

To the Department of Communications and the Arts
GPO Box 2154
Canberra ACT 2601

Submission—Review of the Part XIB telecommunications anti-competitive conduct provisions

This submission can be published on the World Wide Web

Yes.

Date of submission

3 October 2016

Logo of organisation—if an organisation making this submission



Name and contact details of person/organisation making submission

Competitive Carriers' Coalition

Contact: Matt Healy
Macquarie Telecom
email: mhealy@macquarietelecomgroup.com
mobile: 0402259140

General comments

The Competitive Carriers' Coalition (**CCC**) considers that the telecommunications specific anti-competitive conduct provisions in Part XIB of the CCA should be retained even if section 46 of the *Competition and Consumer Act 2010* (Cth) (**CCA**) is amended as set out in the exposure draft of the Competition and Consumer Amendment (Competition Policy Review) Bill 2016. However, in order to remove duplication between the existing provisions in Part XIB and the proposed section 46, section 151AJ(2), which is essentially the equivalent of existing section 46 but which contains an “effects” test, rather than a “purpose” test, could be removed.

The telecommunications specific anti-competitive conduct provisions in Part XIB go beyond prohibiting anti-competitive conduct that takes the form of a carrier or carriage service provider with a substantial degree of market power taking advantage of that power with the effect, or likely effect, or substantially lessening competition. The competition rule extends to conduct in contravention of other sections of Part IV of the CCA, including section 45 (contracts, arrangements or understandings) and section 47 (exclusive dealing).

Further, the telecommunications competition regime embraces the use of competition notices that may be issued in respect of anti-competitive conduct and potential contraventions of the competition rule. Competition notices are important enforcement tools that should remain available to the Australian Competition and Consumer Commission (**ACCC**) to address anti-competitive conduct. The Attachment to this submission sets out details of competition notices that have been issued by the ACCC to date and highlights their effectiveness in addressing anti-competitive conduct.

For the reasons set out in this submission, competition in a number of significant telecommunications markets has not developed to such a state that the competition notice regime should be substantially amended or removed. Further, the rollout of the National Broadband Network (**NBN**) has given rise to the potential for new kinds of anti-competitive conduct that, if it eventuates, will need to be quickly addressed, including because of the scope of first-mover advantages created by migration of services to the NBN.

The CCC submits that there is a further benefit in retaining the telecommunications-specific competition regime in Part XIB despite proposed amendments to section 46. The anti-competitive conduct regime in Part XIC provides a dedicated focus on competition issues in a sector that is of critical importance to Australian residents and businesses. Industry participants and the ACCC are familiar with its operation and it provides a structure for the investigation of, and response to, potential anti-competitive conduct relating to telecommunications markets.

This submission is made on the premise that section 46 of the CCA is amended to incorporate an “effects” test and the “take advantage” element is removed. In the event some other form of section 46 is contemplated, the observations made by the CCC in this submission would not necessarily be applicable.

Responses

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?](#)

As a general position, the CCC considers that the telecommunications specific anti-competitive conduct regime set out in Part XIB should be retained. However, the implication of the proposed changes to section 46 is that section 151AJ should be amended by deleting subsection 151AJ(2). The current reference in subparagraph 151AJ(3)(a) to section 46 would then pick up the proposed amended section 46.

Why?

The telecommunications competition rule is that a carrier or carriage service provider must not engage in anti-competitive conduct: section 151AK(1) and (2). Section 151AJ(1) then sets out the two circumstances in which a carrier or carriage service provider is said to engage in anti-competitive conduct, which are:

- where a carrier or carriage service provider has a substantial degree of power in a telecommunications market and takes advantage of that power in that or any other market, with the effect or likely effect of substantially lessening competition in that or any other telecommunications market (subsection 151AJ(2)); and

- where a carrier or carriage service provider engages in conduct in contravention of section 44ZZRJ, 44ZZRK, 45, 45B, 46, 47 or 48, and the conduct relates to a telecommunications market (subparagraphs 151AJ(3)(a) and (b)).

If section 46 is amended as proposed, such that it prohibits a corporation that has a substantial degree of power in a market from engaging in conduct that has the purpose, or has or is likely to have the effect, of substantially lessening competition in that or any other market, it will no longer be necessary to include subsection 151AJ(2). This is because the proposed amended section 46 should operate to capture conduct that would previously have been caught by subsection 151AJ(2). Subparagraph 151AJ(3)(a) would then operate to bring any conduct in (alleged) contravention of section 46 into the anti-competitive conduct regime in Part XIB, including that it may be the subject of a competition notice.

The competition rule in Part XIB goes beyond conduct in contravention of section 46 and is a central part of the operating provisions in Part XIB that relate to the issuing of competition notices. As the CCC considers it essential that the competition notice regime is retained (as discussed below), the competition rule should be retained with the amendment noted above (deletion of subsection 151AJ(2)).

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 the competition rule in Part XIB is retained, no changes would need to be made to the rule to provide certainty for businesses. The competition rule would continue to operate as it has since 1997.

Division 3 of Part XIB

3. [Do competition notices have ongoing utility in addressing anti-competitive behaviour in the sector?](#)

Competition notices have ongoing utility in addressing anti-competitive behaviour in the telecommunications sector and it is important that this aspect of the telecommunications-specific competition regime be retained.

