



Australian Government
Department of Communications and the Arts



Review of the Part XIB telecommunications anti-competitive conduct provisions

Discussion paper

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About this review

On 16 March 2016, the Government announced that it will implement the Harper Competition Review's recommendation to amend section 46 of the *Competition and Consumer Act 2010* (the CCA)—the misuse of market power law. The Harper Review recommended that section 46 be replaced by a new provision that prevents firms with substantial market power from engaging in conduct that has the purpose, effect or likely effect of substantially lessening competition. The Australian Government has now released a bill to amend the CCA, which includes the proposed changes to section 46.

As a result of the proposed changes, the Department of Communications and the Arts, on behalf of the Minister for Communications and the Arts, is conducting a review of the future of the telecommunications-specific anti-competitive conduct regime in Part XIB of the CCA, which has interlinkages with section 46. The purpose of this review is to seek your feedback on the ongoing operation of Part XIB in light of the proposed changes to section 46.

This paper outlines the proposed changes to section 46, the anti-competitive conduct regime in Part XIB and the issues that may arise with Part XIB given the proposed changes to section 46.

Part XIB also deals with other telecommunications matters including tariff filing and record keeping rules. However, this review will focus only on the anti-competitive conduct provisions in Part XIB.

Making a submission

We are seeking the views of all interested stakeholders to inform the review, and provide questions in this paper to help focus discussion. Submissions are to be provided no later than 30 September 2016.

Submissions can be emailed to competitionpolicy@communications.gov.au or submitted online at <https://communications.gov.au/have-your-say>. Enquiries can be directed to competitionpolicy@communications.gov.au or by phone on 02 6271 1000.

Publication of submissions and confidentiality

The Department will publish submissions on its website, unless a submission contains material that is defamatory, otherwise unlawful or unsuitable for publication, or where the respondent specifically requests that the submission, or part of the submission, be kept confidential. Respondents are requested to provide an additional non-confidential version of their submission for public release.

Section 46: the misuse of market power law

Section 46 of the CCA sets out a general misuse of market power law that applies to corporations and a range of other persons who are not corporations in any industry sector, and forms part of the economy-wide anti-competitive conduct rules in Part IV of the CCA. It prohibits a corporation with a substantial degree of market power from taking advantage of that power for certain purposes that are detrimental to competition in that particular market or any other market.

The proposed changes to section 46 will see it replaced with a provision that will instead focus on whether conduct has the purpose, effect or likely effect of substantially lessening competition in a market. The proposed changes would also:

- remove the requirement to show that the corporation had taken advantage of its market power
- introduce mandatory factors that the courts must take into account when determining whether there has been a substantial lessening of competition, and
- allow the Australian Competition and Consumer Commission (ACCC) to authorise conduct which would otherwise be in breach of the section.¹

The Part XIB anti-competitive conduct regime

As well as being subject to section 46, carriers and carriage service providers (CSPs) in the telecommunications industry are subject to Part XIB of the CCA. Part XIB was introduced in 1997 to facilitate the transition to open competition in the telecommunications market. At the time of its introduction, open competition was only beginning and Telstra had a dominant role. Parliament decided that specific regulation was needed to facilitate prompt action against anti-competitive conduct in the telecommunications sector.

The telecommunications-specific anti-competitive conduct regime is set out in Division 2 and Division 3 of Part XIB. The enforcement provisions relating to the telecommunications-specific anti-competitive conduct regime are set out in Division 7 of Part XIB.

Division 2 of Part XIB: the competition rule

Division 2 sets out a telecommunications-specific competition rule. The competition rule provides that a carrier or CSP must not engage in anti-competitive conduct (section 151AK). Section 151AJ defines anti-competitive conduct for the purposes of Part XIB.

In Division 2, a carrier or CSP engages in anti-competitive conduct if it:

- has a substantial degree of market power in a telecommunications market and takes advantage of that power in any market (including by engaging in conduct or a pattern of conduct) with the effect or likely effect of substantially lessening competition in a telecommunications market, or
- engages in conduct that contravenes section 46 (or other provisions in Part IV) and that conduct relates to a telecommunications market.

¹ <https://consult.treasury.gov.au>

Division 3 of Part XIB: competition notices and exemption orders

Division 3 provides for the ACCC to issue competition notices. Competition notices are designed to enable the ACCC to quickly respond to a breach of the competition rule. After investigation of alleged anti-competitive conduct, the ACCC can issue a competition notice in relation to a carrier or CSP if the ACCC has reason to believe that it is engaging or has engaged in conduct that breaches the competition rule.

There are two types of competition notices: Part A competition notices (section 151AKA) and Part B competition notices (section 151AL). Under Part A competition notices, the ACCC needs to only specify the kind of anti-competitive conduct rather than any particular instance of anti-competitive conduct (subsection 151AKA(5)). Part B competition notices need to include particulars of the contravention that the ACCC believes has occurred or is occurring (paragraph 151AL(1)(b)). Part A notices last for a period of not more than 12 months (section 151AO).

A Part A competition notice allows the ACCC to institute court proceedings to obtain pecuniary penalties for conduct found to breach the telecommunications competition rule (section 151BY). This type of competition notice also provides for the recovery of damages under section 151CC. Under Part XIB, potential penalties for contravention of the telecommunications competition rule accrue on a daily basis from the issue of a Part A Competition Notice (subsection 151BX(3)). A Part B competition notice is *prima facie* evidence of the matters in the notice, and can reverse the evidentiary onus of proof in court (subsection 151AN(1)).

