



Australian  
Competition &  
Consumer  
Commission

# Draft revised Telecommunications Competition Notice Guidelines

Issued pursuant to section 151AP(2) of the *Competition and Consumer Act 2010*

August 2015

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# 1. Preamble

## 1.1. Telecommunications Competition Notice Guidelines

Telecommunications carriers and carriage service providers are prohibited from engaging in anticompetitive conduct under the *Competition and Consumer Act 2010* (Cth) (the Act). Section 151AJ of the Act sets out what constitutes anti-competitive conduct and section 151AK prohibits this conduct. Section 151AK is referred to as the 'competition rule'.

Proceedings for enforcing the competition rule, other than proceedings for injunctive relief (that can be instituted at any time), cannot be instituted unless the alleged conduct is of a kind dealt with in a Part A competition notice that was in force at the time the alleged conduct occurred. A Part B competition notice sets out the particulars of the contravention, which are prima facie evidence of the matters in any proceedings under or arising out of alleged contraventions of the competition rule.

Section 151AP of the Act requires the Australian Competition and Consumer Commission (ACCC) to formulate guidelines (Guidelines), which it must consider when deciding whether to issue a competition notice. Section 151AP(3) requires the Guidelines to address the appropriateness of the ACCC issuing a competition notice as opposed to taking other action under the Act.

This version of the Guidelines has been issued to reflect the replacement of the *Trade Practices Act 1974* (TPA) with the *Competition and Consumer Act 2010* and changes that have occurred to the competition notice regime since the Guidelines were last updated in 2004. The ACCC may revise this document or issue further Guidelines under section 151AP(2) from time to time, as required.

## 1.2. Role of this publication

This publication sets out the written instrument that constitutes the Guidelines issued under section 151AP(2), as well as providing an overview of the competition notice regime. The overview does not form part of the Guidelines issued under section 151AP(2).

# 2. Overview of the competition notice regime

## 2.1. History of Part XIB

Part XIB of the Act was inserted pursuant to the *Trade Practices Amendment (Telecommunications) Act 1996*, and took effect from 1 July 1997. Part IV of the Act, which contains the general restrictive trade practices provisions that apply across all industries, had been in existence in a version similar to its modern form since the introduction of the *Restrictive Trade Practices Act 1965* (Cth). Part XIB provided the ACCC with additional powers enabling a quick response to instances of anti-competitive conduct in the telecommunications industry. The amendments that brought Part XIB into existence were introduced after deregulation of the telecommunications industry, at a time when new entry was expected to take place.

As the Second Reading Speech of the Bill in the Senate stated:

Total reliance on Part IV to constrain anti-competitive conduct, might in some cases, prove ineffective given the still developing state of competition in the telecommunications industry. The fast pace of change and complex nature of horizontal and vertical arrangements of firms operating in this industry mean that any

anti-competitive behaviour could cause rapid damage to the competition that has already developed and severely hamper new entry.

Part XIB established a competition rule, which proscribes carriers and/or carriage service providers from engaging in anti-competitive conduct. Anti-competitive conduct was defined in wider terms than in the Part IV provisions. The ACCC's primary tool to ensure a quick response to a breach of the competition rule was the ability to issue a competition notice. It calls on the recipient to cease the allegedly anti-competitive conduct or else face the prospect of proceedings for pecuniary penalties and/or damages.

Part XIB also introduced a number of information-gathering powers relating to the telecommunications industry. These provisions empower the ACCC to direct carriers and carriage service providers with a substantial degree of power in the industry, to file tariff information. The ACCC is also empowered to make record keeping rules and can specify which carriers or carriage service providers are required to comply with these rules.

### **2.1.1. Historical amendments to Part XIB**

The *Telecommunications Legislation Amendment Act 1999* further amended Part XIB to enhance the competition regime. The most significant amendments included:

- the distinction between a Part A competition notice and a Part B competition notice
- the introduction of a section providing that a Part B competition notice is prima facie evidence of the matters it sets out
- the introduction of a provision allowing for competition notices to be varied
- amendments to empower the ACCC to monitor and report on significant matters relating to competition in the telecommunications industry and specified by the minister.