[If so, why?](#)

The Discussion Paper notes that Part XIB was introduced in 1997 to facilitate the transition to open competition in the telecommunications market and that, at the time of its introduction, open competition was only beginning and Telstra had a dominant role.¹ The Discussion Paper goes on to note that Part XIB was “always envisaged as a transitional regime for the telecommunications sector” and that telecommunications markets and industry structures have changed, including that there has been an increase in market participants and the rollout of the NBN.²

The Explanatory Memorandum accompanying the Bill that inserted Part XIB into the (then) *Trade Practices Act 1974 (Cth) (TPA)* observed:³

Telecommunications is an extremely complex, horizontally and vertically integrated industry and competition is not fully established in some telecommunications markets. There is considerable scope for incumbents to engage in anti-competitive conduct because

¹ Discussion Paper, p 4.

² Discussion Paper, p 6.

³ Explanatory Memorandum, Trade Practices Amendment (Telecommunications) Bill 1996, p 6.

competitors in downstream markets depend on access to networks or facilities controlled by the incumbents. Furthermore, the possibility of anti-competitive cross-subsidies by incumbents from non-competitive markets to markets in which competition exists or is emerging is a particular threat to the establishment of a competitive environment.

Total reliance on Part IV of the TPA to constrain such anti-competitive conduct might, in some cases, prove ineffective because of the state of competition in the telecommunications industry and the fast pace of change in this industry...Anti-competitive behaviour in telecommunications could cause particularly rapid damage to competition because of the volatile state of the industry during the early stages of competition. Against this background, Part IV alone may prove insufficient to deal with anti-competitive behaviour in telecommunications at this time.

...

It is intended that competition rules for telecommunications will eventually be aligned, to the fullest extent practicable, with general trade practices law. Part XIB will apply for the period from 1 July 1997 until some future review determines that competition is sufficiently established that the Part or some provisions of the Part are no longer needed.

While it may be accepted that the industry has changed since 1997, what has not fundamentally changed in a significant number of important telecommunications markets is Telstra's dominant role. For example:

- Telstra remains the provider of ubiquitous fixed line access—as at September 2015, Telstra supplied around 8.9 million active connections on its copper access network (relative to NBN Co's 500,000 active fixed line connections);⁴
- Telstra remains the largest provider of retail fixed voice services, actually increasing its market share from 61 per cent in June 2014 to 64 per cent as at June 2015;⁵
- Telstra has the largest share of the retail fixed broadband services market, with a 41 per cent share of that market as at June 2015;⁶
- Telstra's 4G network covers 94 per cent of the total Australian population;⁷
- Telstra has maintained a market share advantage for handset services, with 45 per cent market share of the retail mobile handset market, which represents a five per cent increase in market share since 2011, despite Telstra's products being priced at a premium;⁸
- Telstra has a market share of 64 per cent of the retail market for wireless broadband services, which represents an increase of 17 per cent since 2011.⁹

⁴ ACCC, *Competition in the Australian Telecommunications Sector*, February 2016, p 10.

⁵ ACCC, *Competition in the Australian Telecommunications Sector*, February 2016, p 22.

⁶ ACCC, *Competition in the Australian Telecommunications Sector*, February 2016, pp 23–24.

⁷ ACCC, *Competition in the Australian Telecommunications Sector*, February 2016, p 27. The ACCC report notes: "Telstra's 4G network covers 94 per cent of the total Australian population, while Optus' 4G network reaches 86 per cent. VHA advertises that its 4G services cover 96 per cent of the Australians living in metro areas, but does not advertise its 4G coverage outside of these metro centres".

⁸ ACCC, *Competition in the Australian Telecommunications Sector*, February 2016, pp 28–29.

⁹ ACCC, *Competition in the Australian Telecommunications Sector*, February 2016, pp 29–30.

It may also be accepted that the rollout of the NBN may (in the long run and depending what form the network and its owners / controllers take) significantly change industry dynamics, however:

- the rollout is at an early stage and the provision of services on the NBN nascent;
- the very involvement Telstra has in the rollout of the NBN and provision of services to NBN Co gives rise to the potential for new types of anti-competitive conduct which, if it occurs, will require rapid response from the ACCC in order to minimise the effect of that conduct.

Just last month the ACCC published an assessment of the service delivery agreements between Telstra and NBN Co.¹⁰ The ACCC found that the agreements potentially introduce impediments to the emergence of more competitive fixed-broadband markets.¹¹ The ACCC's overall conclusion was:¹²

The ACCC's view is that the agreements could still pose a significant risk of distorting or otherwise lessening competition in the supply of broadband services unless all NBN access seekers are equally able to plan the commencement of their services over the NBN, and unless Telstra carries out the activation and assurance work for NBN Co in a way that does not disadvantage other NBN access seekers.

The ACCC considered two service delivery agreements between NBN Co and Telstra, being the:

- **Operation and Maintenance Master Agreement (OMMA)**: pursuant to the OMMA, Telstra provides network activation and assurance services on NBN Co's fixed line networks. The work covered by the OMMA includes:
 - activating homes and businesses once an area has been declared "Ready for Service" by NBN Co and end-users are able to order a connection;
 - ongoing maintenance; and
 - fault remediation.

There are two other entities that provide operation and maintenance services to NBN Co. Telstra is the only provider of these services that is also a broadband service provider. The service area in which Telstra is to provide these services is not fixed and may be supplemented as the NBN rollout extends into new areas.¹³

- **HFC Delivery Agreement (HDA)**: Services provided by Telstra to NBN Co under the HDA include design, construction, program management, construction management and scheduling activities concerning NBN rollout within the Telstra HFC footprint in Sydney, Melbourne, Adelaide, Perth and Brisbane/Gold Coast.¹⁴

The ACCC's concerns about the agreements are threefold.

First, the ACCC is concerned about the "first mover" advantage that Telstra may secure as a consequence of Telstra having access to NBN funded HFC lead-ins within the existing Telstra HFC

¹⁰ ACCC, *NBN Co – Telstra Service Delivery Agreements: ACCC Assessment*, September 2016.

