

TELSTRA CORPORATION LIMITED

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

Response to Discussion Paper

30 September 2016

# Executive Summary

Telstra welcomes the opportunity to respond to the discussion paper published by the Department of Communications and the Arts in its review of the Part XIB telecommunications anti-competitive conduct provisions.

Telstra supports regulation that promotes competition and investment, increases productivity and boosts Australia’s international competitiveness. Competition in markets is key to improving the economic welfare of Australians. In the telecommunications market, competition spurs carriers and carriage service providers (**CSPs**) to invest billions of dollars in networks and innovation to provide customers with high quality services that meet their evolving needs.

Telstra considers that if the proposed amendments to section 46 are made, the competition rule and competition notice regime in Divisions 2 and 3 (and associated provisions in Divisions 7-10) of Part XIB, will distort competition to the detriment of consumers and should be repealed as soon as possible.

The competition rule and competition notice regime in Part XIB is already extremely onerous for carriers and CSPs with a reversed onus of proof in subsequent court proceedings and potential penalties for a beach of a competition notice well beyond those typically levied in respect of equivalent Part IV breaches. Telstra is not aware of any jurisdiction in the world where telecommunication providers are subject to a specific misuse of market power rule with a reversed onus of proof in subsequent court proceedings. Retaining the competition rule and competition notice regimes would make Australia an outlier in terms of competition regulation.

If the proposed section 46 amendments are made, Part XIB will become even more onerous, because the removal of the ‘take advantage’ element in the current section 46 test will create a lower threshold test and there is significant uncertainty associated with the implementation of the new competition test as it applies to unilateral conduct. Because the new section 46 will flow through to Part XIB, carriers and CSPs should not face the compounding risk brought about by changing section 46 and then be obliged to discharge the onus of proof in court and face the threat of disproportionate fines under Part XIB. The compounding uncertainty and risk that this creates will impact carriers’ and CSPs’ decision-making. Carriers and CSPs are more likely to adopt lower-risk strategies, resulting in adverse impacts on competition and consumers.

The competition rule and competition notice regime will also no longer be necessary for addressing competition concerns in the telecommunications market given that:

* The new section 46 test will be in place, with its significantly lower enforcement threshold.
* Part XIB was introduced nearly twenty years ago to address specific competition concerns in an industry transitioning to an open and competitive market. These concerns no longer characterise the industry, which now has highly competitive market players, a wide range of new products and services that compete with legacy-based services. There is no longer a justification for subjecting carriers and CSPs to this telecommunications-specific enforcement regime.
* The industry is undergoing further significant change with the rollout of the NBN, which creates a wholesale-only provider of fixed line services, subject to a legislated non-discrimination obligation. Telstra has committed to structurally separate, with interim equivalence and transparency measures negotiated with and accepted by the ACCC.
* The ACCC has many regulatory tools other than Part XIB to promote competition in the communications sector, including Part XIC access determinations, binding rules of conduct (BROCs), and Telstra’s structural separation undertaking (SSU) and migration plan (MP). In fact, it has shown a strong preference to use these rather than competition notices, the last of which was issued over ten years ago.

If the government retains Divisions 2 and 3 and associated sections in Divisions 7-10 of Part XIB, it will be important to ensure at the very least that the separate telecommunications-specific anti-competitive conduct test in section 151AJ(2) and the reversed onus of proof in section 151AN are repealed. As the Harper Review recognised, the proposed new section 46 test obviates the need for the competition rule in Part XIB, and there is no current justification for retaining the reversed onus of proof provision which is contrary to general principles of civil law and, given that carriers and CSPs do not have the benefit of the ACCC’s investigative powers, will create a near insurmountable hurdle for carriers and CSPs in any court proceedings under the proposed new section 46 test.

# The lower thresholds for section 46 and onerous Part XIB enforcement mechanisms will harm competition and consumers

As expressly recognised in the final Harper Review report,[[1]](#footnote-1) the section 46 amendments obviate any need for the competition rule in Part XIB.

The proposed section 46 amendments introduce an ‘effects’ test and remove the ‘taking advantage’ test, resulting in a lower threshold for establishing a misuse of market power under section 46.

The lower thresholds in the new section 46 would act in conjunction with the onerous enforcement powers in Part XIB. In particular,

* There are severe pecuniary penalties under Part XIB for breaches of section 46 that are disproportionate to the penalties for other sectors under the proposed section 46 – penalties for a contravention of a competition notice start at $10 million and increases by $1 million per day for 21 days, increasing to $31 million and $3 million per day thereafter. After 100 days, the potential penalties accruing to the defendant would amount to $268m.
* By issuing a Part B Competition Notice in relation to s46 conduct, the ACCC can reverse the onus of proof in subsequent court proceedings, so that Carriers and CSPs bear the onus of satisfying a court that there is no substantial lessening of competition – an almost impossible task for a party that does not have the powers to conduct market inquiries or compel competitors to provide information in order to prove that there is no substantial effect on competition. The reversed onus of proof may also be relied upon by private parties seeking an injunction under section 151AC.