These amendments were made by government partly to address concerns that the competition notice regime was not addressing anti-competitive conduct in telecommunications markets as efficiently as was envisaged. As was stated in the Supplementary Explanatory Memorandum to the Bill in the Senate, these 'targeted amendments' would:

... enable the ACCC to issue competition notices more quickly and notices would be more robust in terms of identifying conduct in contravention of the competition rule and opening the gate to Court action.

On 21 December 2001, the Productivity Commission issued a report on the operations of Part XIB and XIC. The report, titled *Telecommunications Competition Regulation*, proposed a number of amendments to make processes involved in the issuing of a competition notice more transparent.

The *Telecommunications Competition Act 2002* was government's response to this report. Relevant amendments were:

1. Amendment of subsection 151AP(3), with a provision which repealed the previous subsection and adds another subsection. These amendments provide that:
  - (a) guidelines published pursuant to subsection 151AP(2) must address the appropriateness of the ACCC issuing a competition notice as opposed to the ACCC taking other action under the Act

- (b) the ACCC must take all reasonable steps to ensure that any such guidelines comply with the requirement noted above within 12 months of the commencement of this subsection.
- 2. Amendment of section 151AKA, included the requirement that the ACCC must, before issuing a competition notice:
  - (a) provide a written notice to the relevant carrier or carriage service provider stating:
    - i. that the ACCC proposes to issue a competition notice
    - ii. describing the anti-competitive conduct alleged
    - iii. inviting the carrier or carriage service provider to make a submission to the ACCC regarding the proposed issuing of a competition notice
  - (b) consider submissions from the carrier or carriage service provider
- 3. Amendment of section 151AQB, provided that:
  - (c) the ACCC may issue an advisory notice before, at the same time or after it issues a competition notice, but it does not have a duty to consider whether to issue an advisory notice for any particular instance or kind of anti-competitive conduct before it issues a Part A competition notice
  - (d) where the ACCC has issued an advisory notice, if it is satisfied that the publication of the notice would result or is likely to result in a benefit to the public that would outweigh any prejudice to the commercial interests of any person, the ACCC may publish the advisory notice.

### **2.1.2. Recent amendments to Part XIB**

The *Telecommunications Legislation Amendment (Competition and Consumer Issues) Act 2005* amended subsection 151BX(3)(a) to increase the penalties payable for a contravention of the competition rule.<sup>1</sup> Under the amended subsection 151BX(3)(a) if a contravention continues for more than 21 days, a body corporate can be liable to paying the sum of \$31 million and \$3 million for each day in excess of 21 that the contravention continues.

The *Trade Practices Legislation Amendment Act (No. 1) 2007* made amendments to subsections 151AH(5)-(6) and subsection 151AJ(2).<sup>2</sup> Subsections 151AH(5)-(6) were inserted to provide guidance on when a person may have a substantial degree of power in a telecommunications market. Subsection 151AJ(2) was inserted to provide that a carrier or carriage service provider will be considered to have engaged in anti-competitive conduct if it has a substantial degree of power in a telecommunications market and uses that power with the likely effect of substantially lessening competition in a telecommunications market.

The *Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009* introduced the dual civil and criminal cartel provisions to Australian competition law. Civil cartel provisions in sections 44ZZRJ and 44ZZRK of the Act were included within the definition of “anti-competitive conduct” in section 151AJ, and accordingly contravention of these provisions in relation to the telecommunications market will constitute a breach of the competition rule. However, the criminal cartel provisions have not been captured within this definition. Section 151BZ of the Act states that criminal proceedings are not to be brought for a contravention, attempted contravention or involvement in the contravention of the competition rule. Section 151BZ(3) clarifies that criminal proceedings for an offence against the cartel provisions in sections 44ZZRF and 44ZZRG may be initiated under Part IV.

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<sup>1</sup> *Telecommunications Legislation Amendment (Competition and Consumer Issues) Act 2005* schedule 4 s 1.

<sup>2</sup> *Trade Practices Legislation Amendment Act (No. 1) 2007* sections 5-8.