¹¹ ACCC, *NBN Co – Telstra Service Delivery Agreements: ACCC Assessment*, September 2016, p 2.

¹² ACCC, *NBN Co – Telstra Service Delivery Agreements: ACCC Assessment*, September 2016, p 3.

¹³ ACCC, *NBN Co – Telstra Service Delivery Agreements: ACCC Assessment*, September 2016, p 4.

¹⁴ ACCC, *NBN Co – Telstra Service Delivery Agreements: ACCC Assessment*, September 2016, p 4.

footprint. While the Telstra HFC network will be transferred to NBN Co, Telstra is permitted to continue to supply pay TV and broadband services over the network. Access to these lead-ins will only become available to other service providers once NBN starts selling access services in that area.¹⁵

Second, the ACCC is concerned about the risk of preferential service activation and fault handling on the NBN as Telstra, in providing services under the OMMA, could potentially prioritise the activation or remediation of NBN services where Telstra is the access seeker over those where Telstra's competitors are the access seekers.¹⁶

Third, Telstra's role under the HDA may provide Telstra with better access to information on the NBN rollout and when areas are likely to be declared ready for service.¹⁷ Telstra could use this information to better plan and undertake its own network investments and marketing activities.

Despite the assurances given by NBN Co and Telstra as to how they propose to implement the aspects of the agreements that give rise to competition concerns, competitors of Telstra are rightly sceptical of the effectiveness of those assurances. Telstra has previously been found to engage in conduct that prevents access seekers from engaging in competitive behaviour, and giving preferential treatment to itself.

The case of *Australian Competition and Consumer Commission v Telstra Corporation Ltd* (2010) 188 FCR 238 involved the conduct of Telstra in refusing numerous requests for interconnection from access seekers in relation to various exchanges over a period of two years. Telstra represented that these exchanges were "capped", meaning there was no longer any space available within the exchange for the installation of access seekers' facilities, whereas there was in fact space available. Telstra was found to have been responsible for a substantial non-compliance in failing to put in place exchange access policies, procedures, training and oversight to ensure it met its legal and regulatory obligations, which had the potential to be very serious from a competition law perspective.¹⁸ The Federal Court observed:

Undoubtedly, the nature of Telstra's contravening conduct in this proceeding had the potential to be very serious from a competition law perspective. This purpose of the access obligations imposed by the TPA and the Telecommunications Act is to facilitate access to Telstra's facilities so as to encourage downstream competition for the benefit of end consumers. The failure to comply with these obligations had the potential to harm consumers.¹⁹

...it is to be recalled that in respect of access to exchange facilities Telstra has an overwhelming position of bargaining strength. It has control over its exchanges and the power to allow or refuse access. Telstra also has a substantial information advantage compared to access seekers.²⁰

The seriousness that the contravening conduct must be considered in the context of the fact that the provision of access to bottleneck infrastructure like Telstra's PSTN has been an integral feature of competition policy in Australia for nearly a decade...This sector is characterised by a high level of vertical integration and associated market power on the

¹⁵ ACCC, *NBN Co – Telstra Service Delivery Agreements: ACCC Assessment*, September 2016, p 5.

¹⁶ ACCC, *NBN Co – Telstra Service Delivery Agreements: ACCC Assessment*, September 2016, p 6.

¹⁷ ACCC, *NBN Co – Telstra Service Delivery Agreements: ACCC Assessment*, September 2016, p 6.

¹⁸ *Australian Competition and Consumer Commission v Telstra Corporation Ltd* (2010) 188 FCR 238, 282–284.

¹⁹ *Australian Competition and Consumer Commission v Telstra Corporation Ltd* (2010) 188 FCR 238, 282.

²⁰ *Australian Competition and Consumer Commission v Telstra Corporation Ltd* (2010) 188 FCR 238, 282.

part of Telstra giving it both the ability and incentive to favour its downstream retail business over its wholesale customers.²¹

The statutory obligations that Telstra contravened were first imposed on Telstra in 2001. Telstra is a very well resourced company. Telstra had more than five years to organise its affairs so as to satisfy the obligations. Whilst I have accepted the conduct did not occur with deliberate anti-competitiveness in mind, the conduct did not occur by accident or by inadvertence. Telstra's managers and employees were given the authority on behalf of Telstra to make decisions to refuse competitors access to its facilities and to impose conditions on any offer of access. The relevant managers and employees were not properly trained in relation to Telstra's access obligations, or otherwise failed to comply with any training that was given to them, and Telstra had no adequate system for checking on compliance.²²

Telstra's conduct in the above case was in breach of the misleading and deceptive provisions of the (then) TPA and the *Telecommunications Act 1997* (Cth).²³ These provisions will be of limited (or no) applicability in relation to the service delivery agreements between NBN Co and Telstra. Rather, the relevant provisions will be those in Part IV and Part XIB of the CCA. Given the advantages that the service delivery agreements give to Telstra relative to its competitors, and that Telstra has previously used advantages such as access to information to improve its position vis-à-vis its competitors, there is no case for removing safeguards such as the competition notice regime in Part XIB. If anything, there is a case for a further strengthening of those safeguards.