Even in the absence of the proposed section 46 amendments the Part XIB powers are unique and onerous, and go well beyond what is necessary to regulate and prosecute anti-competitive conduct. It is generally recognised that the person seeking the benefit of the law bears the burden of persuading the court that it should exercise its authority. The ACCC, or any private party, should bear the onus of proof to establish any party is acting unlawfully, particularly when the relevant test will no longer require consideration of ‘taking advantage’ but will require an assessment of the effect on competition, which the ACCC is in a better position to do than any single market participant. Telstra is not aware of any jurisdiction in the world where telecommunication providers are subject to a specific misuse of market power rule with a reversed onus of proof in subsequent court proceedings.

The lower thresholds, and additional complexity and uncertainty associated with the proposed amendments to section 46, combined with the extreme potential penalties and the reversal of the onus of proof under Part XIB will make it extremely difficult – if not near impossible – for Carriers and CSPs to defend an allegation of anti-competitive conduct. Facing such a challenge and significant uncertainty, Carriers and CSPs may opt to adopt low-risk strategies to reduce the possibility of defending costly regulatory actions and the need to manage any resulting reputational damage. This would have a detrimental impact on competition across the economy as service providers invest and innovate less and, accordingly, compete less vigorously. This ultimately harms competition and consumers.

# The competition rule and notice regime is no longer necessary

## The market has changed significantly since the introduction of Part XIB

Part XIB was introduced in 1997 as a special industry-specific regime for regulating anti-competitive conduct in the telecommunications industry. The reason for an industry focused regime was to address the challenge of moving from a highly regulated and vertically integrated market to open competition.

The industry is no longer in the early stages of competition and has undergone – and is continuing to undergo – significant changes in technology and product innovation, consumer preferences and the structure of the market, as recognised by the ACCC in its recent market study issues paper.[[2]](#footnote-2) The market is today a productive and dynamic market characterised by a number of well-established and competitive participants, increasingly owned by international enterprises. The Department recently stated that:[[3]](#footnote-3)

*“Technological advancements, changes in consumer demand and policy-induced structural change continue to ensure that Australian communications markets are dynamic and complex” with service providers “adopting new digital technologies and changing business practices to respond to consumer demands, drive productivity and compete.”*

Competition is intense with consumers now able to opt for a range of fixed line, mobile, wireless, satellite and over-the-top services such as VoIP (rather than the traditional legacy based services that characterised the market in 1997). Providers of legacy based services (at the retail and wholesale level) are therefore competitively constrained by an array of non-legacy services, and the use of legacy based services has declined significantly since 1997. In broadband markets, the ACCC has recognised that there is “*vigorous competition*” with “*competition in the fixed broadband market to intensify as the NBN is rolled out*”.[[4]](#footnote-4) There is also fierce competition in mobile markets in Australia with multiple mobile virtual network operators and three competitive mobile network operators who continue to make significant investments in their mobile networks across Australia. In 2015 the use of traditional fixed line services was a third of the number of mobile phone voice services in operation[[5]](#footnote-5), and VoIP services were accessed by 4.9 million adult Australians[[6]](#footnote-6) with mobile handsets the most common way for consumers to access the internet .[[7]](#footnote-7)

Any concerns around vertical integration in the telecommunications sector have now been addressed through Part XIC access regulation, the rollout of the NBN and Telstra’s undertaking to structurally separate with a commitment to onerous interim measures to ensure equivalence prior to structural separation taking effect. The ACCC places significant importance on the SSU as a mechanism to address vertical integration concerns. It has stated that breaches identified to it by Telstra “*demonstrate both the importance of Telstra implementing the equivalence and transparency measures contained in the SSU in a robust manner, and the benefits of achieving structural reform of the telecommunications sector in order to resolve the perennial competition concerns resulting from Telstra’s vertical integration*.”[[8]](#footnote-8) NBN is itself subject to wholesale-only and non-discrimination obligations.

The Department of Communications recently stated that: [[9]](#footnote-9)

*“At a structural level the distinction between the traditional well-defined, vertically integrated segments of the telecommunications, broadcasting and online industries is breaking down. This deconstruction is being driven by the digitisation of content which has enabled it to be accessed over multiple platforms and devices. The heterogeneous nature of digital services and the any-to-any connectivity of communications networks is distinguishing them from more traditional networked industries, such as utilities.”*

The telecommunications industry is no longer so different from other industries to justify the continuation of a more onerous industry-specific competition rule and enforcement regime. With the threshold for section 46 being lowered it is imperative that the telecommunications sector only be subject to anti-competitive rules that generally apply across different sectors. To do otherwise will increase uncertainty for telecommunication providers and in turn reduce innovation and competition in this sector. This would be an unwelcome outcome for consumers.

