



11 November 2015

Jason McNamara
Executive Director
Office of Best Practice Regulation
Department of the Prime Minister and Cabinet

Dear Mr McNamara

GOVERNMENT RESPONSE TO COMPETITION POLICY REVIEW

This letter certifies that the Competition Policy Review (Harper Review) was informed by a process and analysis equivalent to a Regulation Impact Statement (RIS) as set out in 'The Australian Government Guide to Regulation' (the Guide).

Election Commitment

Prior to the 2013 Federal election, the Government committed to a 'root and branch' review of competition laws and policy. This commitment was part of the Government's policy for small business and was designed to examine not just laws, but the broader competition framework, to increase productivity and efficiency in markets, drive benefits to ease cost of living pressures and raise living standards for all Australians.

The Harper Review process

The Government announced a review of competition policy on 4 December 2013. On 27 March 2014, the Government released the final Terms of Reference following consultation with the States and Territories and announced the Review Panel, chaired by Professor Ian Harper.

The Review was conducted over the course of 12 months. In total, the Harper Review Final Report was informed by almost 1,000 written submissions and more than 150 meetings with stakeholders including public consultation forums. Non-confidential submissions were made publicly available.

Government consultation following Harper

Following the release of the Harper Review Final Report, the Government conducted an eight week consultation process, seeking feedback from industry, consumers and governments on the Final Report's recommendations. Around 140 written submissions were received in response to the Final Report.

Harper Review recommendations and RIS requirements

The Harper Review made a total of 56 recommendations across the themes of competition policy, competition laws and competition institutions. A number of these recommendations have already been addressed through Government decisions and associated RIS processes. There are also recommendations that are directed at state and territory governments, and do not include any Australian Government involvement. In other cases the Office of Best Practice Regulation (OBPR) has agreed that the recommendation does not change the regulatory burden. A detailed breakdown of recommendations falling into these categories is included at [Attachment A](#).

Addressing the RIS questions

Treasury considers that the process and analysis undertaken by the Harper Review has addressed the seven RIS questions set out in the Guide. Specific recommendations that do not change the regulatory burden and are not covered by this certification process are detailed in Attachment A, Table 2.

Further regulation impact analysis, including updated costings, would be undertaken on a case-by-case basis where there are subsequent decision points.

Questions 1 and 2: The Harper Review Draft Report and Final Report outline the problem and explain why government action is needed.

This was the first comprehensive review of Australia's competition framework in more than 20 years. The Panel examined whether Australia's existing competition settings are 'fit for purpose', especially in light of the persistent forces for change that will shape the Australian economy now and into the future.

Evidence presented to the Panel showed that reform is overdue and critical to improving Australia's productivity performance and sustaining standards of living into the future.

The rise of Asia and other emerging economies provides significant opportunities for Australia but also poses some challenges. A heightened capacity for agility and innovation will be needed to match changing tastes and preferences in emerging economies.

Australia's ageing population will give rise to a wider array of needs and preferences among older Australians and their families. The right policy settings will help people to meet their individual health and aged care needs.

New technologies are 'digitally disrupting' the way many markets operate, the way business is done and the way consumers engage with markets. The challenge for governments is to capture the benefits of digital disruption by ensuring that Australia's competition settings encourage innovation, but still preserve expected safeguards for consumers.

In some cases, governments will be directly responsible for driving reform, including in areas where governments are direct participants in markets through procuring goods and services and ownership of important assets.

In other cases, governments can facilitate reform through the policy development and legislative processes, including by reviewing and reforming regulation, and engaging in market design and market stewardship.

Questions 3, 4 and 6: The Harper Review Final Report considers and discusses a range of policy options to enhance competition policy settings in Australia. The benefits of reform are considered, with a preference for reforms that enhance the long-term interests of Australians.

The Issues Paper, published early in the Review process, provided an initial forum for stakeholders to raise policy options. The Draft Report weighed stakeholder views, considered the benefits of potential reforms, made a range of draft recommendations and invited further submissions in response to those recommendations. The Final Report again weighed stakeholder views, considered the benefits of potential reforms and made final recommendations which, in the Panel's view, were the best options for reform. The Final Report classifies recommendations in three categories: competition policy, competition laws and competition institutions.

