

# Review of the Part XIB telecommunications anti- competitive conduct provisions

nbn submission to the Department of Communications and the Arts in  
response to Discussion Paper issued in September 2016





---

# 1 Introduction

**nbn** welcomes the opportunity to respond to the Department's discussion paper on its review of the Part XIB telecommunications anti-competitive conduct provisions. Such a review is timely in circumstances where the Government proposes to amend s46 of the *Competition and Consumer Act 2010* (Cth) (**CCA**) to implement the recommendations of the Harper Review.

Briefly, **nbn's** position is as follows:

- the telecommunications competition rule in Part XIB should be retained, however the telecommunications-specific misuse of market power provision in s151AJ(2) should be repealed as it will no longer have utility if s46 is amended as proposed. Subject to **nbn's** comments in sections 3.2 and 4 below, this is the only change required to appropriately update Part XIB in the event that s46 is amended as proposed;
- the telecommunications-specific exemption regime contained in Part XIB remains appropriate and should be retained; and
- there are good policy reasons for retaining the competition notices regime in Part XIB. In this respect, **nbn** does not consider that the existence of Part XIC means that the value of retaining the competition notices regime in Part XIB is reduced. To the extent Part XIC and Part XIB potentially address the same types of conduct (e.g. access to key infrastructure), Part XIC may be better suited to dealing with that issue. This is because Part XIC provides a regime for determining and monitoring the terms and conditions of access, a matter which courts are not readily able to address. However, Part XIB and Part XIC also address different types of conduct, with the former focusing on anti-competitive conduct or other behavioural issues on the part of particular carriers or CSPs, matters which Part XIC is not intended to address. However, this does not mean that the regime in Part XIB cannot be improved and **nbn** sets out below some practical measures that might be taken to increase transparency and effectiveness.

Part **XIB** should however provide for a statutory review of the competition notice regime at the time the **nbn**<sup>TM</sup> network is built and fully operational. The need to continue with the regime should be assessed at that time having regard to the market landscape.

**nbn** also sets out some additional issues concerning the use by the ACCC of its other powers in Part XIB, such as the record keeping rules and tariff filing directions. In particular, **nbn** considers that these powers should be used consistently and fairly across the telecommunications industry as a whole and the Government may wish to consider clarifying the circumstances in which the ACCC will be empowered to use these powers.

## 2 The telecommunications competition rule

The telecommunications competition rule should be retained, however the telecommunications-specific misuse of market power provision in s151AJ(2) should be repealed as it will no longer have any utility if s46 is amended as proposed by the Exposure Draft Bill.<sup>1</sup>

---

<sup>1</sup> Exposure Draft Bill, Competition and Consumer Amendment (Competition Policy Review) Bill 2016.

---

## 2.1 The telecommunications-specific misuse of market power provision should be repealed

As the Department is aware, the telecommunications competition rule in Part XIB prohibits a carrier or carriage service provider (**CSP**) from engaging in 'anti-competitive conduct'.<sup>2</sup> 'Anti-competitive conduct' in that context covers both:

- contraventions of Part IV of the CCA, including s46; and
- contraventions of the telecommunications-specific misuse of market power provision in s151AJ(2). Relevantly, that subsection prohibits a carrier or CSP with substantial market power from 'taking advantage' of its power if the conduct has the 'effect or likely effect of substantially lessening competition in a telecommunications market'.<sup>3</sup> The prohibition is therefore broader than the current formulation of s46.

The Government's proposed changes to s46 will, if enacted, prohibit a corporation with substantial market power from engaging in conduct that has the purpose *or effect* of substantially lessening competition. The amended s46 will therefore likely encompass a broader range of conduct than is currently caught by the prohibition in s151AJ(2), which only considers a corporation's purpose in engaging in the relevant conduct and further, only captures conduct which involves a *use* of substantial market power.

The Government's proposed amendments to s46 will make redundant the telecommunications-specific misuse of market power provision in s151AJ(2) of the CCA:

- first, as noted above, the amended s46 will be broader and will incorporate an effects test similar to the current telecommunications-specific misuse of market power prohibition in s151AJ(2). However, unlike s151AJ(2), the amended s46 will not require proof of a 'taking advantage' of market power;
- second, the amended s46 will assess not only the *effect* of the conduct but also the corporation's *purpose*. Purpose is not currently assessed under s151AJ(2).

It is difficult to identify any additional work that would be done by s151AJ(2) if s46 is amended as proposed.

As mentioned above, a contravention of s46 by a carrier or CSP in relation to a telecommunications market represents 'anti-competitive conduct' under the telecommunications competition rule.<sup>4</sup> There would therefore be no practical utility in retaining s151AJ(2).

