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Harper makes case for competition overhaul: experts react

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Economist Ian Harper has delivered the final report in the most comprehensive review of competition law and policy in more than 20 years. Mark Graham/AAP

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The removal of restrictions on retail trading hours, pharmacies and parallel imports, and a controversial “effects test” on existing misuse of market power rules are among the many recommendations contained in the **final report** of the Competition Policy Review released yesterday.

Boosting competition in the health, education and community sectors has been identified as a priority by the panel, which said even small improvements in these areas would have “profound impacts on people’s standard of living and quality of life”.

The panel has also named planning and zoning rules, taxi regulation and product standards as areas that require an immediate regulatory review.

It says state and territory governments should subject restrictions on competition in planning and zoning rules to the public interest test. It also said regulation limiting the number of taxi licences has raised costs for consumers, and hindered the emergence of innovative passenger transport services.

The review panel led by Emeritus Professor Ian Harper, says section 46, which deals with the misuse of market power, is deficient in its current form and out of step with international approaches.

Instead it wants to prohibit conduct by firms with substantial market power that has the “purpose, effect or likely effect” of substantially lessening competition.

The report also calls for cartel provisions to be simplified, and price signalling provisions, which have applied specifically to banks, to be removed and replaced with a similar effects test.

The panel has also called for a new national competition body to replace the National Competition Council, one that would be “an independent entity and truly ‘national’ in scope”, as well as the establishment of a pricing and utilities commission separate from the Australian Competition and Consumer Commission (ACCC).

It says collective bargaining and collective boycott arrangements should be made more flexible and easier for small business to use.

Road pricing should be made cost-reflective, according to the review, and regulations governing retail trading hours and parallel imports, and pharmacy location and ownership rules should be removed.

It says the current exception to competition law for conditions of intellectual property licences in consumer law should be repealed.

The panel says the rise of Asia and other emerging economies, Australia’s ageing population and the emergence of new technologies all help make the case for competition policy reform. It says delaying policy action will make reform “more difficult and more sharply felt”.

The review panel received around 600 submissions in response to its draft report, 40% came from peak and advocacy bodies, around 30% from individuals, around 25% from business, and the remainder from governments.

We asked experts to respond.

Allan Fels, Professorial Fellow, Melbourne University

The Harper review has addressed the two most pressing needs in competition policy. The first is to modernise competition law by strengthening the protection of small business from economically harmful illegitimate anti-competitive behaviour by big firms with market power, and at the same time by simplifying the law, which is far too long.

This is to be done through the introduction of an effects test in a simplified section 46. This conforms with standard international practice.

Harper has replaced a previous proposed defence under section 46 with an improved set of economic criteria that can be used to distinguish between pro competitive and anti-competitive behaviour and it is wrong to think that the line between competitive and anti-competitive behaviour should be drawn by a purpose test. What is needed is an economic test that Harper proposes.

The second change is to revise the national competition policy of Hilmer covering taxis, bookshop trading hours and pharmacies and to extend competition choice to areas such as education, health and the provision of public services. These are important but they are much more complicated than applying competition law to normal businesses. The difficulties that will be experienced are comparable to those experienced in regard to deregulation of university fees and to medical co-payments.

**Graeme Samuel, Vice-Chancellor's Professorial Fellow at Monash University **

The proposed competition policy reforms are a re-energisation of the National Competition Policy reform package commenced in 1995 but suspended by COAG in 2004. The fundamental philosophy underlying these reforms is that the disciplines of competition should apply to all sectors of the economy unless the public interest is better served by retaining anti-competitive restrictions. But the corollary is that governments must place the interests of the public above those of private vested interests. The difficulty of course is in the detail, which the review doesn't examine.

Governments have previously shirked from implementing so many of the reforms recommended by the Harper panel because of some very strong vested interests, like the Pharmacy Guild, or in relation to restrictive retail trading hours, the pleadings of unions and small business interests in Western Australia, South Australia and Queensland. Other industries, such as taxis, are beset with financial and social complexities flowing from decades of arcane regulations that have placed the public interest at the bottom of the list of policy considerations.

In the end governments have to make up their minds – will they place the public interest first or continue to be beholden to loud and persistent vested interests? Competition should reign supreme and should be presumed to be in the public interest unless it can be demonstrated by objective independent analysis that the public interest is better served by competition restrictions.

