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# COMPETITION & REGULATION UPDATE

HARPER REVIEW - IMPLICATIONS FOR THE PRIVATE HEALTH  
INSURANCE INDUSTRY

On 31 March 2015 the final report of the Competition Policy Review Panel chaired by Professor Ian Harper (Harper Review) was released. The Harper Review Panel (Panel) has completed the most comprehensive review of Australia's competition and consumer laws, policy and institutions in more than 20 years and the Panel's 56 wide-ranging recommendations reflect its broad terms of reference. If implemented, these recommendations could have significant ramifications for Australian businesses, including private health insurance companies. In this update, we provide an overview for private health insurers on some of the Harper Review's key recommendations for reform.

## KEY RECOMMENDATIONS OF NOTE

### Specific reforms for private health insurers

The Panel considered whether regulatory restrictions on competition in several particular industries continue to be in the public interest. One industry in which such regulations were assessed was private health insurance.

The Panel recognised that private health insurance is one of the most heavily regulated industries in Australia, with regulations governing services offered, pricing and discounts, product design and capital requirements.

The Panel also recognised an earlier finding by the National Commission of Audit, which suggested "lighter touch regulation" may encourage innovation and greater product availability for consumers. In particular, the "lighter touch" regulation would involve:

- removing the current requirements for any increases in premium to be approved by the Commonwealth Minister for Health (which can be a long and resource intensive process) and replacing it with a "light handed" system of price monitoring by an independent regulator
- removing restrictions regarding the scope of services offered, so that insurers may expand their coverage including to care in out-of-hospital (primary care) settings for members managing chronic conditions.

The Panel recommends fully deregulating prices in the private health insurance industry as soon as competition is deemed to be effective. The Panel suggests that this assessment be undertaken by a recommended new body, the Australian Council for Competition Policy.

### Section 46 - Changes to the misuse of market power prohibition

The Harper Review recommends bringing the misuse of market power prohibition into line with the other provisions in Part IV of the *Competition and Consumer Act 2010*. If implemented, these amendments would expand the reach of section 46 and make it easier to prove a contravention, primarily because of the removal of the "take advantage" limb and the addition of an "effects" test.

The Australian Competition and Consumer Commission (ACCC) has long advocated for the addition of an effects test on the basis that it is difficult for it to prove the subjective purpose of an accused.

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 Harper Review initially proposed including an express defence to this effect. The removal of this limb would expand the reach of the prohibition and place significant importance on the interpretation of the substantial lessening of competition test, which the Harper Review recommends inserting in place of the existing proscribed anti-competitive purposes. The Harper Review recommends requiring Courts to have regard to specific factors that increase or lessen competition including efficiency, innovation, product quality or price competitiveness. In our

view, the inclusion of those factors would not alter the nature of the test. Existing jurisprudence establishes that the test requires a comparison of the state of competition in the relevant market with and without the conduct, including pro-competitive and anti-competitive factors.

The Harper Review also recommends allowing the ACCC to authorise conduct which satisfies a public benefit test. However, the time and cost associated with an authorisation application means that significant forward planning and investment would be required by firms with substantial market power seeking to rely on authorisation as a basis to engage in conduct that could lessen competition.

### OTHER RECOMMENDED REFORMS

- **Cartel conduct** - The Panel proposes to simplify the prohibitions against cartel conduct and expand the current joint venture defence to apply to more types of joint ventures. The Panel comments that its proposed amendments to the joint venture defence aim to protect more legitimate, pro-competitive collaborative conduct among competitors.
- **Price signalling** - The Panel recommends replacing the current price signalling prohibitions applicable only to the banking sector with a broadly applicable prohibition against "concerted practices" that have the purpose or effect of substantially lessening competition. The concept of "concerted practices" would be a new and untested one in Australia, and is likely to include disclosures or exchanges of information between firms. Businesses will need to carefully assess their interactions with competitors if legislative changes are made in accordance with this recommendation.
- **Third line forcing** - The Panel recommends that the prohibition against third line forcing be changed from a per se offence, to one which is competition tested. This reform has been recommended by many of the previous reviews of Australian competition laws, yet has remained unchanged by governments to date. The Panel's recommended approach would reduce the cost and administrative burden on business of having to notify the

ACCC of third line forcing conduct prior to engaging in it, despite such conduct rarely raising competition concerns. In making its recommendation, the Panel commented that conduct should only be prohibited per se if it is anti-competitive in most circumstances.

- **Unconscionable conduct and unfair contract terms** - The Panel does not recommend any changes to these provisions at this time, pointing to the recent case against Coles as evidence that they work. However, many larger businesses remain concerned that there is insufficient guidance as to at what point conduct crosses the line from normal commercial dealings to become unconscionable conduct.
- **Section 155 notices** - In recognition of increased information and documents in the digital age, the Panel recommends the introduction of a "reasonable search" defence in relation to the offence of refusing or failing to comply with a section 155 notice. In what a "reasonable search" is, factors such as the number of documents involved and the ease and cost of retrieving the documents may be considered. On the other hand, the Panel recommends increasing the severity of sanctions for failing to comply with section 155 notices.
- **ACCC: structural reform** - The Harper Review recommends a number of structural and governance changes to the ACCC, including the restructuring of the positions and responsibilities of Commissioners of the ACCC and creating a new body, the Australian Council for Competition Policy, to take over policy work and market studies.

## MORE INFORMATION

The government will now engage in an eight week consultation period with industry, consumers and other levels of government on the Harper Report's recommendations. The government will then decide which recommendations it will implement.

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

[www.dlapiper.com](http://www.dlapiper.com)

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