The *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act 2010* further amended Part XIB to modify the operation of the anti-competitive conduct provisions in Part XIB. The most significant amendments were:

- The introduction of subsection 151AF(d) which extends the telecommunications market to the supply or acquisition of content services.<sup>3</sup> Consequently the competition notice regime now also applies to content services delivered by carriers and carriage service providers.
- The introduction of subsection 151AJ(9), which provides that a person does not engage in “anti-competitive conduct”, if under section 577BA of the *Telecommunications Act 1997* the conduct is authorised for the purpose of section 51(1) of the Act.<sup>4</sup>
- The introduction of subsection 151AKA(9), to replace subsections 151AKA(9)-(10), which provides that the ACCC is not required to observe any requirements of procedural fairness in relation to the issue of a Part A competition notice.<sup>5</sup>

These amendments were made by the government to address concerns that the consultation process prior to the issuing of a competition notice delayed enforcement action, which disadvantaged parties who were impacted by the alleged anti-competitive conduct. The amendments were aimed at shifting the parties focus from litigation that challenged the ACCC’s processes, towards resolving the alleged anti-competitive conduct. The Explanatory Memorandum to the Bill in the House of Representatives stated that the amendments would increase regulatory certainty and reduce the risk of protracted legal disputes on the issue.

On 1 January 2011, the *Competition and Consumer Act 2010* was enacted to replace the *Trade Practices Act 1974*. The content of the competition notice provisions was not impacted by this. The *Telecommunications Legislation Amendment (National Broadband Network Measures—Access Arrangements) Act 2011* amended Part XIB to authorise certain conduct. Subsection 151AJ(10) was inserted, which states that despite anything in section 151AJ, a person does not engage in anti-competitive conduct, if under section 151DA the conduct is authorised for the purposes of subsection 51(1). The subsection was introduced to allow the structural reform of the telecommunications industry by authorising certain conduct engaged in by Telstra, the NBN corporations and others as part of the Telstra structural separation arrangements.<sup>6</sup>

### **2.1.3. Competition Notice Guidelines**

Section 151AP of the Act requires the ACCC to formulate guidelines which it must consider when deciding whether to issue a competition notice. The first written guideline was issued before 1 July 1997 as required by section 151AP(3) of the *Trade Practices Act 1974*. The revised guideline was issued in August 1999 following the introduction of amendments to Part XIB of the *Trade Practices Act 1974* made by the *Telecommunications Legislation Amendment Act 1999*. The Guidelines were revised in February 2004 following the introduction of amendments to Part XIB of the *Trade Practices Act 1974* made by the *Telecommunication Competition Act 2002*. The Guidelines set out in this publication constitutes the fourth written instrument issued by the ACCC under section 151AP and has been issued to reflect the replacement of the *Trade Practices Act 1974* with the *Competition and Consumer Act 2010*.

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<sup>3</sup> *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act 2010* section 211; *Competition and Consumer Act 2010* section 151AF(d).

<sup>4</sup> Section 51(1) of the CCA provides a general exemption from Part IV of the CCA for matters authorised by federal legislation; Section 577BA authorises specified conduct to promote structural reform in the telecommunications industry.

<sup>5</sup> *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act 2010* section 212; *Competition and Consumer Act 2010* section 151AKA(9).

<sup>6</sup> *Telecommunications Legislation Amendment (National Broadband Network Measures—Access Arrangements) Act 2011* section 25D.

The ACCC may revise this new instrument or issue further Guidelines under section 151AP(2) from time to time, as required.

The Act does not require the Guidelines to exhaustively list all matters that the ACCC will consider when deciding to issue a competition notice. Section 151AP(1)(b) requires that, if the ACCC considers that other matters are relevant to the decision to issue a particular competition notice, it have regard to those matters when making its decision.

## 2.2. The ACCC's goals

The objective of the *Competition and Consumer Act 2010* (the Act) is set out in section 2 and described as follows:

To enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.

### 2.2.1. Outcomes

The ACCC has formulated key outcomes it strives to achieve in pursuing its objective. With reference to Part XIB, those outcomes are:

- compliance with the competition rule (and other provisions of Part XIB) and, in particular, stopping anti-competitive conduct in the telecommunications market
- improvement in market conduct generally by carriers and carriage service providers
- protecting consumers from the adverse effects of anti-competitive conduct
- informing the community about the operation of the Act in telecommunications markets and the implications for business and consumers
- efficient and effective use of the ACCC's resources.

