
Alexandra Merrett

Rachel Trindade

Rhonda Smith

the state of COMPETITION

Issue 17 (May 2014)

The Harper Review is off and running. The Panel's been charged with reinvigorating the Australian economy for the coming decades, and has a very short timetable in which to do its work. Indeed, submissions in response to a lengthy Issues Paper are due sooner than you might think.

In this edition of The State of Competition, we identify the issues likely to be of key concern to small business & consumers. We also set out some tips for those thinking about making a submission.

The Harper Review: what they are talking about & how to join in

The Panel charged with overseeing the review into Australian competition policy has reported for work, and is calling for your input. It's the most significant review of competition policy since Hilmer in 1992 and its ramifications could be just as far-reaching. If you have views about privatisation, the role of the ACCC, the effectiveness of competition law, or the handling of market power in the Australian economy, then you might want to consider how you can contribute to the process.

Still think it's not all that relevant to you? Ever made a midnight dash to your local supermarket? Maybe you've sat down to work out which energy retailer offers the best deal, or wondered why they've stuck you with a smart meter. Perhaps you've lamented the disappearance of the local co-operatives, such as in the dairy industry, that marked your youth. Each of these developments is, in some way, referable to the Hilmer Report, the first – and, until now, only – comprehensive review of Australian competition policy. The Harper Review has clearly been identified as its heir apparent, so we can only wonder what significant changes it might result in.

If the Harper Review goes even close to living up to its billing, its consequences will be far-reaching



©iStockPhoto.com/AlexandraMerrett

The Harper Review is ambitious in its scope, examining the very foundations of the Australian economy

The Government released the review's **Terms of Reference** in late March, at the same time as announcing that the review panel would be headed by Ian Harper with Su McCluskey, Peter Anderson and Michael O'Bryan assisting (see further Alexandra's **recent article in *The Conversation***). The Panel has since knuckled down and last month released a lengthy **Issues Paper**, seeking input on many and varied questions which fall under the auspices of the Terms of Reference. Submissions are due by 10 June. Working on the theory that the big end of town will take care of itself, here at *The State of Competition*, we'd like to consider how the Inquiry might impact on small business and consumers. In this issue, we set out some of the questions raised in the Issues Paper which – given their potentially far-reaching consequences – parties falling into these categories might want to ponder.

What is the Harper Review all about?

As stated in the Issues Paper, the Harper Panel:

will be examining the broader competition framework to make sure that it can contribute to the Australian economy for the next 20 years. We will also be examining our competition policies and laws, to evaluate whether they continue to be 'fit for purpose' for Australia's current and emerging economy.

It would be a misconception to think the debate will be limited to the effectiveness of the mergers test or whether the prohibition against misusing market power works. Much more is on the table.

Indeed, the Issues Paper is the length of a novella, listing around 50 questions for consideration. Don't worry though: the Review Panel is happy to examine issues falling outside these questions, so long as they are within the scope of the (extremely broad) Terms of Reference! Ultimately, almost anything to do with the effectiveness of the Australian economy is up for grabs.

The big picture

The Terms of Reference set out five keys areas for consideration:

1. identifying impediments throughout the economy that restrict competition and reduce productivity;
2. ensuring that the competition provisions of the *Competition and Consumer Act 2010* (the **CCA**) are effective in "driving efficient, competitive and durable outcomes";
3. examining how those same competition provisions provide for small business, to ensure that "efficient businesses, both big and small, can compete effectively";
4. considering whether we have the appropriate institutional arrangements (including whether our regulatory agencies are operating effectively); and
5. reviewing government involvement in markets, with a view to reducing such involvement "where there is no longer a clear public interest need".

Some specific questions raised by the Issues Paper

In the Issues Paper, some of the stand-out questions falling within the scope of the Terms of Reference include:



Are Australian consumers unduly insulated from international competition (eg due to import restrictions, international price discrimination, restrictions on parallel importation)?

In considering this question, it might be useful to think about the sources of effective competition. If you consider Australia needs to open up its economy to more competition – particularly from overseas – your answer will be very different than if you think small business is the engine room of the Australian economy.

"Governments should not be a substitute for the private sector where markets are, or can, function effectively or where contestability can be realised."

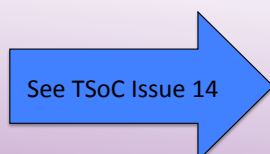
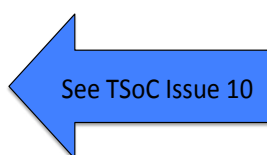
Should there be further reform of infrastructure sectors / greater competition in relation to health, education, disability care etc.

In what areas should the government continue to be involved? Are consumers' interests sufficiently represented in regulated industries? If sectors such as education & health are opened up to further competition, will vulnerable consumers be appropriately protected?



What are the regulatory impediments to effective competition?

Think about compliance costs: what can be done to relieve the burden for small business?



How should misuse of market power be dealt with under the CCA?

Is the law right? Is it enforced appropriately? Are complaints handled well? Can s46 deliver timely and effective outcomes with appropriate remedies?

Are the unconscionable conduct provisions working? What other measures could support the participation of small businesses in the economy?