While the ACCC may not have issued any competition notices since 2006, the ACCC has undertaken numerous investigations under Part XIB since that time. For example, the ACCC has indicated that between 1 July 2009 and 30 June 2014 it undertook 16 investigations into alleged anti-competitive conduct in relation to the telecommunications sector under Part IV and Part XIB of the CCA (and TPA).²⁴ The ACCC has noted that two of those investigations raised serious concerns:²⁵

In August 2010, the ACCC received complaints regarding Telstra's closure of its South Brisbane telephone exchange, with the existing copper network in the area being replaced by fibre to the premises. Access seekers requiring copper based services from Telstra raised concerns about the effect on competition when the copper services were withdrawn. This was resolved by Telstra offering improved terms of access to wholesale customers transitioning from unconditional [sic: unconditioned] local loop services and line sharing services to fibre-based services.

In 2010, the ACCC investigated an allegation that Telstra had been engaging in anti-competitive conduct regarding the terms on which it was providing wholesale ADSL services. Ultimately, the ACCC, under Part XIC of the CCA, declared a wholesale ADSL service in February 2012 which addressed the competition concerns.

It should not be surmised from the mere fact that no competition notices have been issued since 2006 that they do not have ongoing utility in addressing anti-competitive behaviour in the telecommunications sector. A comparison may be drawn with the declaration provisions

²¹ *Australian Competition and Consumer Commission v Telstra Corporation Ltd* (2010) 188 FCR 238, 283.

²² *Australian Competition and Consumer Commission v Telstra Corporation Ltd* (2010) 188 FCR 238, 283.

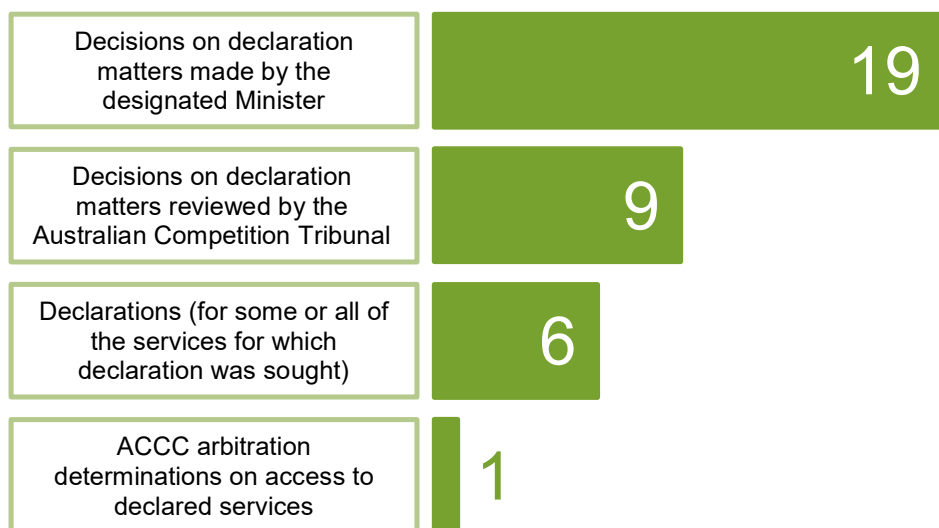
²³ *Australian Competition and Consumer Commission v Telstra Corporation Ltd* (2010) 188 FCR 238, 289–290.

²⁴ Senate Economics Legislation Committee, "Answers to Questions on Notice", Treasury Portfolio, Supplementary Budget Estimates 2015 – 2016, ACCC Question SBT 54, p 2.

²⁵ Senate Economics Legislation Committee, "Answers to Questions on Notice", Treasury Portfolio, Supplementary Budget Estimates 2015 – 2016, ACCC Question SBT 54, p 3.

Part IIIA of the CCA. The below figure²⁶ illustrates that between November 1995 and September 2013, only six declarations have been made.

Figure 2 Declaration matters under Part IIIA
November 1995 – September 2013



The Productivity Commission observed that although declaration has been rare, this did not indicate that the declaration regime did not have ongoing utility, commenting that it could be the case that Part IIIA is an effective threat that encourages parties to reach private settlement.²⁷ In a similar manner, the competition notice regime is likely to give market participants strong incentives not to engage in competition in breach of the competition rule and also, where concerns are raised by the ACCC in relation to particular conduct, to ensure that timely action is taken to address those concerns.

The fact that no competition issues have been issued since 2006, and in light of the number of investigations that have been conducted by the ACCC, consideration should be given to whether the anti-competitive conduct provisions need to be strengthened. In response to competition notices being issued by the ACCC, Telstra has changed its conduct slightly so that, while the conduct still gave rise to anti-competitive concerns, it no longer strictly fell within the competition notice issued by the ACCC. This is an example of Telstra understanding where the potential weaknesses in the regime are, which reduces the effectiveness of the regime. In short, Telstra's experience with the regime and how it has learnt to respond may in part also explain why competition notices have not been issued by the ACCC, and consideration might be given to how the provisions can be strengthened so that they are robust to strategic behaviour.

In summary, competition notices have ongoing utility in addressing anti-competitive behaviour in the sector. In many telecommunications markets, Telstra remains the dominant supplier. Further, at this stage there is no basis to consider that the rollout of the NBN will so fundamentally change the structure of the industry that the telecommunications specific

²⁶ Taken from: Productivity Commission, *National Access Regime*, Inquiry Report No. 66, 25 October 2013, p 14.

²⁷ Productivity Commission, *National Access Regime*, Inquiry Report No. 66, 25 October 2013, p 14.

competition provisions are no longer required. In fact, as the transition to the NBN creates opportunities for “first mover” advantages, it is particularly critical that the ACCC is able to utilise tools, such as competition notices, to guard against anti-competitive conduct and its impact on consumers.

4. Do the proposed changes to section 46 and section 46’s interaction with Part XIB raise issues for the operation of competition notices?

