

Competition Law News

The Harper Review of competition law and policy: what do you need to know ahead of the Draft Report?

WHAT YOU NEED TO KNOW

- As has been widely publicised in the media, the Harper Review of competition law and policy will soon release its Draft Report. The Draft Report will consider some of the wide-ranging issues raised by over 300 written submissions made to the Review Panel, and during public consultations.
- The submissions address a wide range of proposals to reform Australian competition law, including the merger clearance and authorisation processes, the prohibitions on misuse of market power, price signalling and third line forcing, and the exceptions which apply to joint ventures and certain intellectual property rights. Submissions also address proposed reforms to third party access regimes, and the powers of the ACCC.
- This note identifies some of the wide ranging issues raised in submissions to the Review Panel to date, to assist businesses in understanding the types of issues which may be addressed in the forthcoming Draft Report.

Summary: key areas addressed in submissions to the Harper Review

Competition law	Policy
<ul style="list-style-type: none"> • Misuse of market power • Merger clearance and merger authorisation • Joint venture exception to cartel conduct • Price signalling • Unconscionable conduct/unfair contracts (particularly for small businesses) • Third line forcing • Resale price maintenance • Intellectual property exception • Secondary boycotts, and the intersection of competition law and industrial relations 	<ul style="list-style-type: none"> • Government involvement, and the potential for increased competition, in areas such as health, insurance, education, waste management, childcare and transport • Competitive neutrality • Industry specific concerns in the following sectors: <ul style="list-style-type: none"> ➢ Energy, and environmental regulation ➢ Retail ➢ Planning and zoning ➢ Pharmacies ➢ Industrial relations ➢ Tax <p>Banking and financial services</p>
Third party access to infrastructure	Enforcement
<ul style="list-style-type: none"> • Productivity Commission's recommendations on Part IIIA of the Competition and Consumer Act • The impact of access regulation on efficiency and investment, and the future of the Part IIIA declaration regime 	<ul style="list-style-type: none"> • Costs associated with ACCC investigations, including compulsory "section 155 notices" • ACCC's proposal to extend its power to issue section 155 notices and introduce a new power to undertake "market studies" • Structure of the ACCC/AER, and oversight of the ACCC

The Harper Review: progress to date

The Harper Review Panel has now finished receiving submissions and conducting public consultations concerning its Issues Paper. Our [March 2014](#) publication has the full background on the Review and its terms of reference.

The Review Panel is expected to release its Draft Report in late September. The Panel will then seek submissions in response to the Draft Report, and is also organising an invitation only conference in late October, which will provide an international perspective on some of the matters being considered by the Review Panel. The Panel will present its Final Report to the Commonwealth government in March 2015.

1. First and foremost: what might happen to competition law?

Misuse of market power

Many submissions have addressed the question whether the prohibition on misuse of market power should be amended, and many of these issues have received extensive press coverage.

The key issues are:

- whether, as the ACCC and others have proposed, the misuse of market power prohibition should be subject to an "effects test", so that it would apply to conduct that had an anticompetitive purpose or effect (whereas the current prohibition contains a "purpose" test only). The introduction of an effects test is strongly supported by some businesses and business groups, but has generated a lot of criticism from others;
- repeal of the "Birdsville" amendment prohibiting particular predatory pricing conduct; and
- whether courts should have the power to order divestiture of assets by a firm found to have misused its market power.

Merger clearance and merger authorisation

Merger clearance and merger authorisation are hot issues, particularly following the success of AGL's application to the Australian Competition Tribunal for merger authorisation based on public benefit grounds, to allow it to acquire the assets of Macquarie Generation.

Some of the key themes raised in submissions are:

- whether the Australian law, and the ACCC's application of it, has adequate regard to the competitive constraints faced by Australian businesses which operate in globally competitive markets (some have linked these submissions to suggestions that there should be greater support for "national champions");
- whether a different merger authorisation process should apply in future (eg the ACCC submits that it should make first instance decisions on authorisation, subject to a limited merits review by the Competition Tribunal based on the materials before the ACCC);
- in the wake of Murray Goulburn's experience during its attempted takeover of Warrnambool Cheese and Butter, whether there should be greater co-ordination as to the timing of regulatory approvals by bodies such as FIRB, the ACCC and the Australian Competition Tribunal in a competitive takeover process;
- support for reforms to improve the timeliness, efficiency and transparency of the ACCC's informal merger clearance process;
- whether merger notification should be mandatory in particular industries, or for particular businesses; and
- whether the merger test in section 50 – which tests whether an acquisition of shares or assets would have or be likely to have the effect of substantially lessening competition – should be amended to better address "creeping acquisitions".

Joint venture exception to the cartel prohibitions

A number of submissions from businesses in a range of industries advocate reform of the joint venture exception to the prohibitions on cartel conduct, in order to address the overly technical nature of the current exception, and the inadequate protection it provides to legitimate, pro-competitive collaborative conduct among competitors.