Competition policy

The Panel assessed Australia's competition policies and determined that competition policy should:

- make markets work in the long-term interests of consumers;

- foster diversity, choice and responsiveness in government services;
- encourage innovation, entrepreneurship and the entry of new players;
- promote efficient investment in and use of infrastructure and natural resources;
- establish competition laws and regulations that are clear, predictable and reliable; and
- secure necessary standards of access and equity.

Across the Australian economy, the Panel found examples of policies and regulations that do not meet the criteria for good competition policy. For each of the competition policy proposals, the status quo was considered against reforms that could address the Panel's criteria for competition policy detailed above.

The Panel found that without reform, Australia's economy will face increasing challenges, affecting not only the choices of our citizens in their everyday activities, but also the state of our public finances.

Drawing on the criteria for competition policy, particularly with a focus on making markets work in the long-term interests of consumers, the Panel made policy recommendations aimed at encouraging innovation, growth in productivity and average income levels, and ultimately the number and quality of Australian jobs.

In human services, the Panel found establishing choice and contestability in government provision of human services can improve services for those who most need them. If managed well, this can both empower service users and improve productivity at the same time.

In infrastructure markets, the Panel recommended that reforms begun in electricity and gas be finalised, water reform be reinvigorated, and road investment decisions be more responsive to the needs and preferences of road users. Each of these recommendations has the potential increase efficiency and productivity.

The Panel also found a broad review of regulations can help remove regulatory restrictions on competition and ensure that regulations continue to operate in the public interest.

Other recommended reforms to intellectual property, competitive neutrality, government procurement and informed consumer choice also target efficiency, productivity and innovation.

Competition laws

The Panel also examined the *Competition and Consumer Act 2010* (CCA) to assess whether Australia's competition laws remain fit for purpose having regard to consumer and business experience with the laws, changes that have occurred in the Australian economy and that are anticipated, and relevant international developments.

In guiding consideration of whether Australia's competition laws are fit for purpose, the Panel asked four questions:

- Does the law focus on enhancing consumer wellbeing over the long term?
- Does the law protect competition rather than individual competitors?
- Does the law strike the right balance between prohibiting anti-competitive conduct and not interfering with efficiency, innovation and entrepreneurship?
- Is the law as clear, simple and predictable as it can be?

The Review process sought to ensure that the competition law provisions of the CCA appropriately address each of these questions. For each of the competition law recommendations, the status quo was benchmarked against proposals to enhance their effectiveness.

While the Panel considered that the competition laws have served Australia well, the Final Report recommended specific reforms to enhance their effectiveness. The Panel recommended a number of changes to simplify and clarify the operation of the law, to bring to the forefront the competition policy objectives of the law and to reduce business compliance costs.

Importantly, the Panel recognised that all changes to the law will involve some transitional costs, as firms become familiar with the new provisions and as the courts develop jurisprudence on its application. Many of the recommendations were specifically designed to help businesses manage transitional costs, including:

- legislative guidance to help guide the courts with respect to the intended operation of provisions;
- broadening the ACCC's powers to authorise conduct where there is a net public benefit, or where there are unlikely to be competition concerns; and
- encouraging the ACCC to public guidance material which sets out its enforcement approach.

Competition institutions

Finally, the Panel considered whether Australia has the right competition institutions to drive reform. Good institutional structures are needed to ensure that governments can have confidence in the regulation and enforcement of competition laws and access and pricing laws; and confidence that a reinvigorated round of competition policy reform would succeed.

In particular, the structure and governance of the ACCC was considered. While the Panel recognised that the ACCC is a well-regarded and effective body, specific recommendations were made to strengthen its transparency and accountability.

Discussions between all jurisdictions on the future structure of competition institutions can occur through intergovernmental processes to ensure that decisions take into account a broad national interest.

