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Government response to the Harper Competition Policy Review: a quick guide

Paul Davidson
Economics Section

Professor Ian Harper [released](#) the final *Report of the Competition Policy Review* ('the Harper Review') on 31 March 2015, making 56 recommendations to government. On 24 November 2015, the Turnbull Government [released](#) its response to the Harper Review, supporting 39 of the recommendations either in full or in principle, and a further five recommendations in part. The Government 'remains open' to considering implementing the remaining 12 recommendations.

Recommendations affecting all levels of government

The Harper Review recommended that the competition principles be updated (recommendation 1). They build on the principles recorded in the 1995 agreement between the Commonwealth and the states and territories that underpinned the National Competition Policy reforms of the 1990s following the [Hilmer Review](#). The Government supported the recommendation and will work with the states and territories to ensure implementation at all levels of government.

The Harper Review recommended that all regulations should be reviewed to ensure that unnecessary restrictions on competition are removed (recommendation 8). The Government has supported the recommendation and encouraged the states and territories to review their regulations.

The Harper Review recommended expanding the application of the [Competition and Consumer Act 2010](#) ('the CCA') to all levels of government insofar as they undertake activity in trade or commerce (recommendation 24). The Government supported the recommendation in principle.

Recommendations affecting the federal, state and territory governments

The Harper Review recommended adopting choice and competition principles in human services (recommendation 2). The Government supported the recommendation and announced that it will commission a Productivity Commission (PC) review into human services, 'which will include research on past or ongoing reforms in different jurisdictions that incorporate principles of choice, competition and contestability'. The inquiry [commenced](#) on 29 April 2016.

The Harper Review made a series of recommendations on competitive neutrality (recommendations 15–17). Competitive neutrality aims to ensure that government business activities do not enjoy net competitive advantages over private sector competitors simply by virtue of public sector ownership. The first, which the Government supported, was that competitive neutrality policies should be reviewed, noting that it will encourage the states and territories to undertake similar reviews. Recommendation 16 was aimed at improving the transparency and effectiveness of competitive neutrality processes. The Government supported the recommendation and encouraged other governments to improve their competitive neutrality processes. Recommendation 17 concerned improving transparency and accountability in competitive neutrality reporting,

requiring all government agencies to provide a compliance statement in their annual reports. The Government stated that it remained open to the recommendation and will consult on competitive neutrality in 2016.

Recommendation 19 provides that states and territories should finalise the energy reform agenda, and that the Australian Government should undertake a detailed review of competition in the gas sector. The Government supported the recommendation and noted its commitment to promoting the application of the national energy legislation and rules across all Australian jurisdictions.

A series of the Harper Review's recommendations (43–47) related to the establishment, roles, and functions of a new body, the Australian Council for Competition Policy (ACCP). The Government supported the establishment of the ACCP and its role, and that the ACCP has to examine areas of the economy where competition issues may arise, and provide recommendations to government (a 'market studies' power). The Government remained open to the ACCP having the power to receive market studies requests from any government. The final roles and functions of the ACCP will be discussed with the states and territories.

The Harper Review recommended establishing a national Access and Pricing Regulator, taking a range of roles away from the Australian Competition and Consumer Commission (ACCC) and the National Competition Council (recommendation 50). The Government remained open to the recommendation and would continue discussions with the states and territories as to 'the most appropriate institutional architecture to support reform'.

The Harper Review recommended improving small business access to remedies and improving the ACCC's communication with small business (recommendation 53). The Government provided in-principle support for the recommendation and 'has asked the ACCC to consider introducing changes to improve transparency and clarity for small businesses on why it is unable to pursue certain complaints'. In terms of improving communication, the response noted that the 'Government will explore options for facilitating greater collaboration and cooperation across tiers of government to have a national complaint handling and dispute resolution network'.

The Harper Review recommended that the report be discussed with the states and territories as soon as practicable after its receipt, and that the PC undertake modelling of the recommendations (recommendations 55 and 56). The Government supported recommendation 55 and noted recommendation 56.

Competition payments

Introduced as part of the implementation of the Hilmer Review, competition payments were payments made by the Commonwealth to the states and territories that implemented pro-competition reforms. Over three tranches between 1999 and 2001, the National Competition Council assessed whether the states and territories had met the conditions for receipt of competition payments. The Harper Review recommended that the PC should undertake a review of reforms agreed by the Australian Government and the states and territories, to estimate their effect on revenue in each jurisdiction. Payments should be made available to states and territories 'based on actual implementation of reform measures, not on undertaking reviews' (recommendation 48). The Government supported the recommendation, and noted that it would discuss the possibility of a PC review with the states and territories.

Competition payments could be made available to states and territories in the following areas:

- implementation of reforms to road transport (recommendation 3)—the Government supported the recommendation that cost-reflective road pricing be introduced, and noted that it is a 'long term reform option'.
- implementation of reforms to the pharmacy sector (recommendation 14)—the Government 'noted' the recommendation that the current restrictions on ownership and location of pharmacies be removed, and stated that an independent review of pharmacy remuneration and regulation would be conducted.
- implementation of the principles of the National Water Initiative, with a view to national consistency (recommendation 20)—the Government supported the recommendation.
- planning and zoning, priority reform areas, and removing retail trading hour restrictions (see below).

Recommendations affecting state and territory governments

The Harper Review recommended that states and territories subject planning and zoning laws to both competition and public interest tests (recommendation 9). The Government supported the recommendation.

The Harper Review considered that priority areas for regulation review were taxis and ride-sharing, and mandatory product standards (recommendation 10). The Government supported the recommendation.

The Harper Review recommended removing remaining retail trading hour restrictions, noting that existing restrictions should be strictly limited to Christmas Day, Good Friday and the morning of Anzac Day (recommendation 12). The Government supported the recommendation.

