



MAY 2015

COMPETITION & REGULATION UPDATE

GOOD NEWS FOR THE PRIVATE HEALTH INSURANCE SECTOR... BUT HOW LONG WILL THE WAIT BE?

In our update on [10 April 2015](#), we highlighted the key recommendations of relevance to the private health insurance industry contained in the final report of the Competition Policy Review Panel chaired by Professor Ian Harper (Harper Review). In this update, we provide further comment on some of those key recommendations and further discussion of the implications for private health insurers.

SPECIFIC INDUSTRY REFORM

Lighter touch regulation recommended but implementation not an immediate or priority area for reform

In good news for private health insurers, the Harper Panel recommends "lighter touch" regulation of private health insurance premiums and services, subject to an assessment by a recommended new body, the Australian Council for Competition Policy (ACCP), that competition in the industry is effective. The imposition of this assessment as a condition on the lighter regulation was added by Panel after its draft report and is based on the Panel's view that consumers would not be adequately protected by "lighter touch" regulation unless competition is effective.

The real downside for private health insurers, however, is that they are going to have to wait some time for this "lighter touch" regulation. In its Report, the Panel proposed a timetable for implementing its reforms. The Panel did not identify the review of private health insurance regulation as an immediate or priority area for reform. Instead, the Panel recommends immediate reviews of regulations governing retail trading hours, parallel imports and pharmacy ownership and then prioritising planning and zoning, taxis and ride-sharing, and mandatory product standards.

Deregulation of prices of inputs for private health insurers recommended, but again this may take time

The Panel also recommends consideration be given to deregulating prices of some inputs purchased by private health insurers, once competition in the industry is deemed by the ACCP to be effective.

For example, the Panel suggests that the ACCP examine the regulation of pricing of prostheses under the *Private Health Insurance Act 2007*, and consider if pricing and supply can be made more competitive while still maintaining the policy aims of the current prostheses arrangements.

However, again, this recommendation is not identified by the Panel as an immediate or priority area for reform.

Comparator websites

The Harper Panel also considered the availability of information for consumers, noting that markets work best when consumers are empowered to make informed decisions. In this context, the Panel recognised that comparator websites, including in relation to private health insurance, can assist consumers to analyse their options for products and make it easier for new firms to enter markets.

However, the Panel noted the importance of ensuring that comparator websites serve as accurate decision-making tools and that consumers trust their operation. The Panel pointed to the risks identified in the ACCC's December report on comparator websites and noted the ACCC's plans to release best-practice guidelines to assist comparator website operators and businesses to comply with Australia's competition and consumer protection laws.

PROPOSED AMENDMENTS TO THE MISUSE OF MARKET POWER PROHIBITION

One of the most significant competition law reforms recommended by the Harper Review concerns the prohibition against misuse of market power, contained in section 46 of the CCA.

The Harper Review recommends subjecting unilateral conduct by firms with market power to a "substantial lessening of competition" (SLC) test (Proposed s46). If implemented, these amendments would extend section 46 beyond the "misuse of

market power" and would make it easier to prove a contravention.

If implemented, the key implications would be:

- **Expanded reach:** Removing the nexus between the conduct and the market power would increase the scope of conduct caught by the provision beyond the "misuse of market power" to conduct by certain companies that has the purpose or effect of substantially lessening competition.
- **Contraventions easier to prove:** History suggests that an effects test is easier to prove than a purpose test.
- **Transitional Uncertainty.** The SLC test would not apply to misuse of market power cases in the same way as it applies in other contexts.

We expand on each of these issues below:

Expanded reach

The Proposed s46 removes key mechanisms that have been used to distinguish between competitive and anti-competitive conduct by firms with substantial market power and would thereby capture more conduct than the existing provision.

For example:

- **Conduct in other markets:** The Proposed s46 would apply to all operations of firms that have substantial market power in any single market, including their operations in markets where they do not have market power. This would be a significant change from the existing provision in which the "take advantage" limb requires a link between the market power and the proscribed conduct.
- **Business decisions that would be rational for a firm without market power:** The "taking advantage" limb has traditionally provided comfort to firms engaging in conduct that would be a rational business strategy even for a firm without substantial market power. The Proposed s46 would expand the reach of the prohibition by removing reference to that factor. In a practical sense, this would remove a "rule of thumb" and make it more difficult for firms to obtain comfort that their actions do not contravene the provision. The Proposed s46 would apply to all operations of firms that have substantial market power in any single

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Contraventions easier to prove

As a practical matter, proving an anti-competitive effect is often easier (albeit more expensive) than proving an anti-competitive subjective purpose. Although Courts are entitled to draw inferences as to purpose in a number of circumstances, commercial decisions are typically driven by a large number of considerations. Furthermore, as a matter of practicality, it is the subjective purpose of employees or officers that is relevant, as they are the directing mind of a corporation. Demonstrating that such individuals had a substantial subjective anti-competitive purpose has proven difficult. The ACCC has long advocated for the addition of an effects test for this reason. As such, although it is costly to prove that conduct has the effect of substantially lessening competition, the introduction of an effects test will in our view make it easier to prove that a contravention has occurred.