Question 5: The 12-month review process provided all interested stakeholders with opportunities to comment on proposed changes to competition policies, laws and institutions. The Panel commenced the Review process with the release of an issues paper on 14 April 2014, followed by an eight week consultation period, including written submissions and meetings with local businesses in a number of locations arranged through representative business groups. A Draft Report was released on 22 September 2014, followed by an eight week consultation period including written submissions and public forums held in Perth, Adelaide, Melbourne, Sydney, Brisbane, Canberra, Darwin and Hobart. On 23-24 October 2014, the Harper Review Panel hosted an International Conference, to draw on international and domestic expertise to consider and review the recommendations in the Draft Report.

Over the course of the Harper Review, the Panel hosted more than 150 meetings with stakeholders and received almost 1,000 written submissions (almost 350 in response to the Issues Paper and around 600 in response to the Draft Report).

Consistent with normal processes, for reforms that require specific legislative changes, exposure draft legislation and explanatory materials would be subject to public consultation (see below).

Question 7: The reform agenda laid out in the Harper Review Final Report is ambitious, with recommendations to all levels of government. In some cases state and territory governments may choose to act unilaterally in adopting some of the Panel's recommendations, and there are already examples of

individual jurisdictions progressing competition policy matters. In other cases the Panel found that cooperation and collaboration across jurisdictions may lead to better outcomes.

Discussions with the states and territories on potential competition reforms are continuing..

Competition Policy

Many of the competition policy reforms in particular would require cooperation and collaboration across jurisdictions. Reform can be discussed and progressed through formal government channels. Involvement at a high Ministerial level would assist in ensuring that the reforms remain a priority.

Competition law

Changes to the CCA are made by legislative amendment. Consistent with general Commonwealth legislative reform, exposure draft legislation would be released for public consultation before new laws are enacted. In addition, any amendments to the competition provisions of the CCA are required to comply with the intergovernmental *Conduct Code Agreement*, including:

- A three-month period of consultation with States and Territories. Consultation would be based on the agreed Government position on each of the CCA recommendations; and
- At the conclusion of the consultation period, a 35-day voting period. A majority is required before the Australian Government puts forward for Parliamentary consideration an amendment to Part IV of the CCA.

Competition institutions

Decisions on institutional structures would require national discussions. Discussions between all jurisdictions on the future structure of competition institutions can occur through intergovernmental processes.

Estimation of regulatory burden

Table 1 sets out the regulatory costs and savings arising from implementation of the Harper Review's recommendations. These costs have been agreed with the OBPR. As the overall impact is a regulatory saving, offsets are not required.

**Table 1: Regulatory costings for Harper Review recommendations
(final figure rounded to 1 decimal place)**

Recommendation	Business (\$m)	Community organisations (\$m)	Individuals (\$m)	Total Cost (\$m)
13: Parallel imports (books)	-	-	-	nil
23: Competition law simplification	-0.14	-	-	-0.14
29: Price signalling	0.64	-	-	0.64
32: Third-line forcing test	-3.6	-	-	-3.6
34: Resale price maintenance	0.16	-	-	0.16
39: Block exemption power	-0.45	-	-	-0.45

Recommendation	Business (\$m)	Community organisations (\$m)	Individuals (\$m)	Total Cost (\$m)
40: Section 155 notices	-1.3	-	-	-1.3
54: Collective bargaining	0.01	-	-	0.01
Total by Sector	-4.7			-4.7
Are all new costs offset?				
<input type="checkbox"/> Yes, costs are offset <input type="checkbox"/> No, costs are not offset <input checked="" type="checkbox"/> Deregulatory—no offsets required				
Total (Change in costs – Cost offset) (\$million) = \$0				

Final matters

Further regulation impact analysis, including updated costings, would be undertaken on a case-by-case basis where there are subsequent decision points.

I am satisfied that the Harper Review and subsequent consultation processes represent a thorough analysis of the impact on stakeholders and certify that the processes and analysis above are equivalent to those required for a RIS as set out in the Guide.

Should the OBPR have any queries in relation to this matter please contact Scott Rogers on 02 6263 3076 or scott.rogers@treasury.gov.au.