The proposed changes to section 46 and section 46’s interaction with Part XIB do not raise issues for the operation of competition notices.

One benefit that the CCC considers arises with retention of the competition notice regime following the proposed changes to section 46 is that the regime provides for the issuing of advisory notices, advising the carrier or provider of the action it should take, or consider taking, in order to ensure that it does not engage, or continue to engage, in anti-competitive conduct.²⁸ The CCC considers that the mechanism of the advisory notice will be a helpful one immediately following the amendments to section 46, where greater guidance from the ACCC is likely to be of particular benefit.

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?

The CCC does not consider that there is any need to amend the threshold that currently applies to the issuing of competition notices 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.

The relevant threshold for a Part A competition notice is that the ACCC has reason to believe that the carrier or carriage service provider has engaged, or is engaging, in at least one instance of anti-competitive conduct of that kind.²⁹ The relevant threshold for a Part B competition notice is that the ACCC has reason to believe that the carrier or carriage service provider has committed, or is committing, the contravention of the competition rule particularised in the competition notice.³⁰

It is appropriate that the threshold that applies for the ACCC to issue a competition notice is directed to the same matters that a court would consider in determining whether conduct has been in breach of the competition rule. This includes because where a person commences an action for damages, such an action may only be brought in relation to a contravention of the competition rule where the alleged conduct is of a kind dealt with in a Part A competition notice that was in force at the time when the alleged conduct occurred.³¹

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?

The need for competition notices is not reduced by the ACCC powers under Part XIC to set terms and conditions for access to services and issue binding rules of conduct.

²⁸ CCA, section 151AQB.

²⁹ CCA, section 151AKA(7).

³⁰ CCA, section 151AL(3).

³¹ CCA, section 151CC(3).

First, the ACCC's powers under Part XIC are only in respect of the provision by a carrier or carriage service provider of declared services.

There may be many circumstances in which the conduct of concern is unrelated to the provision by that carrier or carriage service provider of declared services. For example, the concerns identified by the ACCC in connection with the service delivery agreements between NBN Co and Telstra are unlikely to be considered to relate to the provision by Telstra of declared services. Nor is it likely that the provision of those services by Telstra could be declared.³²

Second, declaring services because of the potential for anti-competitive conduct is a disproportionate response and may stymie commercial agreements on terms and conditions of access being reached, and increase regulatory error. The benefit of the competition notice regime is that it operates to facilitate commercial agreements being reached on price and non-price terms and conditions of access, as opposed to these terms and conditions of access being imposed, or imposed by default through access determinations.

A number of the competition notices that have been issued (set out in the Attachment) demonstrate that the issuing of the competition notice empowered Telstra to identify commercial solutions that it considered addressed the competition concerns raised by the ACCC. The competition notice issued in connection with internet peering, commercial churn, wholesale and retail ADSL services, and broadband internet pricing are examples of this. Removal of the competition notice regime may have the consequence that more services are declared, which may not be the most appropriate response from an economic efficiency point of view.

7. [Would the exemption order provisions in Part XIB be rendered obsolete by the introduction of authorisations under section 46?](#)

The ACCC has not made any exemption orders under section 151AS of the CCA,³³ so it is not possible to comment on whether the ACCC's approach to making such orders would be different where the conduct related to a telecommunications market.

The introduction of authorisations under section 46 may result in the exemption order provisions in Part XIB being relatively duplicative of the general authorisation provisions in Division 1 of Part VII. However, there are some differences between the two, including that the provisions in Part XIB provide that in determining whether the ACCC is satisfied that the conduct will result in a benefit to the public and that benefit outweighs the detriment to the public arising from any lessening of competition, the ACCC may have regard to a number of matters, including:

- social and environmental factors;
- the need to satisfy any applicable universal service obligation.

The provisions in Part XIB also provide that the ACCC can make an exemption order in relation to conduct where it is satisfied that the conduct is not anti-competitive.

The CCC does not have a strong view on whether the exemption order provisions in Part XIB should be retained following the introduction of the amended section 46 and associated introduction of

³² Pursuant to CCA, section 152AL(1) and (3) only "eligible services" may be declared services. The term "eligible service" is defined in s 152AL(1) as a listed carriage service or a service that facilitates the supply of a listed carriage service (as those terms are defined in the *Telecommunications Act 1997* (Cth)).

³³ See: < <http://registers.accc.gov.au/content/index.phtml/itemId/847936>>

authorisations under section 46, but consideration should be given to the policy behind the differences in the provisions and whether it remains appropriate for the exemption order provisions in Part XIB to be retained.

Attachment: Competition Notices issued by the ACCC

1. The ACCC has issued five Part A competition notices to Telstra:
 - 28 May 1998 – relating to Telstra charging its internet competitors for transmission and interconnection services while refusing to pay for the same service it received from those internet competitors (internet peering).
 - 10 August 1998 – relating to Telstra’s refusal to negotiate about conditions and costs associated with its process for transferring customers to other fixed-line suppliers (commercial churn).
 - 6 September 2001 – relating to the supply of Telstra’s broadband ADSL service to wholesale customers at prices only marginally less than the comparable Telstra Retail Service (price squeeze).
 - 19 March 2004 – relating to Telstra increasing its wholesale broadband internet prices without a comparable increase in its retail prices (price squeeze).
 - 12 April 2006 – relating to Telstra increasing its wholesale line rental price without a comparable increase in its retail prices (price squeeze).
2. Details of the competition notices issued by the ACCC are set out below.