Note that unconscionability has recently been considered by the Full Court and forms the basis for the ACCC's recent action against Coles. This law – which has been subject to ongoing change ever since its introduction – at last seems relatively settled.

Consumers

Do the CCA prohibitions against agreements between competitors (eg cartels and horizontal agreements) operate effectively & do they further the objectives of the CCA?

If they do not, what is the problem? Previous focus has been on the remedies (resulting in the criminalisation of cartels), but legal actions have stumbled on the interpretation of "contract, arrangement or understanding" which remains unchanged.

Given high compliance costs, is there a case to argue that per se prohibitions should be relaxed for small business – perhaps businesses under a certain size should be subject to a substantial lessening of competition test only?

See TSoC Issue 16

Should the price signalling provisions of the CCA be retained/ repealed/extended?

How do these provisions improve competition for Australian consumers?

Do the joint venture provisions of the CCA operate effectively, furthering the Act's objectives?

Note several shortfalls in the practical operation of the JV exceptions.

Do the prohibitions against third line forcing & resale price maintenance operate effectively, furthering the objectives of the CCA?

How does this conduct presumptively harm competition? Bear in mind, it's small business, who doesn't know about/can't afford notification, who most often falls foul of the per se prohibitions.

See TSoC Issue 6

Do the merger provisions operate effectively, furthering the objectives of the CCA?

Can third parties participate effectively in the merger process? Is it appropriate for authorisation to proceed automatically to the Tribunal – does this effectively remove authorisation as an option for all but the largest players?

Do the authorisation & notification provisions operate effectively, furthering the objectives of the CCA?

Can third parties participate effectively in these processes? Can small business afford to take advantage of them? Are they too complex/ expensive? Is it appropriate that collective bargaining notifications be subject to regular renewal?

See TSoC Issues 11 & 12

Do industry codes work?

Are they providing an effective level of protection, or do they merely create additional red tape (particularly for those who they are intended to protect)?

What other remedies should be considered for contraventions of the CCA?

For example, divestiture as a general remedy rather than only for anti-competitive mergers.

What are the experiences of small businesses in dealing with the ACCC?

How does the ACCC deal with small business as a complainant, an investigatory target or as an interested third party? What measures could be put in place to improve small business engagement?

Are the structures and powers of the competition institutions right? What is your experience in dealing with the ACCC, the Competition Tribunal & other regulatory bodies?

Does the ACCC wear too many hats? Is the ACCC choosing between its various roles appropriately (eg exercising administrative power as against regulatory power, as occurred in relation to petrol discounting by Coles & Woolworths)? Should the role of the Tribunal be expanded? Should there be relief for small parties on the issue of costs?

Parallel process

Small businesses interested in issues such as compliance costs and/or protection from unfair competition should also be aware of a parallel process (albeit on a slightly faster timetable) concerning the Small Business Commissioner. The government is currently considering introducing a Small Business and Family Enterprise Ombudsman in its place, with expanded powers (and a bigger budget).

Amongst the proposed functions of the Ombudsman, a number directly intersect with the terms of the Harper Review. In particular, the objective is to have an Ombudsman who serves as a:

- Commonwealth-wide advocate for small businesses and family enterprises;
- contributor to the development of small business friendly Commonwealth laws and regulations; and
- single entry-point agency through which Commonwealth assistance and information regarding small business can be accessed.

A Discussion Paper has been released: interested parties are invited to make their submissions by 23 May.

Know the buzzwords

The Terms of Reference for the Harper Review, as well as the Issues Paper, both use language that has a particular meaning in the field of competition policy. It's worth spending a moment to de-code some of the key phrases.

Productivity growth

This is about achieving more value added for every hour worked, in other words, more output for the same labour. Productivity growth has been the source of sustainable rises in Australian living standards, and the strong economic growth of the 1990s and 2000s has been credited to the boost in productivity from the reforms arising from the Hilmer Review. Concern that productivity growth has slowed in more recent times has been a key driver behind calls for this review to follow in the footsteps of the Hilmer Review: see, for example, **Ross Garnaut's recent book, *Dog Days***.

Efficiency

Efficiency is an economic concept that is often waved around like a talisman. But make no mistake, efficiency can be a harsh and brutal master – for example, it can justify the death of the corner store or small independent at the hands of more efficient large players or charging more to those who need something the most. There are two broad types of efficiency: 'static' and 'dynamic'. Static efficiency is the type economists can measure; it covers 'productive' efficiency (producing a good at the lowest possible cost) and 'allocative' efficiency (the efficient allocation of resources under a given set of conditions, also referred to as maximising total welfare – see our discussion in Issue 10). Real world markets will never achieve that state of clean and precise perfection. Dynamic efficiency is much more messy and cannot be mathematically modelled. In essence, it is the interactive process by which real world markets strive to reach the 'nirvana' of economic theory.

Competition

We all think we know it when we see it (or perhaps more precisely when we *don't* see it) but what is a "competitive" market?