Yours sincerely



Michael Willcock
Acting Deputy Secretary, Markets Group

Attachment A - Process for recommendations not included in this letter

Some of the recommendations in the Harper Review Final Report are directed at state and territory governments. In these instances the recommendations are not certified by this letter. A COAG RIS, or regulatory impact analysis by individual jurisdictions may be required in the future where reforms are considered and/or progressed.

In other cases, recommendations contained in the Harper Review Final Report have or are being considered through other Government processes (Table 2).

Table 2: Recommendations being addressed through other processes

Recommendation	Agreed process / reasons	OBPR reference
5: Cabotage – coastal shipping	On 20 May 2015, the Deputy Prime Minister and Minister for Infrastructure and Regional Development, the Hon Warren Truss MP, announced the Australian Government's plan for coastal shipping to be implemented via the passage of legislation.	17128 (Shipping Legislation Amendment Bill 2015)
9: Planning and zoning	No change in regulatory burden imposed by the Commonwealth as the recommendation is not directed at Commonwealth planning agencies.	18976
12: Retail trading hours	No change in regulatory burden imposed by the Commonwealth as the Commonwealth does not have a role in regulating retail trading hours.	18976
13: Parallel imports (motor vehicles)	On 16 April 2015, the Government announced its consideration of possible reforms to the <i>Motor Vehicle Standards Act 1989</i> , including possible options to reduce restrictions on the personal importation of new vehicles, noting the Government was not inclined to take the same approach with used vehicles.	17240
14: Pharmacy	On 18 May 2015, the Minister for Health, the Hon Sussan Ley MP, announced that an independent and public review of the pharmacy sector would be conducted over the next two years, including consideration of the location rules.	18160
26: Extra-territorial reach of the law (Ministerial consent)	The Competition and Consumer Amendment (Deregulatory and Other Measures) Bill 2015, introduced into the House of Representatives in March 2015, gives effect to the part of Recommendation 26 to remove the requirement for private parties to seek ministerial consent before relying on extra-territorial conduct in private actions.	18019
42: National Access Regime	A separate letter certifying the Productivity Commission Inquiry into the National Access Regime has been prepared by Treasury to inform that Government's decision.	18976

A number of recommendations in the Harper Review Final Report do not change the regulatory burden (Table 3).

Table 3: Recommendations that do not change the regulatory burden (OBPR reference 18976)

Recommendation	Agreed process / reasons
1: Competition principles	<p>Nil change in regulatory burden. The principles are not specific to any policy and do not create an expectation of compliance for industry.</p> <p>Further regulatory impact analysis may be needed where specific policies are considered.</p>
2: Human services	<p>Nil change in regulatory burden. The principles are not specific to any policy.</p> <p>Further regulatory impact analysis may be needed where specific policies are considered.</p>
3. Roads	<p>Nil change in regulatory burden further to the Government's response to the Productivity Commission Inquiry Report into Public Infrastructure and ongoing work by the Transport and Infrastructure Council.</p> <p>Further regulatory impact analysis may be needed where specific policies are considered.</p>
4: Liner shipping	<p>Nil change in regulatory burden – Government to consider further options.</p> <p>Further regulatory impact analysis may be needed where specific policies are considered.</p> <p>OBPR reference: 19395.</p>
5: Cabotage – aviation	<p>Nil change in regulatory burden.</p>
6: Intellectual property	<p>Nil change in regulatory burden – links to further review by the Productivity Commission.</p> <p>Further regulatory impact analysis may be needed where specific policies are considered.</p>
7: Intellectual property exception	<p>Nil change in regulatory burden – links to further review by the Productivity Commission.</p> <p>Further regulatory impact analysis may be needed when any specific policy change is considered.</p>
8: Regulation review	<p>Nil change in regulatory burden – will link in to further Government review.</p> <p>Further regulatory impact analysis may be needed where specific policies are considered.</p>
10: Priorities for regulation review	<p>Nil change in regulatory burden – will link in to further Government review.</p> <p>Further regulatory impact analysis may be needed where specific policies are considered.</p>
11: Standards review	<p>Nil change in regulatory burden.</p> <p>The Memorandum of Understanding will not increase the number of reviews that Standards Australia would undertake from business as usual.</p>
13: Parallel imports (motor vehicles)	<p>The Australian Government has consulted on removing restrictions on personal importation of new vehicles. A separate RIS to inform the Government's decision has been prepared by the Department of</p>

