be given to a new access and pricing regulator.

For many years state governments and others have advocated that energy regulation be split from the ACCC. The Panel has gone further by including telecommunications and other industries.

We think this is a move in the right direction. It will allow for a specialisation of skills. In addition, the removal of certain regulatory functions from what is, in essence, an investigatory body may give rise to a more collaborative approach to market regulation.

It is now over to the government to press forward with the suggested reforms. We hope they also hold the course and ensure a much desired reinvigoration of competition in Australia.

This opinion piece was first published on Business Spectator here, 31 March 2015

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