Price signalling

The ACCC and others submit that the price signalling prohibitions which currently apply only in the banking sector should be applied to all sectors of the economy. Submissions by many major businesses advocate repealing these cumbersome prohibitions.

Exception for intellectual property

Currently, conduct regarding particular intellectual property rights is exempt from the key competition law prohibitions: some submissions advocate repealing this exception, but others support its retention.

Dealings with small business: unfair contracts and unconscionable conduct

Several bodies support applying the unfair contract terms regime in the Australian Consumer Law to contracts involving small businesses (the Federal Government is undertaking a concurrent review into, and has previously expressed support for, this proposal).

Some businesses have also called for clarification or extension of the unconscionable conduct prohibitions. Primary producers, among others, have raised particular concerns about the effectiveness of the current unconscionable conduct prohibitions, for example regarding conduct towards suppliers of perishable goods. However other submissions argue against any extension to these provisions, including because key cases testing their application are currently before the courts.

Third line forcing and resale price maintenance

There is widespread (but not unanimous) support among the submissions for amending the law so that third line forcing is only prohibited if it has the purpose, effect or likely effect of substantially lessening competition.

The ACCC recommends retaining the current prohibition on resale price maintenance, but others either oppose its retention, or suggest that resale price maintenance should only be prohibited if it has an anti-competitive purpose or effect.

Price discrimination

Various submissions have also advocated reintroducing a prohibition on price discrimination, including by suppliers who offer different prices in Australia than in other countries. Other submissions have advocated against this proposal.

Collective boycotts

Some submissions argue that the competition law should allow small business greater opportunities to undertake collective boycotts. Others call for the ACCC to establish guidance on collective bargaining "safe harbours" to protect conduct that falls within prescribed safe harbours based on the value of the conduct or the market share of the participants.

2. Third party access to infrastructure

Submissions have raised a number of matters regarding third party access to infrastructure:

- A key issue is whether the Productivity Commission's recommendations regarding amendment of the criteria for third party access declaration under Part IIIA of the CCA should be adopted, including whether declaration should be able to occur in circumstances where it is privately profitable to develop an alternative facility. Some submissions supported, and others rejected, the Productivity Commission's proposed amendments.
- Some submissions support the Productivity Commission's proposal that the ACCC should have power to order an infrastructure owner/operator to expand its facilities to accommodate a third party access seeker, while others strongly oppose such a power.
- Several submissions address the impact of third party access on export supply chain efficiency and global competitiveness, with a particular focus on mining and wheat supply chains.
- Some submissions emphasised that current access arrangements create uncertainty about whether and to what extent third parties will gain access to new and expanded infrastructure, and so act as a disincentive for further investment. Some suggest resolving this by having access terms determined "upfront", before investments are made. The question whether the Part IIIA declaration regime should be repealed has also been raised.

3. Enforcement: new powers for the ACCC?

Several submissions raise concerns about the time and cost associated with dealing with the ACCC, particularly in responding to compulsory "section 155 notices", which often require the production of extensive information and documents to the ACCC.

However the ACCC proposes that its power to issue section 155 notices be extended, so that they can be exercised regarding a wider range of the ACCC's functions. The ACCC also proposes increased penalties for non-compliance with these notices.

In addition, the ACCC proposes that it be granted a new power, to allow it to conduct market studies of its own motion (ie without a referral from government), such as those able to be undertaken by the UK Competition and Markets Authority. Some submissions from business support, and some oppose, this proposal.

Other submissions consider whether the ACCC's competition and consumer functions should sit in the one body or be separated, whether the current institutional arrangements between the ACCC and the AER are appropriate, and whether the ACCC should be subject to additional oversight.

4. Competition policy and regulation

Competition Policy

Some submissions advocate introducing increased competition into sectors characterised by significant government involvement, such as postal services, water, energy research, education and early childhood, health and human services, justice, waste collection and transport.

Others call for a new program of conditional "productivity payments" to States and Territories, to incentivise competition and productivity enhancing reforms.

A number of submissions also propose that governments should commit to assess new legislation and regulation to identify any associated anti-competitive effects, as was originally intended under the National Competition Policy.

Competitive neutrality

The Productivity Commission's submission calls for timely annual reporting by governments and government agencies in relation to competitive neutrality. Other submissions propose various measures to improve the application of competitive neutrality principles.

Planning and environmental approvals

Various submissions support streamlining planning and environmental approval processes. For example, submissions suggest rationalising overlapping government processes, such as environmental impact assessment and approval processes, under a single harmonised process.

5. Industry specific concerns

Energy and resources

Submissions propose a wide range of reforms throughout the energy and resources sector. Proposals include: greater demand side participation in energy markets, retail price deregulation in energy markets, network tariff reform and the full privatisation of energy assets (including electricity and gas distribution networks).