## There are other effective and preferred means of addressing competition concerns

The ACCC now has an armory of other powers that it can use to address competition concerns in the telecommunications market, including:

* **Section 46**: If the proposed amendment to section 46 are passed, the threshold test for establishing a contravention will be lower under section 46 than Part XIB as the requirement for “taking advantage” will be removed.
* **Part XIC**: Under Part XIC, the ACCC can declare a service in respect of which – since 2011 – it can make an access determination setting price and non-price terms and conditions to apply to the supply of those services in the absence of agreement between the parties on such terms and conditions. The ACCC also has the power to respond to urgent issues through the making of an interim access determination (**IAD**) if an access determination has not been made for a declared service or a BROC which can be made quickly and apply up for 12 months in which time the ACCC could, if required, vary an access determination. The ACCC is not required to adhere to procedural fairness in making a BROC or an interim access determination.
* **Structural Separation Undertaking**: In 2010, the Government introduced legislation which created a framework for reforming the telecommunications industry by effecting structural separation of Telstra through the progressive migration of Telstra’s fixed line access services to the NBN. Telstra’s SSU, accepted by the ACCC in 2012, specifies Telstra’s commitments to promote equivalence and transparency during the transition period to the NBN. The SSU contains a number of obligations, including a broad obligation to ensure that Telstra’s retail and wholesale regulated services will be supplied to an equivalent standard service quality and operational equivalence commitments. Telstra is required to identify breaches of its obligations and how it is (or will be) remediating those breaches. The ACCC then reports to the Minister on these and whether it considers that Telstra’s remedial steps are sufficient to address any competitive detriment that may arise as a result of the breach. If the ACCC considers that Telstra has breached the SSU it may also apply to the Federal Court for a range of remedies.
* **Migration Plan**: Telstra’s Migration Plan, accepted by the ACCC in 2012, sets out how Telstra will migrate its fixed line voice and broadband customers onto the NBN. It includes a general principle that Telstra must provide for the equivalent treatment of wholesale customers and retail business units in the implementation of the processes for disconnecting wholesale and corresponding services supplied by Telstra to itself. Telstra reports to the ACCC on its compliance with the Migration Plan

In the past ten years, the ACCC has demonstrated a preference for using Part XIC to address competition concerns. For example, the ACCC withdrew its last competition notice against Telstra in 2006 on the basis that the relevant service, wholesale line rental (WLR), had been declared under Part XIC. Since 2006, the ACCC has not issued a competition notice but has declared four new services and made final access determinations (FADs) for ten services and an IAD for a further service. It has also recently announced a declaration inquiry into mobile roaming. In its 2016 report into competition in the telecommunications sector, the ACCC stated that it considers access regulation to be the “*central component of promoting competition in the sector”*.[[10]](#footnote-10)

The ACCC has also been active in monitoring and reporting on Telstra’s compliance with the SSU and MP. As noted in section 2.1, the ACCC places significant importance on the SSU as a mechanism to address vertical integration concerns. It has stated that – compared with the previous operational separation regime – the “*SSU provides for stronger enforcement mechanisms which are particularly important for protecting competition and delivering outcomes in the interests of consumers and businesses during the rollout of the NBN*.”[[11]](#footnote-11)

Table 1 below provides an overview of the ACCC’s activities pursuant to its powers in respect of Part XIC, the SSU and competition notices in the past five years. As can be seen, the ACCC has not issued a competition notice in that period and has instead relied on Part XIC and SSU reporting obligations to address competition concerns. In addition to its powers under Part XIC and in respect of the SSU, the ACCC is able to conduct market studies into the sector and has just commenced a wide reaching study.

Table 1: ACCC activity (2011 – 2015)

| **Year** | **Part XIC decisions** | **SSU and MP breaches and remedies** | **Competition Notices issued** |
| --- | --- | --- | --- |
| 2011 | * Fixed line services[[12]](#footnote-12) FAD * Mobile Terminating Access Service (**MTAS**) FAD | n/a | 0 |
| 2012 | * Domestic Transmission Capacity Service (**DTCS**) FAD * WDSL declared * Local Bitstream Access Service (**LBAS**) declared * LBAS FAD | n/a | 0 |
| 2013 | * WDSL FAD * NBN special access undertaking accepted | * Telstra identified breaches of its SSU obligations, which it had taken steps (or was taking steps) to remediate. The ACCC accepted Telstra’s remedial actions in its Annual Compliance Report to the Minister (2012-2013). | 0 |
| 2014 | * Fixed line services re-declared (excluding WDSL) * DTCS re-declared * MTAS re-declared * WDSL re-declared * CBD exemptions removed for WLR and LCS | * Telstra identified breaches of its SSU obligations, which it had taken steps (or was taking steps) to remediate. The ACCC accepted Telstra’s remedial actions in its Annual Compliance Report to the Minister (2013-2014). | 0 |
| 2015 | * New Fixed line services FAD * New DTCS FAD * New MTAS FAD | * Telstra identified breaches of its SSU obligations, which it had taken steps (or was taking steps) to remediate. The ACCC accepted Telstra’s remedial actions in its Annual Compliance Report to the Minister (2014-2015). | 0 |
| 2016 | * New DTCS FAD * Superfast Broadband Access Service (**SBAS**) declared * SBAS interim access determination * LBAS re-declared * ACCC inquiry into WDSL re-declaration commences * ACCC announces declaration inquiry into mobile roaming | * To be published. | 0 |