## 2.2 The Part XIB exemption regime should be retained

The Exposure Draft Bill also provides for the introduction of an authorisation process for conduct that would otherwise contravene s46 of the CCA. As the Department is aware, Part XIB contains an exemption regime from conduct that could raise concerns under the telecommunications competition rule.<sup>5</sup>

---

<sup>2</sup> Sections 151AJ and 151AK of the CCA.

<sup>3</sup> Section 151AJ of the CCA.

<sup>4</sup> Section 151AJ(3)(a) of the CCA.

<sup>5</sup> Section 151AS of the CCA.



**nbn** considers that if the Exposure Draft Bill is to be passed in its current form and s151AJ(2) repealed for the reasons set out in section 2.1 above, the exemption regime in Part XIB should nevertheless be retained.

In circumstances where the exemption regime is retained, **nbn** submits that the following amendments should be made to Part XIB:

- incorporate a time limit for review of the exemption order application which is shorter than that for an application for authorisation under Part VII. Alternatively, an objects clause could be added to s151AS providing that the ACCC should act expeditiously in its consideration of an application for exemption under s151AS. Doing so would fulfil the intention of the exemption order regime in Part XIB which was to 'increase certainty'.<sup>6</sup> Expeditiously dealing with exemption order applications would increase certainty for applicants; and
- repeal s151BC(4) so that applicants may seek an exemption order under s151AS for conduct that contravenes s46. This would be consistent with the Government's proposal to introduce an authorisation process for s46 conduct and would harmonise Part XIB with Part VII.

## 3 The competition notices regime should be retained

For the reasons set out below, **nbn** considers that the competition notices regime should be retained in Division 3 of Part XIB of the CCA.

### 3.1 The competition notices regime has practical utility

**nbn** supports the retention of the competition notices regime and considers that it has continued practical utility in regulating anti-competitive conduct in the telecommunications industry.

Part XIB was introduced in 1997 at a time when the telecommunications industry in Australia was going through a process of deregulation and privatisation. The market was therefore incredibly dynamic and it was understood that the ACCC would need to be able to respond quickly to any potential breach of the telecommunications competition rule by a carrier or CSP.<sup>7</sup>

These market characteristics are present today. As the ACCC's issues paper relating to its market study into the communications sector acknowledges, rapidly evolving technological developments, structural change within the industry, product innovation and changing consumer preferences are all contributing to a changing communications environment.<sup>8</sup> By way of example:

- RSPs are transitioning to the **nbn**<sup>TM</sup> network;
- recent market consolidation is significantly changing the dynamics of competition for fixed line services;

---

<sup>6</sup> Trade Practices Amendment (Telecommunications) Bill 1996, Explanatory Memorandum, p.14.

<sup>7</sup> Trade Practices Amendment (Telecommunications) Bill 1996, Explanatory Memorandum, p.6.

<sup>8</sup> <https://www.accc.gov.au/system/files/Comms%20Market%20Study%20-%20Issues%20Paper%20-%20September%202016.pdf>

- the increasing use of the internet as a delivery platform, particularly in accessing communications services and content (eg the emergence of OTT services);
- ongoing rapid technology change, including the emergence of new access technologies; and
- the proliferation of bundled offerings by RSPs, which increasingly cover triple and quadruple play bundles.

Accordingly, **nbn** submits that the competition notices regime in Part XIB provides continued utility, for the following reasons:

- the regime provides the ACCC with the ability to respond quickly to place carriers or CSPs on notice of potential anti-competitive conduct. This is because after an investigation of alleged anti-competitive conduct by a carrier or CSP, the ACCC can issue a competition notice if the ACCC has reason to believe the carrier or CSP is engaging or has engaged in conduct that breaches the telecommunications competition rule;<sup>9</sup>
- competition notices provide a unique incentive for the recipient to reconsider the conduct identified by the ACCC and to discontinue the conduct if it considers appropriate to do so;
- potential penalties for contravention of the telecommunications competition rule under s151AK accrue on a daily basis from the date of issue of a Part A competition notice, meaning that issue of such a notice can operate as a significant deterrent;<sup>10</sup>
- a Part B competition notice reverses the evidentiary onus of proof in court proceedings as it constitutes prima facie evidence of the matters in the notice, thereby enhancing the ACCC's ability to prosecute instances of anti-competitive conduct in the telecommunications sector;<sup>11</sup> and
- evidence suggests that the regime has only been used as a 'last resort' by the ACCC, with only five competition notices having been issued since the regime's inception.<sup>12</sup>