We should also remember the technological revolution that is taking place with the digital economy. It's going to make so many anti competitive regulations of the past simply inoperable. As consumers exercise their choice, using the options available to them in the ever expanding digital and sharing economy, the regulatory mechanisms developed in past decades will prove powerless in the face of overwhelming public preference for how and with whom it deals. Do we see consumers restricting themselves to arcane restrictive trading hours in the 24/7 environment of on line trading?

Regulatory institutions

The recommendations as to the structure of the regulatory institutions are very sensible. The separation of utility regulation from the ACCC into a specialist utilities regulator reflects the fundamentally different culture from that associated with pure competition and consumer protection enforcement.

The proposed Australian Council for Competition Policy is essential to provide a continuing process of competition policy reform education and advocacy.

Amendments to law

The repeal of the price signalling provisions is eminently sensible. The current provisions are a mutant, resulting from a patchwork of legislative amendments enacted in 2011 which should never have been confined to banks alone but, like the other competition provisions of the law, should have applied economy wide.

Section 46 - Misuse of Market Power

This section is titled in the Harper report as “Misuse of market power”. But the proposed amendments have nothing to do with “misuse” for they apply to all conduct by big business. The primary prohibition effectively threatens big business with substantial penalties if it engages in any conduct that has the purpose, effect or likely effect of substantially lessening competition. The section is a misconceived approach to satisfy the urgings of small business groups.

The suggested legislative guidance to the courts is bewildering - it asks the courts and big business to weigh the pro-competitive and anti-competitive impact of conduct, that is conduct which is subject to the charge that it is likely to substantially lessen competition. This is so stifling on the commercial activity of big business that one can only wonder how a committee that on the one hand recommends pro-competitive reforms to commerce, can then proceed to urge an significant intrusive constraint on the commercial activities of big business. It is such a fundamental contradiction in economic philosophy, that it leaves one wondering as to the motivations for this recommendation which, as the Harper panel tabulates, has been rejected in no less than ten reviews over the past four decades.

Separate pricing and utility regulator

Joe Dimasi, Professorial Fellow, Department of Economics, Monash University:

The Harper Review has sometimes been described as Hilmer Mark2. However, the two reviews differ in at least one major respect. Hilmer's focus was relatively tight and paid particular attention to the restructure and regulation of monopoly network facilities. It's fair to say that it had a substantial impact in this area. Harper's broad mandate has resulted in a report which traverses a wide range of issues with many useful recommendations.

Harper's wide brief made it difficult to look at all the issues in detail. One area of significant current controversy which escapes attention is the application of regulation to bottleneck network facilities.

Harper's recommendation to establish a multi-industry access and pricing regulator which is separate from the ACCC, is useful. Given the breadth of the ACCC's remit and the differences in skills and culture required to undertake these very different roles, that recommendation makes a lot of sense.

However, the way these facilities are regulated is important and requires greater attention. The regulation of utilities and bottleneck facilities today does not look much the way it was envisaged by Hilmer, an issue we'll be looking at in a forthcoming paper by the Monash Business Policy Forum.

Regulatory decisions can take up to two years and if appealed can take several more years to resolve. This soaks up large amounts of the regulator's resources.

And most importantly it results in far from socially ideal outcomes. For example, there is a widely acknowledged over-investment in poles and wires in electricity which has been significantly affected by the regulatory system. The rules and regulatory approach rather than just the regulator are the issues here.

When independent utility regulation was introduced in Australia in the 1990s, the aim was to avoid the well-understood widespread pitfalls of cost-of-service seen in the United States, as well as to learn from UK reforms which introduced regulation that provided greater incentives for the regulated business to operate efficiently.

Despite these aims it appears that we have ended up with a system that has the negative features of cost-of-service regulation without some of the improvements that we see, for example, in the US regulatory systems. Perhaps in establishing a separate pricing and access regulator, we also need to look at how we regulate.

Intellectual property

Bruce Baer Arnold, Assistant Professor, School of Law, University of Canberra

From a consumer, small business and education perspective the report lacks the courage of its intellectual property convictions. It notes sustained cogent criticisms of Australia's regime by a

diverse range of local and overseas stakeholders. It acknowledges some of the plethora of independent fact-based reviews of that regime, including studies on pharmaceutical patents, software and other IT pricing, and copyright in the digital environment.

