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Harper competition review seeks widespread change: experts react

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Restrictions on retail trading hours, taxis, pharmacies and parallel imports should be lifted according to a far-reaching draft report by the Competition Policy Review.

Professor Ian Harper’s new report also advocates the introduction of yet another regulatory body, the Australian Council for Competition Policy. This Council would push for new competition rules and financially incentivise states that implement competition reforms.

A separate pricing regulator should also be introduced to oversee industries regulated by the Commonwealth such as gas, electricity, telecommunications and water. The report says there is a need for the Australian Competition and Consumer Commission to improve its governance structure and have a board.
Roads should also be priced consistently across Australia and directly charge road users, the review panel argues.

The review is also seeking feedback on its proposal to change one of the most controversial areas of competition law which prevents a corporation with market power from acting to reduce competition. The panel has flagged a move from the “purpose” test to the “effect” test of substantially lessening competition.

For consumers, the report advocates the need to remove regulations that restrict new entrants, such as Uber, to the taxi industry. It recommends the abolition of location and ownership rules for pharmacies. Retail trading bans also unfairly disadvantage traditional retailers over online traders, according to the panel.

“The Panel notes that the growing use of the internet for retail purchases is undermining the intent of the retail trading hours restrictions, while disadvantaging ‘bricks and mortar’ retailers.”

The report also encourages the removal of restrictions on parallel imports, in which cheaper foreign products are banned from Australia.

The panel has also recommended price signalling provisions controversially introduced into law in June 2012, be repealed. The provisions, led by then Treasurer Wayne Swan in response to banks moving out of step with the Reserve Bank on interest rates, made it illegal for banks to disclose prices to rivals in circumstances considered not in the ordinary course of business.

The report considered around 350 submissions, responses to the draft are due by November 17 and a final report is set to be released in March 2015.

**Intellectual property and parallel imports**

*Bruce Arnold, Assistant Professor, School of Law at University of Canberra*

Media attention about intellectual property aspects of the draft report is likely to centre on Harper’s call for the removal of parallel import restrictions. Ending those restrictions is forecast to result in public goods such as cheaper coffee, software and other products. It will be viscerally opposed by overseas film industry and other interests that are engaged in rent seeking and have the ear of George Brandis.

The real excitement in the draft report is acknowledgement that Australia still has no overarching IP policy framework or objectives guiding changes to IP protection or approaches to IP rights in the context of negotiations for international trade agreements.

We need a coherent framework, one that centres on public goods rather than rent seeking. Harper suggests that “an overarching review” be conducted by the Productivity Commission. The review should focus on competition policy issues arising from new developments in technology and markets,
with an emphasis on “the best interests of Australians” and “independent and transparent analysis of
the costs and benefits”. A government with vision will embrace that recommendation rather than
commission and ignore a succession of reports on issues such as drug patents.

Harper recognises deep disquiet about the initiatives such as the Trans Pacific Partnership Agreement
– the controversial and secret free trade treaty in which the freedoms will be enjoyed by US
businesses and the pain borne by Australian consumers and taxpayers.

In an echo of cogent analysis by the Productivity Commission, Harper warns against reinforcement of
Australia’s position as an intellectual property colony.

The draft calls for assessment of “the principles and processes followed by the Australian Government
when establishing negotiating mandates to incorporate intellectual property provisions in
international trade agreements”. That analysis “should be undertaken and published before
negotiations are concluded”.

We may well choose to join the TPPA but our choice should be well-informed.

**Retail pharmacies**

*Philip Clarke, Professor of Health Economics at the University of Melbourne*

The Competition Policy Review follows on from the National Commission of Audit in recommending
significant changes to the regulations surrounding retail pharmacies in Australia. Currently, this
industry is highly regulated through an agreement between the government and the Pharmacy Guild
(the peak body representing pharmacy owners), known as the Community Pharmacy Agreement.

Two key elements of the current regulation that greatly restrict competition are rules regarding
ownership – only pharmacists can own pharmacies – and location rules that restrict the setting up or
relocation of pharmacies, so they must be located at a minimum distance of at least 1.5 kilometres
from existing outlets.

While the review argues both should be removed in the long run, it prioritises changes to location
rules, indicating it could start to be phased from next year as part of the next Community Pharmacy
Agreement.

Such a change would provide the opportunity for many qualified pharmacists to set up new
businesses, particularly in urban areas, enhancing consumer choice and competition in the sector.
The implementation of this recommendation is a real test for the government as the Pharmacy Guild
is widely perceived as one of the most power lobby groups in Canberra.

**Private health insurance**

*Elizabeth Savage, Professor of Health Economics at University of Technology Sydney*
The Competition Policy Review draft report recommends two significant changes to the private health insurance industry that are likely to have an impact on both consumers and the sector.