By opening the way to significant penalties, competition notices provide an incentive for the recipient to reconsider its conduct and to discontinue the conduct if it considers appropriate to do so. As such they provide a mechanism to deal quickly with conduct of concern to the ACCC. Equally, they may be considered as a deterrent to such conduct in the first instance.

Division 3 also allows a person to apply to the ACCC for an order to exempt certain conduct from the scope of the anti-competitive conduct provisions in Part XIB (section 151AS). This is in addition to a person's ability to apply to the ACCC for an authorisation under Part VII of the CCA to enter into contracts, arrangements or understandings that are otherwise anti-competitive (section 88) or to file a notice of exclusive dealing (section 93).

Enforcement of breaches under Part IV and Part XIB

Action against the conduct of a carrier or CSP that gives rise to a liability under Part XIB or Part IV can be instituted under either Part XIB or Part VI. However, a person is not liable for more than one pecuniary penalty in respect of the same conduct (subsection 151BX(6)).

The main difference between enforcement actions under Part VI for a breach of section 46 and Part XIB is the competition notice provisions in Part XIB. The competition notice provisions are unique to Part XIB—there are no such provisions in other parts of the CCA. The competition notices enable litigation to commence (by either the ACCC or an affected party) against the relevant carrier or CSP where the conduct described in the notice continues, and encourages the recipient of the notice to cease the alleged anti-competitive conduct or else face the prospect of court proceedings.

Since the introduction of Part XIB, the ACCC has issued five Part A competition notices, with the last issued in April 2006. The register of all competition notices that the ACCC has issued is available on the ACCC's website at <http://registers.accc.gov.au/content/index.phtml/itemId/323962>.

The future of the Part XIB anti-competitive conduct regime

Given the interlinkages between section 46 and Part XIB, the proposed changes to section 46 raises questions about the ongoing operation of the Part XIB anti-competitive conduct provisions. In particular:

- introducing 'purpose, effect or likely effect of substantially lessening competition' in section 46 would result in two similar tests under section 46 and Part XIB that would both apply to the telecommunications industry
- the removal of the 'take advantage' test in section 46 would result in a difference between section 46 and Part XIB, which currently includes this test
- as a contravention of section 46 constitutes anti-competitive conduct under Part XIB, the ACCC would be able to issue competition notices in relation to conduct that contravenes the proposed new rules in section 46
- an authorisation process in relation to section 46 may render the exemption order process in Division 3 of Part XIB duplicative, at least in part.

In addition, the Government stated in its response to the Vertigan review that it would undertake a review of Part XIB.² In 2014, the Vertigan review recommended that the telecommunications-specific anti-competitive conduct regime in Part XIB be reviewed to assess the effectiveness of its provisions.³ The Harper Competition Review, in 2015, also noted that its proposed amendments to section 46 and the availability of authorisation would obviate the need for the telecommunications-specific anti-competitive conduct provisions in Division 2 and the exemption order regime in Division 3 of Part XIB.⁴

Part XIB was always envisaged as a transitional regime for the telecommunications sector. Telecommunications markets and industry structures have changed since 1997, with an increase in market participants and the rollout of the National Broadband Network. There have been several significant legislative developments over the last decade, including changes to the telecommunications access regime in Part XIC of the CCA. These changes also allow the ACCC to address competition issues in the market through additional means not available in 1997, including setting terms and conditions, including price, and issuing binding rules of conduct.

Consultation questions

The Government seeks views on the ongoing operation of the Part XIB anti-competitive conduct provisions given the proposed changes to section 46. In particular, the Government seeks views on:

Division 2 of Part XIB

1. In light of the proposed changes to section 46, should the telecommunications competition rule in Division 2 of Part XIB (section 151AJ) be retained? If so, why? If not, why not?
2. If the competition rule in Part XIB is retained, would changes need to be made to the rule to provide certainty for businesses? If so, what changes would need to be made?

² *Telecommunications Regulatory and Structural Reform* policy paper, December 2014, www.communications.gov.au/sites/g/files/net301/f/Telecommunications_Regulatory_and_Structural_Reform_Paper_-_11_December_....pdf.

³ *Statutory Review under section 152EOA of the Competition and Consumer Act 2010*, July 2014, page 24, www.communications.gov.au/sites/g/files/net301/f/3_Section_152EOA_Report_1.pdf.

⁴ Harper Competition Policy Review, page 345, http://competitionpolicyreview.gov.au/files/2015/03/Part4_final-report_online.pdf.

Division 3 of Part XIB

3. Do competition notices have ongoing utility in addressing anti-competitive behaviour in the sector? If so, why? If not, why not?
4. Do the proposed changes to section 46 and section 46's interaction with Part XIB raise issues for the operation of competition notices?
5. If section 46 is amended to include the proposed mandatory factors that the courts must take into account when determining whether there has been a substantial lessening of competition, should they be considered when the ACCC decides to issue a competition notice under Part XIB? If so, how?
6. Is the need for competition notices reduced by the ACCC powers under Part XIC to set terms and conditions for access to services and issue binding rules of conduct?
7. Would the exemption order provisions in Part XIB be rendered obsolete by the introduction of authorisations under section 46? If so, why? If not, why not?

References

In preparing your submission to this review, you may wish to consult the following documents:

- Competition and Consumer Act 2010, Part XIB— www.legislation.gov.au/Latest/C201600740
- Exposure draft of Competition and Consumer Amendment (Competition Policy Review) Bill 2016 – <https://consult.treasury.gov.au>
- Government's announced position on section 46— <http://sjm.ministers.treasury.gov.au/media-release/030-2016/>
- Harper Review report, pp. 335-348— <http://competitionpolicyreview.gov.au/final-report/>