Internet peering

3. The internet peering competition notice alleged that in respect of two of the large internet access providers, Telstra charged for internet peering services it provided to the internet access providers, while not paying those providers for the internet peering services they provided to Telstra. Within one month of the Part A competition notice being issued, Telstra had entered into arrangements with the internet access providers listed in the competition notice, and the competition notice was withdrawn.³⁴
4. Optus was one of the internet access providers Telstra had refused to pay, or otherwise compensate, for providing Telstra with internet peering services. Following an agreement reached between Telstra and Optus, Optus’ domestic rate for internet traffic fell from \$120 to \$100 per gigabyte for customers using more than 400 gigabytes per month. The price decrease followed on from Optus reaching a reciprocal compensation agreement with Telstra on internet peering.³⁵ The ACCC noted at the time:³⁶

ACCC Commissioner Rod Shogren said these rate reductions are exactly what the competition notice was designed to bring about. “Our competition notice stated quite clearly that the lack of reciprocal compensation meant higher wholesale prices”. Commissioner Shogren predicts that Optus’ wholesale rate reductions will result in immediate benefits to consumers.

“Lower wholesale price means lower costs for Internet Service Providers, leading to rate reductions at the retail level”. The price reductions, coming so soon after issuing a competition notice, are the latest tangible benefit of strong telecommunications regulation for competition and consumers.

³⁴ ACCC, ‘ACCC Welcomes Peering Arrangement between Telstra and Optus’ (Media Release, MR 115/98, 22 June 1998).

³⁵ ACCC, ‘ACCC Welcomes Lower Wholesale Internet Rates’ (Media Release, MR 126/98, 8 July 1998).

³⁶ ACCC, ‘ACCC Welcomes Lower Wholesale Internet Rates’ (Media Release, MR 126/98, 8 July 1998).

Customer churn

5. The second competition notice issued by the ACCC related to Telstra's customer transfer process, referred to as "commercial churn". The kind of anti-competitive conduct alleged in the notice was Telstra's requirement that carriage service providers (including AAPT, Macquarie, Optus, Primus, Spectrum and Switch) wishing to transfer an end-user from Telstra to that carriage service provider, be bound by Telstra's transfer conditions which required carriage service providers:
 - in respect of transfers on a "total debt severance basis", to pay Telstra a fee of \$15 for each service of an end-user that is transferred from Telstra to the carriage service provider (regardless of how many services are being transferred);
 - in respect of transfers on a "partial debt severance" basis, to accept liability to Telstra for payment of charges incurred by the end-user and not billed by Telstra prior to the date of transfer from Telstra to the carriage service provider;
 - in respect of transfers on a partial debt severance basis, to pay Telstra a fee of \$7 for each account or service of an end-users that is transferred from Telstra to the carriage service provider.
6. The competition notice also alleged that Telstra was contravening the competition rule by processing transfers on the basis of total debt severance by means of Telstra's manual total debt severance transfer system, which was said to be cumbersome, slow, inefficient and costly. In issuing the competition notice the ACCC stated:³⁷

Information received by the ACCC [indicates] that Telstra's transfer conditions substantially hinder the development of local call competition and the further development of long distance competition.

'The ACCC was extremely concerned about the conditions Telstra imposed for the transfer of customers to its competitors. The current transfer conditions have significantly inhibited the ability of telecommunications customers to enjoy the benefits of a more competitive environment,' Mr Shogren said.

'Of most concern to the ACCC were the transfer fees and conditions regarding pre-transfer debt. Unless Telstra's competitors paid an additional fee of \$23 per service, they inherited pre-transfer debt owned by the customer to Telstra. In addition, the ACCC was concerned about the complex transfer form which Telstra imposed on its competitors, the time taken to process debt-free transfers and the transfer reject conditions.'

7. The ACCC eventually commenced court action in the Federal Court on the basis of the competition notices that it had issued to Telstra, in December 1998 and April 1999.³⁸
8. In February 2000, the ACCC discontinued the Federal Court proceedings following an agreement with Telstra on a package of \$4.5 million for telecommunications service providers that use Telstra's commercial churn process.³⁹ The fund, which was administered by the ACCC, was established with a view to those service providers being able to deal with Telstra and each other online in transferring customers.⁴⁰ Telstra also reduced the price of customer transfers.⁴¹ The agreement followed an

³⁷ ACCC, 'Telstra Faces \$10 million plus penalty over customer transfer procedures' (Media Release, MR 151/98, 10 August 1998).

³⁸ ACCC, 'ACCC Institutes Proceedings Against Telstra' (Media Release, MR 243/98, 24 December 1998); ACCC, 'More ACCC Action on Telstra 'Commercial Churn'' (Media Release, MR 048/99, 28 April 1999).

³⁹ ACCC, 'ACCC and Telstra Reach Agreement on Commercial Churn' (Media Release, MR 030/00, 23 February 2000).

⁴⁰ ACCC, 'ACCC and Telstra Reach Agreement on Commercial Churn' (Media Release, MR 030/00, 23 February 2000).

⁴¹ ACCC, 'ACCC and Telstra Reach Agreement on Commercial Churn' (Media Release, MR 030/00, 23 February 2000).

acknowledgement by Telstra that the commercial churn service may have had an adverse effect on the competitive position of carriers seeking to transfer customers.⁴² The withdrawal of the proceedings by the ACCC followed the implementation by Telstra of a new automated wholesale billing platform, which had improved customer transfer times and costs significantly.⁴³

Wholesale and retail ADSL services

9. The competition notice that related to wholesale and retail ADSL services essentially alleged that Telstra supplied its wholesale ADSL services at a level whereby there was only a small positive margin, or a negative margin, between the wholesale price and the price at which Telstra supplied retail ADSL services to its residential and small business customers. Further, there was an allegation that the technical characteristics of the wholesale ADSL service:

- prevented wholesale customers from differentiating (in terms of functionality and / or quality of services) the ADSL services they supplied to their customers, from the ADSL retail services supplied by Telstra to its retail customers; and
- prevented and / or hindered wholesale customers from using their own infrastructure (or other infrastructure commercially available to them) to provide transmission services from a point of interconnection on the Telstra network to their own premises, or alternative destinations, that would enable them to provide ADSL services to their retail customers more efficiently.

