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Competition Law Root & Branch Review: Harper Draft Report Released

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On 22 September 2014 the much anticipated Draft Report of the 'root and branch' review of the *Competition and Consumer Act 2010* (Cth) (Act) (Harper Review) was released.

The proposed recommendations of the Harper Review panel (Panel) are far reaching, touching on all areas of Australia's economy, including:

- seeking to simplify the Act and enhancing its effectiveness by:
- reformulating the prohibition against misuse of market power to target conduct that has the purpose or likely effect of substantially lessening competition;
- simplifying the cartel conduct provisions and broadening the joint venture exemption to other competitor collaboration that do not have the purpose or likely effect of substantially lessening competition; and
- repealing the existing price signalling laws that only apply to the banking sector and instead extending the current provisions to prohibit 'concerted practices' that have the purpose or likely effect of substantially lessening competition;
- providing for sectoral reform to generate further competition to the taxi industry, to pharmaceutical retailing, to shipping, to planning and zoning laws and retailing more generally and greater choice in the delivery of human services; and
- the establishment of a new body to undertake market studies, a new national access and pricing regulator and potentially new governance arrangements for the ACCC.

The purpose of the Harper Review is to assess Australia's competition policy to determine whether it is still 'fit for purpose' in light of the significant changes that both the world and Australian economies have experienced since the 1990s.

Given the widely framed terms of reference, however, the Harper Review is intended to act more as a 'catalyst' for future reforms rather than setting out any proposed

changes in detail. Where the Panel has proposed changes, the proposals have been made in respect of issues that have been tested and debated.

Background

On 27 March 2014, the terms of reference and members of the Panel were announced (see here for our earlier article), in line with a pre-election promise of the Abbott Government.

An Issues Paper was released by the Panel on 14 April 2014 (see here for our earlier article), with over 300 submissions received in response.

Since the release of the Issues Paper, the Panel has met with consumer and small and large business groups, as well as a variety of academics, current and former regulators, and governments, including a number of state and territory Treasurers.

The Panel has had close to 100 meetings with stakeholders.[1]Draft Paper, page 1.

Draft Recommendations

The Panel considered that there were three major forces affecting the Australian economy that, going forward will influence whether Australia's competition policies, laws and institutions will be fit for purpose going forward, namely:

- the rise of Asia and other emerging economies: which provide both opportunities and challenges for Australia, and require a capacity for agility and innovation on the part of Australia;
- our ageing population: extending competition in government provision of human services will assist in helping people meeting their individual and health care needs; and
- new technologies: resulting in challenges for policy makers and regulators needing to ensure competition laws and policies do not unduly disrupt the impact of new technologies while at the same time preserving safeguards for consumers.

With this context in mind, the Panel made 52 draft recommendations, spanning competition policy, competition laws and competition institutions.

Competition Laws

The Panel's recommendations focused on simplification of the laws, greater certainty and the enhancement of consumer welfare over the long term by seeking to strike the 'right balance' between prohibiting anti-competitive conduct and allowing procompetitive conduct. The major recommendations are set out below.

Looking outward: Extra territoriality

The Panel recommended that the Act be amended to remove the requirement that a contravening firm has a connection to Australia. This recommendation is based on the premise that the Act ought to apply to firms engaging in conduct outside of Australia that damages Australian markets.

Similarly the Panel recommended that the definition of 'market' recognise the global nature of commerce by expanding a market in Australia to include competition from goods or services supplied from outside of Australia.

Misuse of market power: Changing to an 'effects test'

The Panel stated that the threshold for this prohibition, namely a corporation having "a substantial degree of power in a market", is the appropriate and well understood starting point for the assessment of any wrongdoing.

However, it considered that the requirements of:

- 'taking advantage of market power'; and
- the proscribed purposes of the conduct damaging a competitor,

are respectively difficult to interpret and apply in advice and are inconsistent with the policy objective of the Act to protect competition not competitors.

Accordingly, the Panel recommended that the prohibition be reformulated to prohibit a corporation that has substantial market power from engaging in conduct that has the purpose, effect or likely effect of substantially lessening competition.

Cartel and price signalling/concerted action

The Panel reiterated that cartel conduct between competitors remain an automatic or per se offence. However, it considered that the provisions were excessively complex, that given the potential for criminal sanctions, conduct between actual rather than potential competitors should be prohibited. There should also be greater clarity about the exemptions from the prohibitions.