In addition, as was found in the Productivity Commission's review of Telecommunications Competition Regulation,<sup>13</sup> the regime contained in Part XIB is 'ex post' in nature, in that it provides mechanisms to deal with conduct that is occurring or has occurred. In contrast, the access regime contained in Part XIC is primarily 'ex ante' in nature, in that it sets out the principles to be applied by the ACCC in determining whether to mandate access and the terms and conditions on which such access is to be granted. In other words, the latter is forward-looking and designed to enhance competition whereas the former is designed to address instances of existing or past anti-competitive conduct. Accordingly, the existence of both regimes does not result in duplication, as discussed in further detail in section 3.3 below.

**nbn** also submits that Part XIB should provide for a statutory review of the need to continue with the competition notices regime, with the review to be held at the time Communications Minister makes a declaration under s48 of the *National Broadband Network Companies Act 2011* (Cth) that, in the Communications Minister's opinion, the **nbn**<sup>TM</sup> network should be treated as built and fully operational.

---

<sup>9</sup> The ACCC is empowered to issue Part A and Part B competition notices under sections 151AKA and 151AL of the CCA respectively.

<sup>10</sup> Section 151BX(3) of the CCA.

<sup>11</sup> Section 151AN(1) of the CCA.

<sup>12</sup> <http://registers.acc.gov.au/content/index.phtml/itemId/323962>

<sup>13</sup> Productivity Commission, Inquiry Report, Telecommunications Competition Regulation, p.165.



---

## 3.2 The competition notices regime can be improved

Although **nbn** recognises the continued utility of the competition notices regime, the regime could nevertheless be improved by incorporating more stringent rules or guidance:

- clarifying and strengthening the threshold requirement that triggers the issue of a Part B competition notice;
- the circumstances in which the ACCC would issue a notice (i.e. the relevant factors) the ACCC will have regard to in determining whether to take enforcement action including the ACCC's approach to the 'substantial lessening of competition' test under the revised s46 when it comes to telecommunications markets. The ACCC should be in a position to include such guidance in its foreshadowed guidelines to explain the ACCC's approach to an amended s46; and
- the circumstances in which the ACCC would consider a remedy under Part XIC rather than Part XIB (and vice versa).

Doing so would ensure that recipients are afforded procedural fairness and due process. This is particularly important in the case of Part B competition notices which have the effect of reversing the onus of proof, even though the threshold for the ACCC to issue such a notice is the same as in relation to a Part A competition notice.<sup>14</sup> Issues such as these warrant further consideration.

## 3.3 Part XIC does not duplicate the role of the competition notices regime

Another issue raised in the Discussion Paper is the extent to which the utility of the competition notices regime under Part XIB is reduced by the existence of those powers under Part XIC which allow the ACCC to set terms and conditions for access to services and issue binding rules of conduct.

**nbn** considers that Part XIC should be used in preference to Part XIB where the issue could be appropriately resolved by providing competitors with access to a key input or by changes to the relevant access provider's terms and conditions of access. In this respect, mandatory access as well as terms and conditions on which that access is to be granted, enables other carriers or CSPs to compete with the access provider, thereby facilitating competitive outcomes in downstream markets. Part XIC is better suited in addressing this issue than Part XIB. For one thing, Part XIC sets out the principles to be applied by the ACCC in determining whether to mandate access and the terms and conditions on which such access is to be granted. Part XIB does not set out any such principles. Further, in the event the ACCC and the relevant access provider do not agree on whether the access provider's conduct is anti-competitive, the matter needs to be resolved by a court. While the court can address whether the conduct contravenes the CCA and the appropriate penalty to be awarded, courts are not well-placed to determine the terms and conditions on which access is to be granted in the future. The Federal Court's reticence in dealing with these matters in a s46 context are well known.

However, Part XIB continues to serve a useful purpose. **nbn** views the competition notices regime in Part XIB of the CCA as complementing rather than covering the same areas as Part XIC. Part XIB is primarily intended to

---

<sup>14</sup> Section 151AN of the CCA.

---

address 'ex post' anti-competitive conduct or other behavioural issues on the part of particular carriers or CSPs. Conduct which may be addressed by Part XIB but not by Part XIC include:

- competition concerns arising from below cost retail pricing of particular telecommunications services; or
- competition concerns arising from a bundled retail offering by a carrier or CSP which has market power in respect of one of the products in the bundle.