The first is the removal of regulation that requires ministerial approval for increases in private health insurance premiums, which is tied to evidence of increased cost structures, and its replacement by a “price monitoring scheme”. This will allow increases in insurance premiums only to be subject to competitors’ behaviour in what is a highly concentrated industry. (The top four companies have 75% of policy revenues; the top two – Medibank Private and BUPA – have 56% of the market.)

Small companies would likely follow the price lead of big insurers such as Medibank Private, and there may be more mergers as the big companies become stronger, further increasing their market power. The change would likely mean consumers will face higher premiums and the cost of private health subsidies to the government will increase. A positive side effect for the government may be an increase the revenue it raises from the planned privatisation of Medibank Private.

The second change the review panel recommends is the expansion of private health insurance coverage to primary care, that is, allowing private health insurance companies to cover gap payments from GP and specialist consultations and tests. This would reduce the pressures controlling fee increases, such as patients having to pay the gap between the government rebate and the fee, and allow doctors to charge more for consultations.

It could lead to fewer doctor visits being bulk-billed, and uninsured people would likely face higher health costs for primary care. Because of this, it may reduce the number of total consultations but increase the cost of acute care as people delay seeking medical attention until their condition deteriorates.

It could further increase the cost to the federal budget of government subsidies to the private health insurance industry because it would expand the areas that private health sector will cover.

Impact on Medicare

James Gillespie, Associate Professor in Health Policy at the University of Sydney

Since the Abbott government was elected just over a year ago, there’s been a slow creep of private health insurance into primary care, mainly GP services. Since Medicare was introduced in 1984, this has been a no-go area for private health.

Governments have feared allowing insurers to cover the gap between the Medicare rebate and GP charges would undermine bulk billing, and remove a major constraint of medical costs. Private insurers have chafed at this restriction. Given the growing burden of chronic illness among their members, they see the advantage of linking care back into general practice.

The National Commission of Audit recommended a relaxation of the ban on private health insurance in primary care. And Medibank Private, in particular, has been running some controversial
experiments with GP clinics in Queensland, getting around the ban on insuring for GP costs by paying clinics a fixed fee in lieu of a co-payment.

The Medibank Private submission to the Competition Policy Review's issues paper went even further, calling for a broadening of private health insurance across the system. This would see Australia move towards a European-style system of publicly-subsidised universal health insurance provided by competing private health funds.

The Review Panel suggests “health funds could be allowed to expand their coverage to primary care settings” allowing greater competition and individual choice in services to meet the needs of an ageing population. But the implications for Medicare’s increasingly tattered universal coverage need a lot more exploration before we quietly head down this road.

**Cartels**

**Caron Beaton-Wells, Professor Melbourne Law School at University of Melbourne**

The recommendations reflect international best practice or the aspiration to meet it in the area of cartels, but also to ensure the provisions are tailored to the Australian conditions and legal regime.

There’s a broad recommendation that some prohibitions should be simplified and that’s reflected not just in relation to cartel conduct but in relation to other types of conduct as well. The general call for simplification on the grounds competition law is too complex, undermining compliance, is a good move.

The review panel has dealt with the issue concerning the breadth of the prohibitions and whether or not they risk what we call overreach or over-capture of conduct that is not self evidently anti-competitive and may even be pro-competitive.

Exemptions from the prohibitions are currently too narrow - in particular the important exception for joint ventures is too narrow in a number of respects, and there is no exception for vertical supply agreements where two businesses are not just competitors but in a competitor-customer relationship.

The risk in the current law is where a company places restrictions on another competitor in their capacity as a customer - that is dealt with as a cartel arrangement and therefore prohibited without any competition test.

The panel recommends a general broad exemption for collaborative activity between competitors, reflecting the reality that companies don’t just collaborate in a formal joint venture context but they form strategic alliances in ways that enable them to pool their resources, share risks and engage in commercial activity that they would otherwise not engage in. It’s important the law encourages that type of activity.

The proposed exemption is for collaborative activity that doesn’t have the effect of substantially...
lessening competition. This is a good recommendation and follows the approach taken in New Zealand. The panel also follows the NZ model in proposed an exemption for vertical supply agreements, again subject to a competition test.

This approach is consistent with the view of many in this field that when conduct is not self evidently anti-competitive it should only be illegal when it has the purpose or effect of substantially lessening competition.

On price signalling, the panel correctly identifies several defects in the provisions as they currently stand. The most obvious problem is that they apply only to the banking sector and that is inconsistent with a national competition policy.

The other equally compelling issue is that price signalling is just one form of behaviour that falls short of a cartel but may nevertheless have the same effects in harming competition. It’s anomalous and problematic to single out price signalling in the way the law currently does. It’s also inconsistent with approaches taken in other jurisdictions, particularly Europe where the definition of collusion is broader than just agreements and includes concerted practices.