10. At the time of issuing the competition notice, the ACCC stated:⁴⁴

Telstra is engaging in anti-competitive conduct in the provision of broadband ADSL services to competitors, the Australian Competition and Consumer Commission alleges in a Competition Notice issued today. The Competition Notice gives Telstra 12 weeks to change its conduct, failing which it will be exposed to the possibility of large penalties.

“Telstra is failing to provide a true wholesale broadband service that would allow service providers to compete with Telstra’s own BigPond ADSL highspeed Internet services”, ACCC Chairman, Professor Allan Fels, said today. “This conduct denies competitors the ability to differentiate the performance and functionality of their services from the Telstra retail service and to compete fairly with Telstra’s retail prices”.

The ACCC has taken this action as it believes that Telstra:

- supplies its wholesale ADSL highspeed Internet services at prices whereby competitors buying the wholesale service are unable to compete with Telstra’s own BigPond retail prices;
- refuses to structure the wholesale ADSL service in a manner that would allow its competitors to offer services substantially different from those Telstra offers its residential and small business customers. These new services could include video on demand and voice telephony over the Internet; and

⁴² ACCC, ‘ACCC and Telstra Reach Agreement on Commercial Churn’ (Media Release, MR 030/00, 23 February 2000).

⁴³ ACCC, ‘ACCC and Telstra Reach Agreement on Commercial Churn’ (Media Release, MR 030/00, 23 February 2000).

⁴⁴ ACCC, ‘ACCC Believes Telstra Holding Back Competition for High Speed Internet to the Home’ (Media Release, MR 214/01, 7 September 2001).

- refuses to configure its wholesale ADSL service so as to allow for a high speed Internet service to be provided to a residential customer at a different quality of service from what Telstra BigPond offers.

“Telstra has unrivalled access to Australian consumers by virtue of its ownership of the customer access network. It is the ACCC’s view that Telstra is taking advantage of this ownership in not offering a true wholesale ADSL service but merely ‘re-badging’ its BigPond products and then selling them to competitors at uncompetitive prices. The ACCC’s investigations of numerous complaints from Telstra’s competitors indicates that Telstra’s actions are having the effect of restricting the choice of service provider in residential areas to only one service provider – Telstra. This effectively limits the choice that residential customers have in accessing broadband”.

11. By 30 November 2001 (the date on which the competition notice came into effect), there had been significant (up to 30 per cent) price reductions in Telstra’s wholesale broadband ADSL services. The ACCC however remained concerned that the changes did not go far enough in addressing the anti-competitive conduct alleged in the competition notice. The ACCC determined to vary the competition notice and give Telstra a further four months to bring about further promised pricing and network changes.⁴⁵ The ACCC noted:⁴⁶

“Prior to the ACCC taking action, most small businesses and residential users had little prospect of choice of who provided their high speed Internet access”, ACCC Chairman, Professor Allan Fels, today said. “The ACCC believed this lack of choice was due to Telstra’s anti-competitive conduct. Telstra was put on notice about these concerns and is now in the process of negotiating significant wholesale price reductions. Telstra has also committed to further network changes which, if delivered on time, will see more diverse wholesale product offerings early next year...”

12. The competition notice came into force in March 2002, and was ultimately revoked by the ACCC in May 2002, following significant improvements to Telstra’s wholesale ADSL services.⁴⁷ The improvements included price reductions of up to 25 per cent in Telstra’s wholesale price and changes to the architecture of the wholesale service, which permitted wholesale customers to compete against Telstra retail ADSL services.⁴⁸ The ACCC noted:⁴⁹

“The Competition Notice, issued on 6 September 2001 and varied on 30 November 2001, came into force on 21 March 2002. Before the issue of the Competition Notice, most residential and small business customers had little choice of broadband internet service provider. In issuing the Competition Notice, the ACCC had found that Telstra’s conduct in relation to its wholesale and retail ADSL services was holding back competition in the provision of broadband services to these customers.

“It is only since the Competition Notice came into force, and exposed Telstra to potential penalties, that Telstra has offered into wholesale customers the service that they have reasonably been requesting since late 2000.

“The ACCC now believes that, due to the changes in Telstra’s conduct following the actions of the ACCC, a number of Internet service providers are now rolling out competitive high speed Internet services.

⁴⁵ ACCC, ‘Telstra’s Wholesale ADSL Prices Falling, But ACCC To Maintain Watch Over Competition for High Speed Internet Services’ (Media Release, MR 297/01, 30 November 2001).

⁴⁶ ACCC, ‘Telstra’s Wholesale ADSL Prices Falling, But ACCC To Maintain Watch Over Competition for High Speed Internet Services’ (Media Release, MR 297/01, 30 November 2001).

⁴⁷ ACCC, ‘Path Cleared for More Broadband Offerings’ (Media Release, MR 121/02, 16 May 2002).

⁴⁸ ACCC, ‘Path Cleared for More Broadband Offerings’ (Media Release, MR 121/02, 16 May 2002).

⁴⁹ ACCC, ‘Path Cleared for More Broadband Offerings’ (Media Release, MR 121/02, 16 May 2002).