Accordingly, the latter regime is not readily adapted to deal quickly and efficiently with specific examples of anti-competitive conduct by a particular carrier or CSP but is instead designed to 'promote the long-term interests of end-users of carriage services or of services provided by means of carriage services'.<sup>15</sup> This is because the regime in Part XIC is 'ex ante' in nature.

In such circumstances, **nbn** considers there is continued utility in retaining the competition notices regime in Part XIB.

There is one area, however, where the interaction between Part XIB and Part XIC could be improved. Currently, the ACCC may accept a SAU under Part XIC. In determining whether to accept an SAU, the ACCC must be satisfied that the terms and conditions of access are reasonable and in the long term interests of end-users. However, acting in accordance with the terms of an approved SAU does not confer any protection from s46 or Part XIB. By contrast, acting in accordance with authorised conduct under s88 or conduct the subject of an exemption order is exempt from Part XIB.

In circumstances where the proposed new s46 (and therefore Part XIB) will capture a broader range of unilateral conduct, **nbn** considers it to be appropriate and prudent to ensure that conduct which is provided for in an approved SAU is exempt from Part XIB. This could be achieved by amending s151AJ(7) to cover such conduct. As the Department is aware, the ACCC will accept a SAU if the terms and conditions are 'reasonable'.<sup>16</sup> In determining whether those terms and conditions are 'reasonable', the ACCC must be satisfied (among other things) that the terms and conditions promote the long-term interests of end-users of carriage services,<sup>17</sup> with one such criteria being the promotion of competition in markets for listed services.<sup>18</sup> This test is not fundamentally different to the test applied by the ACCC in determining whether to grant an exemption order under s151BC which requires either that the public benefits of the conduct outweigh the public detriments or that the conduct is not anti-competitive. Accordingly, it would be highly unlikely that the ACCC would accept an SAU under Part XIC but not, if the relevant conduct was the subject of an exemption order application, accept the exemption order under Part XIB.

## 3.4 Other issues raised in the discussion paper

The Discussion Paper also asks whether, if s46 is amended as proposed, to incorporate certain mandatory factors that the courts must take into account, these mandatory factors should also be considered when issuing a competition notice under Part XIB.

---

<sup>15</sup> Section 152AB of the CCA.

<sup>16</sup> Section 152CBD of the CCA.

<sup>17</sup> Section 152CBD of the CCA.

<sup>18</sup> Section 152AB of the CCA.

If the telecommunications-specific misuse of market power prohibition is repealed as proposed above in section 2 of this submission, there would be no need to incorporate these mandatory factors into Part XIB. This is because the telecommunications-specific misuse of market power provision would be repealed and the amended s46 would be left to cover the field.

If, however, the telecommunications-specific misuse of market power provision is not repealed, then the mandatory factors should be relevant to either the assessment of a misuse of market power under Part XIB or the ACCC's determination as to whether to issue a competition notice. This is because the mandatory factors are intended to assist in defining the boundary between anti-competitive and pro-competitive conduct, matters which are relevant to the application of s151AJ(2) of Part XIB.

## 4 Use by the ACCC of its information gathering powers should be consistent

In reviewing the telecommunications-specific competition regime in Part XIB of the CCA in the light of the proposed amendments to s46, the Department may also wish to consider the information gathering powers of the ACCC under Part XIB in respect of carriers and CSPs. These powers are an important mechanism through which the ACCC fulfils its monitoring and enforcement roles, including in relation to the telecommunications competition rule.

These powers include the ability to make:

- 'tariff filing directions', requiring any carrier or carriage service provider which the ACCC believes has a substantial degree of power in a telecommunications market to comply with certain obligations in relation to its tariffs;<sup>19</sup> and
- 'record keeping rules', requiring one or more specified carriers or carriage service providers to keep and retain records.<sup>20</sup>

**nbn** considers that these powers should be used consistently and fairly across the telecommunications industry as a whole. In particular, the Department may wish to consider clarifying the circumstances in which the ACCC will be empowered and expected to use these powers, either by legislative amendment or through the publication of guidelines. Doing so is likely to benefit the telecommunications industry as a whole and give greater certainty to participants in relation to the consistency in use of these powers.

---

<sup>19</sup> Section 151BK of the CCA. The effect of a tariff filing direction is that those to whom any direction applies must:

- give the ACCC details of its charges for goods and services coming within the direction;
- give the ACCC details seven days in advance of imposing new charges for goods or services coming within the direction, varying those charges or ceasing to impose the charges.

<sup>20</sup> Section 151BU of the CCA. The record keeping rules may require:

- carriers or carriage service providers to prepare reports consisting of information contained in those records; and
- carriers or carriage service providers to give any or all of the reports to the ACCC.