The recommendation of the review panel in this area is to repeal the existing price signalling provisions and broadening the definition of a cartel to include concerted practices. This is a commendable recommendation and something I and others have supported for many years.

**Competition in education**

**Emma Rowe, Lecturer in Education, Monash University**

It’s hardly surprising that the Abbott Federal Government is pushing for increased competition in the education sector, given their Howard-esque policy agenda. The Competition Review is headed by Ian Harper, an economist who previously acted as Chairman for the Howard Government’s Fair Pay Commission, and who has signaled his belief in economic reform.

The review argues that there needs to be greater choice for consumers, in order to ensure quality affordable services. This is problematic when applied to the education sector, and the review briefly acknowledges that increased school choice can lead to heightened social segregation. However, it also argues that school choice is necessary and that there needs to be greater information for consumers, in order to help them to effectively exercise their choice.

Overall, the review draws on very little educational research and also uses largely inappropriate case models to back-up its arguments, such as Sweden’s education system, even though Sweden scores below the OECD average on international tests such as PISA.

The primary concern about school choice is the notion of equity, being understood as the relationship between socio-economic status and educational achievement. As the Gonski Review showed, the relationship between student background and educational outcomes is more pronounced in Australia,
in comparison to other high-performing OECD countries (such as Canada or Finland).

This is related to the high level of choice within the Australian education system. When high-fee schools are well supported by the government, this complicates accessibility and equity for students from lower socio-economic backgrounds. Fundamentally, choice needs to be managed effectively in order to assure equity.

**Road use pricing**

**Michiel Bliemer, Professor in Transport and Logistics Network Modelling at the Institute of Transport and Logistics Studies, University of Sydney Business School**

Variable charging schemes are in place for electricity networks and other networks, and it makes sense to also replace fixed road charges with a variable charging scheme.

This means for example replacing the annual registration fee with a price per kilometre. Doing this in a revenue-neutral way means the average car driver would pay the same, but people who drive more than average would pay more while others pay less.

It is fair to pay for using the roads (not for merely owning a car) and to pay less when driving little. Trucks would need to pay a higher kilometre price than cars since they damage the roads much more. Technology could take this a step further by also charging a higher price during peak hours (or a lower price for off-peak hours), which could significantly decrease congestion.

Further, insurance companies would be interested in asking an insurance fee per kilometre instead of a fixed insurance premium. Several insurance companies around the world have already introduced such a pricing scheme (which is often referred to as pay-as-you-drive). Direct and cost-reflective pricing can lead to safer and less congested roads.

**The “effects” test and retail trading**

**Russell Miller, Adjunct Professor Australian National University College of Law**

The Harper Review has taken the right approach on shining a light on areas of the economy in need of reform. It focuses on what is needed to promote productivity - enhancing choice, diversity and innovation. Building on the work done by Professor Fred Hilmer in the late 1990s, its objectives are admirable. However, whether the outcomes will be as productive as those that came out of the Hilmer Report will depend on whether governments and affected industries are prepared to make the painful adjustments needed. This will be a real challenge, especially if the Commonwealth is not prepared to make compensation payments, as it did with the National Competition Council (NCC), to enable the Hilmer reforms. Whether future economic benefits instead of competition payments will be sufficient remains to be seen.

The draft report contains much on which comment can and will be made, positively and negatively.
One of the most controversial parts of the report is no doubt the recommendation to adopt an “effects” test for the misuse of market power prohibition. The Business Council of Australia, the Law Council and at least one former Australian Competition and Consumer Commission Chair have been quite vocal in its opposition to the adoption of an “effects” test.

The debate over misuse of market power will continue, but Professor Harper and his panel have clearly come down on the side of change, concluding that debate to date has been unproductive. They have proposed a new approach - a test based on the effect of conduct on the competitive process, rather than on competitors, but also a defense:

“The Panel also proposes that a defence be introduced so that the primary prohibition would not apply if the conduct in question:

a) would be a rational business decision by a corporation that did not have a substantial degree of power in the market; and

b) the effect or likely effect of the conduct is to benefit the long-term interests of consumers”.

Whether the report’s proposal is a workable compromise or whether it will produce “false positives” and has the chilling effect on competitive behaviour that some predict, remains an open question.

Although it stops short of recommending that bans on retail trading hours be lifted, the panel is clearly of the view this should occur - another controversial issue. It is an inevitable continuation of the process that started under the Hilmer Review. A number of prior Productivity Commission and other reports demonstrated that allowing retailers to determine when to open has significant consumer and economic benefits. As the report notes, with the advent of online retailing, consumers are demanding more diversity in how and when they shop.