The report endorses work by the Productivity Commission, the Australian Law Reform Commission, the ACCC and parliamentary committees. It then squibs by calling for yet more inquiries. One will be an overarching Productivity Commission review over a 12 month period that will allow a nervous government to defer annoying media proprietor Rupert Murdoch, Big Pharma and Big IT until after the election.

More disingenuously, the report calls for an independent review regarding “negotiating mandates to incorporate intellectual property provisions in international trade agreements”, recognising that trade negotiations require independent transparent analysis of costs and benefits to Australia rather than undue benefits for offshore rights-holders.

The report says “such an analysis should be undertaken and published before negotiations are concluded”, a polite way of saying that both the Coalition and ALP have been sleepwalking towards acceptance of the still-secret TransPacific Partnership Agreement that will punish Australian consumers and the people who pay for the public health system.

The report sensibly calls for ending parallel import restrictions, unlikely to be heeded by the Attorney-General. That common-sense pro-competition call is offset by recommending erosion of the consumer presence on the ACCC. Effective competition policy requires less protection for Pfizer, Apple and Hollywood, more respect for consumers, and bravery on the part of Governments. Given the history of unimplemented IP reports, don't hold your breath.

Pharmacy regulation & private health insurance

Ian McAuley, Lecturer, Public Sector Finance, University of Canberra

In what should be an uncontentious suggestion the review calls for the removal of pharmacy and ownership rules. These regulations are certainly past their use-by date (if they ever had any justification in the first place). They're one of the last redoubts of strong industry protection, but successive governments have been reluctant to remove these privileges.

The review members seem to have overlooked anti-competitive regulations on non-prescription pharmaceuticals. There are two restrictions protecting pharmacies: the “Schedule 2” list of drugs which can be sold only in a pharmacy, and the “Schedule 3” list of drugs which can be sold only by a pharmacist.

While there is justification for Schedule 3 regulations, it is hard to see how consumers gain any protection from Schedule 2. Pharmacists themselves generally do not operate their counters: taking a Schedule 2 drug to a checkout in a pharmacy is the same as taking any item to a supermarket checkout.

In relation to private health insurance, the review seeks “lighter touch” regulation, including the abolition of price regulation of premiums. This aligns with the general theme of the review.

It also suggests that “health funds could be allowed to expand their coverage to primary care settings.” That suggestion, coming from a body concerned with competition, is bizarre because insurance, by its very nature, is about suppressing price signals, even though price signals are the very mechanism that make competition work. When a service is free at the time of delivery there is an inevitable incentive for over-use and price escalation.

It appears that the review members have gone beyond considerations of competition, and into a general deregulationist ideology. Allowing private insurance into primary care would almost certainly see a steep rise in health care costs, further undermining Medicare’s capacity to keep control on the cost and availability of health care.

Alcohol

Robin Room, Professor of Population Health & Chair of Social Research in Alcohol at University of Melbourne

The report acknowledges that there were about 40 submissions to it on liquor, most opposing “any change that would restrict the ability of governments to set trading hours or planning and zoning rules in order to address the risk of harm from alcohol”. It says “it is certainly not the Panel’s view that the promotion of competition should always trump other legitimate public policy considerations”, but it nevertheless holds to its principle that “all [such] regulations must be assessed to determine whether there are other ways to achieve the desired policy objectives that do not restrict competition”.

The onus of proof that there’s no other way is thus placed on those arguing for a public health interest.

This is not good enough. We have lived through an era of substantial deregulation in alcohol licensing, in considerable part driven by competition policies. The result has been substantial increases in rates of harm from alcohol, mostly in the form of increased “harm per litre” of alcohol. It is rates of health and social harms due to drinking that have gone up, even where the per-capita alcohol consumption has remained fairly stable.

There’s research evidence that the increase in the numbers of places where alcohol is sold (in communities which now have little power to resist new licenses), and the extension of opening times far into the night, are both implicated in this increase in harm. The increase in licenses has also meant the implicit bargain between the government and alcohol sellers has been broken – a bargain whereby they were given limited protection from all-out competition in return for acting as an agent of the government in minimising harm.

In the hands of the Competition Policy Review, competition has become fetishised as a consideration that can trump all others in setting public policy on markets and professions. Market efficiency and unbounded consumer choice and availability may have economic and ideological value, but they

should not given such supreme priority over non-economic considerations. As Keynes put it, economists “are the trustees, not of civilization, but of the possibility of civilization.”

 **ACCC** **competition policy** **Australian competition and Consumer Commission** **Harper Review**