The Issues Paper summarises competition as "the process by which rival businesses strive to meet customer needs by developing and offering desirable goods and services on the most favourable terms". Competitive markets which are "dynamic" deliver benefits such as:

lower resource costs and overall prices, better services and more choice for consumers and businesses, stronger discipline on businesses to keep costs down, faster innovation and deployment of new technology, and better information allowing more informed consumer choices.



It's a surprisingly effective strategy simply to label your issues with the "right" tag...

The Issues Paper also notes that competition can take the form of price *and* non-price competition. The former refers to businesses which seek to increase sales by offering lower prices (even if that means rivals with a higher cost structure end up exiting the market). Conversely, the latter involves the winning of sales by differentiating the goods/services in question (or the terms upon which they are offered) to make them more attractive to buyers. The Issues Paper notes that non-price competition is a key mechanism for small and medium-sized businesses to compete with large businesses.

The Terms of Reference also mention "fair, transparent and open competition". The notion of "fairness" does not typically enter into the efficiency-based perspective of competition associated with prohibitions against anti-competitive behaviour or the misuse of market power. However the Issues Paper seeks comment on the questions "Are existing unfair and unconscionable conduct provisions working effectively to support small and medium sized business participation in markets?" and "Are there other measures that would support small and medium sized business participation in markets?"

The long term interests of consumers

Everyone loves getting a dirt-cheap bargain and virtually no-one willingly gives up a discount for the sake of sustainable supply (just ask the ACCC about taking away people's shopper-docket discounts). But in our hearts we know that some things are too good to be true. Similarly, we're all familiar with the notion of predatory pricing – unsustainable price discounting that squeezes lower cost rivals out today leading to much higher (supra-competitive) prices for everyone tomorrow.

The concept of the long term interests of consumers has taken hold in the regulatory space and has been extensively considered by the Competition Tribunal. For example, in a 2007 Telstra case, the Tribunal articulated that the concept encompasses two significant propositions: the first being that it is in the interests of consumers that efficient producers survive the process of competition; and the second being that it is important not to confuse competition with having the greatest number of competitors.

In Issues 14 and 16 we mentioned why there may be legitimate public interest reasons for protecting smaller businesses – and essentially this comes back to the long term interests of consumers, because smaller businesses are often the source of innovation that keeps bigger businesses on their toes, bringing the dynamic quality that characterises a competitive market.

Having your say

In addition to rounds of public consultations to be conducted during May, views can be expressed via a “**Have Your Say**” option, or by way of a formal submission. In either case, the due date is 10 June. The Committee will then prepare a draft report before another round of consultation.

Tips for submissions

For those thinking of lodging a submission, at this stage in the process we suggest you:

Focus on the big picture: try to frame the issues that are of key concern to you in terms of the Australian economy more generally – the Inquiry has far-reaching Terms of Reference and a broader focus is more likely to capture its interest.

Frame your issues using the buzzwords: specifically, try to link your key issues to one or more of the above buzzwords. If you’re a small business, for example, then it’s likely that you’re not the most efficient player in the market in terms of being the cheapest operator. Nonetheless, you may be one of those small but nimble (“innovative”) players catering to the special needs of a niche: this can be framed in terms of contributing to “non-price competition” or the “dynamic efficiency” of the market. How does your issue impact on overall productivity? What happens to the long-term interests of consumers if your issue isn’t addressed?

Float some balloons (rather than get caught up in detail): it’s probably better to spend your efforts articulating the problems that you see instead of using precious time and resources trying to devise solutions to those problems. Once the draft report has been released and we can see the likely direction of the final report, that will be a better time to put forward detailed proposals. The first step, however, is to persuade the Review Panel that there is a problem that needs fixing. Of course, if you already have a solution in mind, don’t be shy in putting it forward.

Think beyond law reform: the ambit of the review is very broad, bringing into play the roles and functions of the key institutions. Constantly amending the law has its own pitfalls – sometimes, however, we forget to think about whether the law is properly communicated or enforced.

About the authors



Dr Alexandra Merrett is an experienced lawyer specialising in competition and consumer law. She has a particular interest in market power and the use of economic evidence. Alexandra may be contacted on 0432 942 098 or mail to: alexandramerrett@bigpond.com



Rachel Trindade specialises in competition and consumer law. She has advised on a wide range of business structures and commercial arrangements, particularly in the fields of energy, transport and logistics. Rachel may be contacted on 0402 038 301 or mail to: trindade@bigpond.net.au



Dr Rhonda Smith is an economist and academic, specialising in competition issues. A former Commissioner of the ACCC, Rhonda provides strategic and expert advice to both commercial parties and regulators. Rhonda may be contacted on 03 8344 9884 or mail to: rhondals@unimelb.edu.au

Alexandra & Rachel are both Australian Legal Practitioners within the meaning of the Legal Profession Act 2004 (Vic), with liability limited by a scheme approved under Professional Standards Legislation.

Sorry – the Harper Panel gazzumped our promised edition on some implications of the Cement Australia decision as it relates to market definition. We’ll definitely bring that to you next time. Make sure to read all about it by subscribing via the “Newsletter Sign-up” button on [our website](#).

You can also access past issues – including all those mentioned in here – via our Archives page: <http://thestateofcompetition.com.au/newsletter-archive/>