## NBN Co is subject to wholesale only and non-discrimination obligations

The industry is currently undergoing significant change with the rollout of the NBN. To the extent that there are potential concerns with NBN Co’s position, the competition notice regime is not necessary to address these, given that NBN has been designed to create a level playing field for downstream service providers, and:

* any service that NBN Co provides is deemed to be declared for the purpose of Part XIC and, as such NBN Co is subject to the standard access obligations in Part XIC in respect of all services it provides — it complies with those obligations on the terms and conditions of its special access undertaking accepted by the ACCC in 2013;
* NBN Co cannot provide preferential treatment to any particular downstream market players, as it is subject to a legislated non-discrimination obligation; and
* NBN Co is not vertically integrated — it is statutorily required to be a wholesale only provider of access services.

# Conclusion

It is generally recognised that the party seeking the benefit of the law bears the burden of persuading the court that it should exercise its authority. Telstra is not aware of any jurisdiction in the world where telecommunication providers are subject to a specific misuse of market power rule with a reversed onus of proof in subsequent court proceedings, as they are under Part XIB.

Part XIB also means that penalties for a contravention are disproportionate – if conduct is defended and continued, after 100 days, the potential penalties accruing to the defendant would amount to $268m.

While the competition rule and notice provisions of Part XIB may once have been justifiable, this is no longer the case given the changes to the telecommunications market and the proposed new section 46 test.

Further, the removal of the ‘take advantage’ element in the current section 46 test combined with the reversal of the onus of proof will make it extremely difficult – if not near impossible – for Telstra to defend an allegation of anti-competitive conduct. If not addressed, these issues may lead to the industry adopting lower-risk strategies which will reduce the scope for innovative and competitive conduct to the detriment of consumers.

Telstra proposes the government removes the competition rule and notice provisions. This would not prevent the ACCC from exercising its competition powers as it has done for the last decade. If the Government is not minded to remove these provisions, given the lower thresholds for the ACCC to prosecute a section 46 matter, the separate telecommunications specific anti-competitive conduct test in section 151AJ(2) and the reversed onus of proof in section 151AN(1) should be removed regardless of whether or not Divisions 2 and 3 (and associated provisions in Divisions 7-10) of Part XIB are repealed.

1. Harper, The Competition Policy Review Final Report, March 2015, p 345. [↑](#footnote-ref-1)
2. ACCC, Competition in Evolving Communication Markets, Issues Paper, September 2016, p 6. [↑](#footnote-ref-2)
3. Department, Review of the Australian Communications and Media Authority, Issues paper, July 2015. [↑](#footnote-ref-3)
4. ACCC, Competition in the Australian telecommunications sector, Price changes for telecommunications services in Australia, ACCC Report, February 2016, pp 5-6 (**ACCC Report**). [↑](#footnote-ref-4)
5. ACCC Report, p 14. [↑](#footnote-ref-5)
6. ACMA, Communications Report 2014–15, p. 4. [↑](#footnote-ref-6)
7. ACCC Report, p 16. [↑](#footnote-ref-7)
8. ACCC, Telstra’s Structural Separation Undertaking, Annual Compliance Report 2012-2013, ACCC Report to the Minister for Communications, p 3. [↑](#footnote-ref-8)
9. Department, Review of the Australian Communications and Media Authority, Issues paper, July 2015. [↑](#footnote-ref-9)
10. ACCC Report, 13. [↑](#footnote-ref-10)
11. ACCC, Telstra’s Structural Separation Undertaking, Annual Compliance Report 2014-2015, ACCC Report to the Minister for Communications, p 4. [↑](#footnote-ref-11)
12. The fixed line services are the Unconditioned Local Loop Service (**ULLS**); Line Sharing Service (**LSS**): Wholesale Line Rental (**WLR**); Local Call Service (**LCS**); Fixed Originating Access Service, previously PSTN Originating Access (**FOAS**); Fixed Terminating Access Service, previously PSTN Terminating Access (**FTAS**) and – since 2012 – wholesale DSL (**WDSL**). [↑](#footnote-ref-12)