13. The ACCC released broadband service figures on 20 June 2002. Those figures record that take-up of DSL services increased by 206 per cent in the nine months to March 2002.⁵⁰ This indicates what a sensitive time it was for the development of the broadband market and the first-mover advantage that was (at least in part) mitigated by the competition notice issued by the ACCC.

Broadband internet pricing

14. On 19 March 2004, the ACCC issued a competition notice to Telstra in relation to the pricing of Telstra's broadband internet services. The anti-competitive conduct that was alleged in the competition notice was price squeezing—that Telstra's pricing of its wholesale broadband services was set at a level whereby there was only a small positive or negative difference between those wholesale prices and the prices at which Telstra offered broadband services to its retail customers.⁵¹ The ACCC had been investigating the matter since Telstra had announced that it intended to introduce new ADSL pricing a month prior to the competition notice being issued.⁵² The ACCC noted:⁵³

"The ACCC is aware that negotiations between Telstra and its wholesale customers have been under way since the ACCC issued a consultation notice to Telstra.

"The issuing of the Competition Notice gives all parties the opportunity to determine a competitive wholesale rate structure by engaging in constructive negotiations.

"The ACCC expects these negotiations to take place as a matter of urgency. Telstra needs to reach agreement as to this competitive wholesale rate structure quickly with its wholesale customers.

15. Telstra provided the ACCC with a revised wholesale broadband pricing structure about a week after the competition notice was issued,⁵⁴ however, after examining that revised pricing the ACCC found that there were still significant limitations with Telstra's wholesale pricing and that these limitations were "likely to substantially hinder the ability of Telstra's wholesale customers to compete with Telstra BigPond at the retail level".⁵⁵ The ACCC noted:⁵⁶

The ACCC has allowed negotiations to be progressed whilst gathering evidence from industry to determine the effect upon competition of Telstra's pricing.

16. On 21 February 2005, the ACCC announced that it had reached an agreement with Telstra resolving the matters raised in the competition notice.⁵⁷ The ACCC reported:⁵⁸

"Following the ACCC's investigation into Telstra's pricing of high speed internet services, Telstra has reduced its wholesale DSL pricing over a period of time with the latest reduction taking effect from 1 January 2005", ACCC Chairman, Mr Graeme Samuel said today. "In addition, Telstra has now agreed to rebate \$6.5 million to its affected wholesale customers".

⁵⁰ ACCC, 'ACCC Issues Broadband Service Figures' (Media Release, MR 154/02, 20 June 2002).

⁵¹ Part A Competition Notice issued by the ACCC, 19 March 2004, [16].

⁵² ACCC, 'ACCC Issues Competition Notice to Telstra over Broadband Internet Pricing' (Media Release, MR 039/04, 19 March 2004).

⁵³ ACCC, 'ACCC Issues Competition Notice to Telstra over Broadband Internet Pricing' (Media Release, MR 039/04, 19 March 2004).

⁵⁴ ACCC, 'Telstra Revised Broadband Pricing: ACCC Response' (Media Release, MR 050/04, 31 March 2004).

⁵⁵ ACCC, 'ACCC Leaves Competition Notice in Force' (Media Release, MR 129/04, 19 July 2004).

⁵⁶ ACCC, 'ACCC Leaves Competition Notice in Force' (Media Release, MR 129/04, 19 July 2004).

⁵⁷ ACCC, 'Resolution of Broadband Competition Notice' (Media Release, MR 027/05, 21 February 2005).

⁵⁸ ACCC, 'Resolution of Broadband Competition Notice' (Media Release, MR 027/05, 21 February 2005).

The ACCC considers that efficient wholesale customers are now no longer hindered from competing with Telstra BigPond's ADSL services on the basis of Telstra's reduced wholesale DSL pricing. Since the ACCC commenced its investigation on 16 February 2004, Telstra has reduced its Metropolitan list price for wholesale 256/64kbps access by approximately 30 per cent, whilst 512/128kbps and 1500/256kbps charges have been reduced by over 30 per cent. In addition, Telstra has collapsed its Regional 1 and Regional 2 wholesale DSL prices, thereby providing all DSL services at Metropolitan rates. The ACCC believes this will increase competition between broadband providers in regional areas.

Telstra has acknowledged that its pricing changes made in February 2004 for its retail broadband services may have adversely affected the competitive position of its wholesale broadband customers. In order to meet ACCC concerns, Telstra has offered its wholesale customers reduced wholesale pricing and rebates.

Wholesale line rental

17. In April 2006, the ACCC issued a competition notice in relation to wholesale line rental price increase.⁵⁹ The competition notice essentially alleged that Telstra had increased the prices of two of its residential line rental and local call services such that, in respect of "lower spend customers", Telstra's retail price was less than the sum of Telstra's constructive costs of supply. Again, the allegation was one of a price squeeze between Telstra's retail and wholesale prices.
18. The ACCC revoked the competition notice in March 2007, referring to changing regulatory circumstances, including declaration of a wholesale line rental service, which it considered would enable competitive outcomes to be achieved.⁶⁰

⁵⁹ ACCC, Part A Competition Notice, 12 April 2006. Telstra applied to the Federal Court to challenge the ACCC's decision to issue this competition notice. The challenge was upheld by the Court on the basis that the competition notice differed from the consultation notice in the kind of anti-competitive conduct it described. The Court therefore concluded that the ACCC was not entitled to issue the competition notice. See: *Telstra Corporation Limited v Australian Competition and Consumer Commission (No 2)* [2007] FCA 493, [178] (Bennett J).

⁶⁰ ACCC, 'Competition Notice Lifted' (Media Release, MR 051/07, 2 March 2007).