Some submissions advocate the use of domestic reservation and/or pricing policies as LNG exports increase, but others reject these proposals in favour of market-based supply and pricing.

Further submissions emphasise the importance of long-term certainty in regulatory arrangements (eg taxation) and efficiency in regulation to encourage investment in oil and gas exploration and development.

Banking, finance & insurance

Several submissions repeat arguments made to the Murray Financial System Inquiry (see our [July 2014](#) publication), for example in relation to "competitive neutrality" as between banks which are seen as "too big to fail" and other market participants.

Some submissions raise concerns about the interaction of multiple regulators in financial services (for example, the ACCC, the Reserve Bank, ASIC and others). Others suggest that greater competition or efficiency principles should underpin sector specific regulation of financial services.

On insurance, many submissions raise issues concerning competitive neutrality as between private businesses and public sector providers under statutory insurance schemes. Some also call for deregulation of private health insurance premiums.

Retail (including groceries)

A large number of submissions raised concerns about concentration and competition among supermarkets. Proposed reforms to the competition law regarding mergers and misuse of market power were often raised in this context.

Several submissions also propose further reforms to increase planning and zoning flexibility (for example, by introducing "as of right" development approval and limiting third party dispute options), introducing industry codes of conduct, liberalising and nationally standardising trading hours and/or reducing regulation of liquor licencing (although others oppose such changes).

Pharmacy regulation

Various private and governmental organisations made submissions advocating deregulation of pharmacy ownership restrictions to allow supermarkets to co-locate with pharmacies. Other submissions also seek removal of special planning rules that constrain where pharmacies can be located. However, many pharmacy operators and associations strongly opposed these

suggestions, citing concerns about patient health outcomes, pharmacists' ability to practice in a retail sales-focused environment and undermining the National Medicines Policy objectives of timely access to and quality use of medicines.

6. Industrial relations

Secondary boycotts

Many submissions address the current prohibitions on secondary boycotts.

Some industry bodies support additional funding for ACCC enforcement of the secondary boycott prohibitions, simplification of the secondary boycott provisions, introduction of equivalent provisions into building and construction industry legislation, and amendments to give Fair Work Building Construction and the Australian Building and Construction Commission the same powers as, and joint jurisdiction with, the ACCC over secondary boycott conduct in the building and construction industry.¹

Several agricultural, grocery and forestry industry bodies support the repeal of provisions permitting secondary boycotts for consumer or environmental protection reasons. However, various unions and consumer, environmental and rights groups oppose these changes, and one submission recommends a new carve-out to the secondary boycott prohibition, in order to permit "sympathy" boycotts.

Awards and penalty rates

Several submissions suggest that the Fair Work Commission should be obliged to review modern awards and effect changes within the current award structure (for example, concerning penalty rates in the retail sector), and urge the Review Panel to consider these and other matters which might enhance labour market competitiveness more generally.

6. Tax, trade and international competitiveness

Tax

Several submissions encourage the Review Panel to examine ways to simplify taxation schemes, reduce the cost burden and uncertainty for business of tax reporting and compliance, and encourage innovation.

Suggested reforms include: moves towards reducing or abolishing stamp duty on residential property, payroll tax and the luxury car tax, simplifying the land

tax scale, simplifying taxation of user funded infrastructure investment, and reducing duplication in annual company income reporting.

Various other tax reforms are also suggested, such as extending tax credit rates for fuels used in haulage of agricultural produce, and improving tax incentives for research and development.

Trade and international competitiveness

Many manufacturers, distributors and retailers made submissions advocating a more "level playing field" between domestically produced and imported goods, in particular by recommending that the GST exemption for imported goods valued at under \$1,000 be reduced or removed, and that anti-dumping laws and safety and labelling laws should be strongly enforced in relation to imported products. On the other hand, other submissions advocate liberalisation of parallel import restrictions.

Submissions from market participants across sectors spanning airports, grain and bulk export, medical technology, resources and retail encourage the Review Panel to support Australia's entry into further free trade agreements, the removal of protectionist policies and laws, and the reduction of anti-competitive or burdensome regulations facing Australian businesses. Others argue for government intervention to promote the competitiveness of Australian businesses internationally, for example through regulation to reduce energy prices or support the creation of "national champions".

Some submissions argue that exceptions that permit certain agreements in the international liner cargo shipping industry that would otherwise constitute prohibited cartel conduct are consistent with global practice and should be maintained, while others recommend their abolition.

Next steps

The Panel's Draft Report is expected to be released shortly, and we will publish a further update following its release. Interested parties will have opportunities to make written submissions and engage in consultations in the following months. The Panel's Final Report is due in March 2015.

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¹ Ie implementing recommendations 181 and 182 of the Cole Royal Commission Report (2003).

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