Accordingly, the Panel recommended that the prohibitions be simplified and:

- should only apply to cartel conduct affecting goods or services supplied or acquired in Australian markets;
- apply only to firms that are actual competitors and not those for whom competition is a mere possibility
- there be a clearer exemption for collaborative conduct that does not have the purpose or likely effect of substantially lessening competition, and which is broader than the current joint venture exemption; and
- there should be an additional exemption for trading restrictions that are imposed by one corporation on another in connection with the supply or acquisition of goods or services (including IP) licensing as such conduct is otherwise only illegal if it has the purpose or likely effect of substantially lessening competition.

In addition the Panel recommended that:

- consequent to the above changes the exclusionary provisions/ collective boycott per se prohibition is no longer necessary and should be repealed; and
- the price signalling prohibitions are not fit for purpose in that they only apply to the banking industry (rather than the policy objective that the Act should apply to all businesses generally) and do not strike the right balance of distinguishing between anticompetitive and pro-competitive conduct. In their place, the existing prohibition to conduct having the purpose or likely effect of substantially lessening competition should be extended to prohibit "concerted practices" which have the same purpose or effect.

Streamlining merger control

The Panel supported the current test for mergers and was of the view that the current informal merger clearance process generally worked well. It did, however, recognise the need for the ACCC to be more timely with its decisions and that there should be further consultation with business to that end.

The Panel considers that timeliness and transparency issues can also be dealt with by way of parties pursuing the formal clearance process or authorisation process. It also recognised however the excessive complexity of these processes.

The Panel therefore recommended that:

- the formal merger clearance/ exemption process and merger authorisation process be combined and be reformed to remove unnecessary restrictions that have deterred their use;
- the ACCC be the first instance decision maker for the process and should be empowered to approve a merger if it is satisfied that it will not substantially lessen competition or that it will result in public benefits that outweigh the anti-competitive detriments. This is a clear step forward in merger control in our view;
- this process is governed by strict timelines that cannot be extended except with the consent of the merger parties; and
- the decisions of the ACCC be subject to review by the Australian Competition Tribunal and also governed by strict timelines.

Streamlining exemptions and a new block exemption power

The Panel has recognised that the authorisation and notification exemption processes are very important in ensuring that conduct that may not harm competition or that may give rise to public benefits outweighing anti-competitive harm may continue via these exemptions. It acknowledged however that these processes have become overly complex and costly for business. Accordingly, it recommended that:

- the processes be simplified including by ensuring that only a single authorisation application is required for a transaction or arrangement;
- collective bargaining notifications be simplified and made more flexible to reduce cost for small business;
- exemption powers based on the block exemption framework in the UK and EU be introduced to supplement the current exemption processes. This will be an important addition particularly for the shipping industry given that the Panel has

recommended the repeal of Part X of the Act which provided exemptions for Liner Shipping Arrangements. Under the recommendations Liner Shipping Arrangements will be like other arrangements, subject to the Act or be covered by block exemptions or authorisation; and
- that the notification process be extended to exclude resale price maintenance (which is to remain per se illegal unless authorised or now notified).

Vertical restrictions (other than resale price maintenance)

Again the Panel opted for simplification and streamlining of the provisions governing vertical supply arrangements. The Panel recommended that:

- third line forcing no longer being a per se offence indeed being prohibited only if it has the purpose or likely effect of substantially lessening competition; and
- the exclusive dealing provision should apply to all forms of vertical conduct and not just the types currently specified.

Other key recommendations about the Act and process

- Encouragement of private actions: The Panel recommended that the Act be broadened so that admissions of fact made by a person in resolving proceedings with the ACCC are prima facie evidence of that fact (rather than the present position where it is only prima facie evidence where a Court has made findings of fact in contested proceedings).
- Reducing the burden of statutory notices under section 155 of the Act: The Panel recommended that the ACCC review its guidelines regarding responses to section 155 notices and that by law or guidelines, the obligation of a person to produce documents to the ACCC should be qualified by an obligation to undertake reasonable search.
- Intellectual property and parallel imports: Consistent with the policies of universal applications of the Act and competition/ additional choice, the Panel has recommended that:
    - the intellectual property exemptions of the Act be repealed and that a review be undertaken of intellectual property focusing on competition policy issued; and
    - any remaining restrictions on parallel imports be removed unless it can be shown that they are in the public interest and the objectives of the restrictions can only be achieved by restricting competition.

