

NZCLPI Workshop
Auckland, 16 Oct 2015

Australian Competition Policy Review Harper Report 2015 Sirens' Call or Lyre of Orpheus?



Harper Report 2015 (HR)

- Many significant recommendations on competition law
- Tough challenge v short gestation period
- Uncertain future of HR recommendations - the Australian political zoo
- My paper reviews HR on:
 - simplification
 - misuse of market power
 - SLC test
 - cartels
 - mergers
 - IP and competition law
 - remedies, sanctions and enforcement

Competition law simplification

- Recommendation 23:
 - competition law provisions of CCA should be simplified, including by removing overly specified provisions and redundant provisions
- Areas of simplification include:
 - cartels
 - exclusive dealing and 3rd line forcing
 - authorisation
- Simplification welcome but is less important criterion of legislative design than overreach
- Complex legislation is often converted by corporations into basic internal compliance rules
- HR says little about nature and useful scope of principles-based drafting
- Model Legislative Provisions are a let-down:
 - drafting style remains Canberra recoco school
 - jv exemption (s 45I) is misconceived
 - supply agreement exemption (s 45J) is unduly complicated
 - exclusive dealing provision (s 47) is inconsistent with Recommendation 33

Misuse of market power

- Recommendation 30:
 - s 46 should be reframed to prohibit a corporation with SMP from engaging in conduct that has the purpose or effect or likely effect of substantially lessening competition in a market
 - court to have regard to:
 - (a) extent to which the conduct increases competition by enhancing efficiency, innovation, product quality or price competitiveness
 - (b) extent to which the conduct lessens competition by preventing, restricting or deterring potential competitive conduct or new entry
- No element of causation between SMP and impugned conduct – overreach?
- No element of *exclusionary* conduct – overreach?
- Uncertainty?
 - limits on information known to firms with SMP
 - Sims - corporations are accustomed to making SLC assessments under s 45
 - vagueness of ‘substantial’
- Are efficiencies taken into account adequately?
- Inadequate proof of concept in HR
- Unconscionable conduct as alternative possible basis of liability

SLC test

- HR says little about meaning and application of SLC test
- No attempt to assess the possible development of a rule of reason test in Australia:
 - implicit argument that rule of reason is not ‘justiciable’
 - dependency on authorisation
- Meaning of ‘substantial’ – current law is fog-struck
- Leuner’s attempt to disperse the fog
- Use of safe harbours in US
- Use of safe harbours under EU block exemptions
- Use of market share thresholds as safe harbours seems inconsistent with *Dandy Power Equipment v Mercury Marine per Smithers J*
- HR leaves Australia with SLC test that is vague and conducive to potential overreach
- Proposed block exemptions may assist but note potential danger of sector-specific rules

Cartels

- Five main recommendations:
 - Recommendation 27 – cartel conduct prohibition
 - Recommendation 28 – exclusionary provisions
 - Recommendation 29 – price signalling
 - Recommendation 4 – liner shipping
 - Recommendation 54 – collective bargaining
- Proposals differ significantly from those under Commerce (Cartels and Other Matters) Bill (NZ)
- Preserves some undesirable concepts (eg ‘purpose of a provision’)
- Does not address counterfactual issue in price fixing
- Proposal on concerted practices does not follow EU law and does not resolve problem highlighted by *Apco* case
- Supply agreement exemption is unduly complicated
- JV exemption is highly problematic – trifurcated and absurdly lax

Mergers

- Recommendation 35:
 - informal merger review - further consultation between the ACCC and business representatives with the objective of delivering more timely decisions
 - formal merger clearance process and the merger authorisation process to be combined and reformed to remove unnecessary restrictions and requirements that may have deterred their use
 - general framework for formal review outlined – to be settled in consultation with business, practitioners and ACCC
- Recommendation 25 (competition to include import competition)
- HR unwilling to do away with informal merger review; no concrete proposals on transparency or delay
- No sufficient case to amend law to cover creeping acquisitions, but note potential application of proposed s 46 on misuse of market power (creeping acquisitions could = ‘engaging in conduct’)
- Various loose ends, eg:
 - meaning of ‘substantial’ in SLC test
 - when is SLC ‘likely’?

IP and competition law

- Recommendation 6 – IP review by Productivity Commission
- Recommendation 7 – repeal of IP exception under s 51(3)
- Key policy assumption for repeal of s 51(3):
 - commercial transactions involving IP rights, including the assignment and licensing of such rights, should be subject to the CCA in the same manner as transactions involving other property and assets
- HR claims that Recommendation 7 is consistent with approach adopted in other jurisdictions:
 - this claim is misleading because it neglects the relevance and significance of the rule of reason in the US and EU as an important limit on the application of competition law to IP licensing
 - query adequacy of safeguards of authorisation, notification and block exemptions
 - query additional compliance costs
- Repeal of s 51(3) would remove cartel-related cross-licensing loophole
- No recommendation that IP-related guidelines be developed by ACCC – contrast FTC/DOJ IP guidelines and those being prepared in Canada

Remedies, sanctions and enforcement

- Key recommendations:
 - Recommendation 41 – private actions (s 83)
 - Recommendation 53 – small business access to remedies
 - Recommendation 26 – extra-territoriality
 - Recommendation 40 – s 155 notices
- Proposed amendment of s 83 to cover agreed findings of fact in settled cases is overdue
- Recommendation 53 has been criticised for not creating tangible small business rights
- Recommendation 26 sensibly adopts trade or commerce test and dispenses with need for consent of Minister
- Recommendation 40 seeks to limit the burden of compliance with s 155 in the context of emails and electronic data
- No inquiry into lack of criminal prosecution of cartel conduct or possible improvements to immunity regime
- No inquiry into adequacy of sanctions available or as used against corporations and individuals
- HR came out before *CFMEU* decision that a court should have no regard to an agreed penalty figure put forward by the parties

Sirens' call or lyre of Orpheus?

- HR is a major landmark that should lead to many worthwhile changes in Australian competition law
- HR does not fully correspond to the political description of it as a 'root and branch review'
- More work needs to be done in several important areas including:
 - simplification
 - misuse of market power
 - SLC test
 - cartels
 - remedies, sanctions and enforcement
- Narrower, more focussed reviews of the Commerce Act may well be less time-pressured, more thorough and more productive of workable legislation and useful guidelines