In all of these areas, the Government stated that it was willing to consider making competition payments to the states and territories 'for reforms that improve productivity and lead to economic growth'.

Recommendations affecting the federal government

The Harper Review's recommendations that affected the Australian Government can be grouped under two broad headings: recommendations affecting the CCA, and other recommendations.

Recommendations affecting the CCA

The Harper Review recommended that Part X of the CCA which deals with liner shipping be repealed (recommendation 4), and that a block exemption power be granted to the ACCC to better regulate the industry (recommendation 39). The Government stated that it 'remains open' to repealing Part X of the CCA, and supported the introduction of a block exemption power.

The Harper Review recommended that subsection 51(3) (excepting intellectual property from most restrictive trade practices provisions) should be repealed. The Government noted the recommendation and is awaiting the PC inquiry into intellectual property before making a final decision (see below).

The Harper Review recommended no changes to the 'central concepts, prohibitions and structure enshrined in the current competition law' (recommendation 22), and the Government supported the recommendation.

The Harper Review recommended that the CCA be simplified in a process involving public consultation, but at a minimum, subsection 45(1) concerning contracts made before 1977 and sections 45B and 45C concerning covenants should be removed (recommendation 23). The Government supported the recommendation and 'will develop a proposal to further simplify the remaining provisions of the CCA'.

The Harper Review recommended that the definition of 'competition' in section 4 be amended to ensure that competition in Australian markets includes competition from goods or services imported or capable of being imported (recommendation 25). The Government supported the recommendation.

The Harper Review recommended amending section 5 of the CCA, which provides that some parts of the CCA apply to conduct outside of Australia. Specifically, it recommended that contravening firms should not be required to have a connection with Australia, and that parties should not need to seek ministerial approval before commencing competition law actions (recommendation 26). The Government did not support the recommendation that no connection with Australia be required, although it did agree with the latter recommendation, and in this regard noted that legislation before the last parliament achieved the purpose. However, the [Bill](#) lapsed with the prorogation of the Parliament.

A number of the Harper Review recommendations related to improving Part IV of the CCA which deals with restrictive trade practices:

- cartel conduct (recommendation 27)
- exclusionary provisions (recommendation 28)
- price signalling (recommendation 29)
- misuse of market power (recommendation 30)
- price discrimination (recommendation 31)
- third-line forcing (recommendation 32)
- exclusive dealing coverage (recommendation 33)
- resale price maintenance (recommendation 34)
- mergers (recommendation 35)
- secondary boycotts (recommendation 36) and

- trading restrictions in industrial agreements (recommendation 37).

The Government supported all recommendations apart from recommendations 30, 33, and 37. The Government announced that recommendation 30 relating to the misuse of market power (which, among other things, recommended introducing an 'effects test') would be subject to further consultation. The Government noted recommendation 33 on exclusive dealing and is awaiting the outcome of further consultation as part of its response to recommendation 30 before making a decision. The Government noted recommendation 37 on trading restrictions in industrial agreements as it was awaiting the PC report into workplace relations. The [PC report](#) was provided to the Australian Government on 18 December 2015.

The Harper Review recommended changes to the national access regime in Part IIIA of the CCA (recommendation 42). The Government supported the recommendation in part, preferring to amend Part IIIA in line with the [PC inquiry into the national access regime](#).

The Harper Review recommended:

- simplifying the authorisation and notification provisions (recommendation 38)
- extending the coverage of section 155 investigation notices (recommendation 40)
- extending the reach of section 83 to include admissions of fact (recommendation 41)
- introducing greater flexibility into the collective bargaining processes for small businesses (recommendation 54)
- that the ACCC continue to be responsible for both competition and consumer protection matters (recommendation 49) and
- that the ACCC establish, publish, and report against a media code of conduct (recommendation 52).

The Government supported all of these recommendations.

The Harper Review recommended changes to the ACCC's governance structure (recommendation 51), which the Government supported in part. The Government did not accept appointing the ACCC Commissioners on a part-time basis, or that the small business and agricultural sectors both needed specific Commissioners.

Other recommendations

The Harper Review recommended that cabotage restrictions on coastal shipping be removed and that similar restrictions be removed in the aviation industry (recommendation 5). The Government has noted the recommendation, given that the Government has announced changes relating to coastal shipping, and that as part of the [White Paper on Developing Northern Australia](#), a business stakeholder group has been established to assist 'in preparing a plan for improving aviation and surface transport connections to northern Australia'.

The Harper Review recommended a PC inquiry into intellectual property, and also that a separate review should be undertaken to 'assess the Australian Government processes for establishing negotiating mandates to incorporate intellectual property provisions in international trade agreements' (recommendation 6). The Government supported the recommendation in part, noting that it had already charged the PC to undertake an inquiry into intellectual property (the PC issued a [draft report](#) on 29 April 2016). The Government however did not agree to a separate review of intellectual property provisions in international trade agreements.

The Harper Review recommended that Standards Australia periodically review its standards (recommendation 11), which the Government supported. It also recommended that parallel import restrictions be removed on books and second-hand cars (recommendation 13). The Government supported the removal of parallel import restrictions on books, but the Government has decided not to proceed with reducing parallel import restrictions on second-hand cars.

The Harper Review recommended that government procurement and other commercial arrangements are reviewed (recommendation 18). The Government provided support in principle for the recommendation and noted that through the [Efficiency through Contestability Programme](#), 'government functions are systematically assessed, including for improved efficiency through competitive arrangements, where appropriate'.

The Harper Review recommended that the Government 'should work with industry, consumer groups and privacy experts to allow consumers to access information in an efficient format to improve informed consumer choice' (recommendation 21). The Government supported the recommendation and stated that it will task the PC with 'reviewing options to improve accessibility to data'.



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