- Infrastructure Access: Given the comprehensive review undertaken by the Productivity Commission into the National Access Regime, the Panel sensibly supported the Productivity Commission's Recommendations namely that the declaration criteria in Part IIIA of the Act should be targeted to ensure that third party access only be mandated when it is in the public interest and that:
    - criterion (a) should require that access on reasonable terms and conditions through declarations promote a material increase in competition in a dependent market;
    - criterion (b) should require that it be uneconomical for anyone (other than the service provider) to develop another facility to provide the service; and

- criterion (f) should require that access on reasonable terms and conditions through declaration promote public interest.

We are preparing a more detailed note on infrastructure access issues.

Broader Competitive Policy Considerations

The Panel concluded that there remained "important unfinished business" from the original National Competition Policy agenda across many sectors as well as new areas that it considers are in need of reform, including:

- electricity, water and gas: contains the process of energy reform and a national framework for water;
- planning and zoning: all governments should include competition principles in the objectives of planning and zoning legislation so that they are given due weight in decision making;
- retail markets including pharmacy:
  - the remaining restrictions on retail trading hours should be removed; and
  - the current ownership restrictions and location rules for retail pharmacies should be removed in the long term interest of Australian consumers;
- taxis: regulations that restrict competition in the taxi industry should be removed including from services that compete with taxis;
- human services, including health education and community services: governments should craft an inter-government agreement establishing choice and competition principles in the field of human services; and
- regulation review and competitive neutrality: all Australian governments should ensure that unnecessary restrictions on competition be removed and should apply competitive neutrality principles to their business activities.

Small Business

In addition to the above draft recommendations that impact on small business, the Draft Report made specific recommendations for small business:

- the ACCC should actively connect small businesses to alternative dispute resolution services;
- the development and use of industry codes of conduct should be promoted;
- the transparency of current competitive neutrality arrangements should be improved; and
- regulatory restrictions, such as planning and zoning regulations that impede competition should be removed.

Competition Institutions

The Draft Report identified that, within the current framework, a gap exists in the area of competition policy advocacy, analysis and oversight. To address this deficiency, the Draft Report recommended that the National Competition Council (NCC) be replaced with a new national independent competition body, the Australian Council for Competition Policy (ACCP).

It is envisaged that the ACCP will:

- be an advocate and educator in competition policy reform and oversee its implementation;
- be given the power to undertake market studies at the request of any government (and possibly market participants);
- make recommendations to relevant governments on changes to anti-competitive regulations or to the ACCC for investigation of breaches of the law; and
- undertake an annual analysis of developments in competition policy, both in Australia and overseas.

Although the Draft Report states that competition and consumer regulation should remain with the ACCC, it suggests that the ACCC's governance would be strengthened by the addition of a Board, in order to allow business, consumer and academic perspectives to bear directly on ACCC decision-making.

Lastly, for simplification, the Draft Report recommends the introduction of a single access and pricing regulator, the Access and Pricing Regulator. Currently, access and pricing regulation is conducted by the ACCC, NCC, Australian Energy Regulator and state and territory regulators.

Next steps

The Panel will now engage further on the Draft Report through public forums, and further written submissions and feedback from interested parties. Submissions are due by 17 November 2014.

In particular, the Panel is seeking comments on the following draft recommendations:

- in relation to the reformulation of the misuse of market power rules, the Draft Report proposes to introduce a defence for rational business decisions that benefit the long-term interests of consumers. The Panel is seeking submissions on the scope of this defence;
- in relation to the national access regime, the Panel invites further comment on the categories of infrastructure to which Part IIIA might be applied in the future, particularly in the mining sector, and the costs and benefits that would arise from access regulation of that infrastructure and whether Part IIIA should be confined in its scope to the categories of bottleneck infrastructure;
- in relation to the proposed market studies power to be afforded to the ACCP, the Panel seeks comments on the issue of mandatory information-gathering powers and in particular whether the Productivity Commission model of having informationgathering powers, but generally choosing not to use them should be replicated in the ACCP;
- in relation to increased governance of the ACCC, the Panel is seeking views on what

Board structure the ACCC should adopt; and in relation to access to remedies, the Panel invites views on whether there should be a specific dispute resolution scheme for small business for matters covered by the Act.

The Final Report is due to be provided to the Australian Government by March 2015.

References[+]

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