Recommendation	Agreed process / reasons
	Infrastructure and Regional Development.
15: Competitive neutrality policy	Nil change in regulatory burden – will link in to further Government review. Further regulatory impact analysis may be needed where specific policies are considered.
16: Competitive neutrality complaints	Nil change in regulatory burden. Reporting costs on an independent government body is not in scope as the body is not acting as a business.
17: Competitive neutrality reporting	Nil change in regulatory burden.
18: Government procurement and other commercial arrangements	Nil change in regulatory burden - will link in to the existing <i>Efficiency through Contestability Programme</i> .
19: Electricity and gas	Nil change in regulatory burden at this time.
20: Water	Nil change in regulatory burden at this time.
21: Informed choice	Nil change in regulatory burden – will link in to further Government review. Further regulatory impact analysis may be needed where specific policies are considered.
22: Competition law concepts	Nil change in regulatory burden – committing to existing regime.
24: Application of the law to government activities	Nil change in regulatory burden. Any impact will be on government’s non-business related activities.
25: Definition of market and competition	Nil change in regulatory burden. Expanding the definition of potential competition may reduce the number of cases where the ACCC makes an assessment that something substantially lessens competition, however these impacts are excluded from the regulatory burden measure calculator.
26: Extra-territorial reach of the law (excluding ministerial consent element detailed below in Table 2)	Nil change in regulatory burden. Further regulatory impact analysis may be needed where specific policies are considered.
27: Cartel conduct prohibition	Nil change in regulatory burden. Changes may have an impact on firm profits or potential scope for penalties, however these impacts are excluded from the regulatory burden measure calculator.
28: Exclusionary provisions	Nil change in regulatory burden –changes to remove duplication in the competition law.
30: Misuse of market power	Nil change in regulatory burden – Government is further consulting on options.
31: Price discrimination	Nil change in regulatory burden – committing to status quo.
33: Exclusive dealing	Nil change in regulatory burden – will be considered further.

Recommendation	Agreed process / reasons
coverage	
35: Mergers	<p>Nil change in regulatory burden.</p> <p>Changes would not change the total population of merger applications nor the amount of labour time needed for each application.</p>
36: Secondary boycotts	Nil change in regulatory burden.
37: Trading restrictions in industrial agreements	<p>Nil change in regulatory burden –links to further review by the Productivity Commission.</p> <p>Further regulatory impact analysis may be needed where specific policies are considered.</p>
38: Authorisation and notification	<p>Nil change in regulatory burden.</p> <p>Potential for reduced fees is excluded from the regulatory burden measure calculator.</p>
41: Private actions	Nil change in regulatory burden.
43: Australian Council for Competition Policy – Establishment	Nil change in regulatory burden as it relates to processes that are internal to Government.
44: Australian Council for Competition Policy – Role	Nil change in regulatory burden as it relates to processes that are internal to Government.
45: Market studies power	Nil change in regulatory burden as it relates to processes that are internal to Government.
46: Market studies requests	Nil change in regulatory burden as it relates to processes that are internal to Government.
47: Annual competition analysis	Nil change in regulatory burden as it relates to processes that are internal to Government.
48: Competition payments	Nil change in regulatory burden as it relates to processes that are internal to Government.
49: ACCC functions	Nil change in regulatory burden as it relates to processes that are internal to Government.
50: Access and pricing regulator	Nil change in regulatory burden as it relates to processes that are internal to Government.
51: ACCC governance	Nil change in regulatory burden as it relates to processes that are internal to Government.
52: Media code of conduct	Nil change in regulatory burden as it relates to processes that are internal to Government.
53: Small business access to remedies	Nil change in regulatory burden as it relates to processes that are internal to Government.
55: Implementation	Nil change in regulatory burden as it relates to processes that are internal to Government.
56: Economic modelling	Nil change in regulatory burden as it relates to processes that are internal to Government.