Transitional Uncertainty

The Proposed s46 relies almost exclusively on the SLC test to determine the legality of conduct. It would prohibit conduct by a corporation with "substantial market power" that has the purpose, or likely effect, of substantially lessening competition.

Although the SLC test is already used in the CCA, its application in the context of section 46 may differ from existing jurisprudence. For example:

- **Different conduct.** Unilateral conduct by a firm with substantial market power is likely to

impact competition very differently from an arrangement between competitors. For example, a unilateral decision by a monopolist to increase its prices is unlikely to lessen competition while a joint decision by two competitors to increase their prices may well lessen competition.

- **New element.** The proposed section includes a "direction" requiring the Court to consider the extent to which the conduct has the purpose or likely effect of increasing, or decreasing, competition. Prima facie, such a direction should have no impact as Courts have always had the ability to balance the pro-competitive and anti-competitive impacts of conduct. However, the inclusion of this "direction" creates uncertainty because it has not previously been considered by Courts and because the factors listed do not always have the suggested effect on competition, particularly in the circumstances of a firm with substantial market power. For example, the proposed section requires the Court to consider the increase in competition arising from "enhanced price competitiveness". In past cases, discounting by a monopolist has been characterised as reducing competition. Further, although the indicative factors listed in the "direction" could be relevant to a net public benefits test, the "direction" is expressly concerned with effects on competition.

The Harper Review acknowledges that the proposed change would involve transitional costs while Courts develop jurisprudence on its application.

Authorisation

The Harper Review recommends making authorisation available to exempt conduct from section 46 if the conduct satisfies a public benefit test. Authorisation is not currently permitted for such conduct. However, the time, cost and public consultation associated with an authorisation application makes it commercially impractical in many instances. For example, a firm seeking to introduce an innovative new product would be unlikely to seek authorisation to ensure that initially selling the product below cost price did not breach the Proposed s46. Furthermore, the dynamic nature of many markets makes it difficult for firms to

engage in the forward planning and investment necessary when relying on authorisation as a means to avoid breaching the Proposed s46.

Application to specific facts

Of course, the implications of the proposed amendments will be specific to the circumstances and the conduct involved. For example, the implications of the Proposed s46 are likely to differ as between predatory pricing and refusals to supply. Our generalised observations in this update may not be accurate for some particular circumstances.

NEXT STEPS

The government is currently engaging in a consultation period with industry, consumers and other levels of government on the Harper Report's recommendations, including the specific reforms for the private health insurance industry and the Proposed s46. The government will accept written submissions until 26 May 2015. It will then decide which recommendations from the Harper Report it will implement.

MORE INFORMATION

If you would like assistance in making a submission to the government or if you would like to understand the potential implications of the Harper Review for your business, please contact:



Simon Uthmeyer
Partner
T +61 3 9274 5470
simon.uthmeyer@dlapiper.com



Fleur Gibbons
Partner
T +61 3 9274 5840
fleur.gibbons@dlapiper.com



Nicole Breschkin
Senior Associate
T +61 3 9274 5071
nicole.breschkin@dlapiper.com

Or contact your nearest DLA Piper office:

BRISBANE

Level 28, Waterfront Place
1 Eagle Street
Brisbane QLD 4000
T +61 7 3246 4000
F +61 7 3229 4077
brisbane@dlapiper.com

CANBERRA

Level 3, 55 Wentworth Avenue
Kingston ACT 2604
T +61 2 6201 8787
F +61 2 6230 7848
canberra@dlapiper.com

MELBOURNE

Level 21, 140 William Street
Melbourne VIC 3000
T +61 3 9274 5000
F +61 3 9274 5111
melbourne@dlapiper.com

PERTH

Level 31, Central Park
152–158 St Georges Terrace
Perth WA 6000
T +61 8 6467 6000
F +61 8 6467 6001
perth@dlapiper.com

SYDNEY

Level 22, No.1 Martin Place
Sydney NSW 2000
T +61 2 9286 8000
F +61 2 9286 4144
sydney@dlapiper.com

www.dlapiper.com

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