### 2.2.2. Means of achieving outcomes

The ways in which the ACCC will endeavour to achieve these outcomes include:

- proper administration and enforcement of the Act
- enforcing the Act with the purpose of enhancing competition, and ensuring that beneficial competition is not hindered
- providing complainants, a carrier or carriage service provider the subject of an allegation and other market players with an understanding of the investigation process where appropriate
- providing a carrier or carriage service provider under investigation with a reasonable opportunity to comment and provide submissions on the allegations where appropriate
- careful and unbiased consideration of any submissions made by a carrier or carriage service provider under investigation
- providing complainants and other affected parties with an opportunity to provide submissions and ensuring careful consideration of these submissions on their merits where appropriate
- providing complainants and other affected parties with an opportunity to comment on the issuing of an advisory notice where appropriate
- ensuring that the ACCC is not responsible for any undue delay in the investigation of a complaint of anti-competitive conduct



- ensuring transparency in the investigative process and the decision to issue a competition notice.

## 2.3. An outline of the key provisions of the competition notice regime

Section 151AK(1) of the Act provides that a carrier or carriage service provider must not engage in anti-competitive conduct. Section 151AK(2) states that this rule is to be known as the competition rule.<sup>7</sup>

### 2.3.1. What is anti-competitive conduct?

Section 151AJ of the Act defines anti-competitive conduct in the telecommunications industry, as occurring in two circumstances:

- where a carrier or carriage service provider has a substantial degree of power in a telecommunications market and takes advantage of that power with the effect or likely effect of substantially lessening competition in that or any other telecommunications market<sup>8</sup> or
- where a carrier or carriage service provider engages in conduct which would contravene sections 45, 45B, 46, 47 or 48 of the Act where that conduct relates to a telecommunications market.<sup>9</sup>

Section 151AJ(2) provides that where a carrier or carriage service provider has a substantial degree of power in a telecommunications market and takes advantage of that power with the effect, or likely effect, of substantially lessening competition, the carrier or carriage service provider will be said to engage in anti-competitive conduct.

In contrast to section 46 of the Act, where it needs to be shown that a corporation has taken advantage of its market power for a proscribed purpose, section 151AJ(2) does not concern itself with purpose but focuses on the effect of the conduct in a telecommunications market.

Section 151AJ(3) provides that a contravention of certain provisions of the Act, relating to a telecommunications market, will be a breach of the competition rule.<sup>10</sup> The relevant sections are set out as follows:

- **Sections 44ZZRJ & 44ZZRK:** These provisions prohibit a corporation from making a contract, arrangement or arriving at an understanding that contains a cartel provision, and from giving effect to a cartel provision.
- **Section 45:** This section relates to the making or giving effect to a provision of a contract, arrangement or understanding if it:
  - i. has the purpose or has/is likely to have the effect of substantially reducing competition, or

<sup>7</sup> Section 151AB provides definitions for terms used in Part XIB. The section provides that the terms 'carriage service', 'carrier' and 'carriage service provider' have the same meaning as is used in the Telecommunications Act 1997. The terms as defined below are from the Telecommunications Act 1997. The term 'carriage service' is defined in as being 'a service for carrying communication by means of guided and/or unguided electromagnetic energy'. The term 'carrier' is defined as the person to whom a carrier licence is granted. The term 'carriage service provider' is defined as a person who supplied or proposes to supply a listed carriage service to the public using either a network owned by one or more carriers or a network unit for which a nominated carrier declaration is in force.

<sup>8</sup> Section 151AJ(2) provides: A carrier or carriage service provider engages in anti-competitive conduct if the carrier or carriage service provider has a substantial degree of power in a telecommunications market, and either: takes advantage of that power with the effect, or likely effect, of substantially lessening competition in that or any other telecommunications market, or takes advantage of that power, and engages in other conduct on one or more occasions, with the combined effect, or likely combined effect, of substantially lessening competition in that or any other telecommunications market.

<sup>9</sup> Section 151AJ(3) provides: A carrier or carriage service provider engages in anti-competitive conduct if the carrier or carriage service provider: engages in conduct in contravention of section 45, 45B, 46, 47 or 48 the conduct relates to a telecommunications market.

<sup>10</sup> Contravention of sections 45, 46, 47 or 48 will also breach Part IV of the Act.

- ii. it contains an exclusionary provision.
- **Section 45B:** This section relates to covenants which have, or are likely to have, the effect of substantially lessening competition and provides that such covenants are not enforceable.
- **Section 46:** Section 46 prohibits the misuse of market power by a corporation for the purpose of eliminating or substantially damaging a competitor; preventing the entry of a person into the market or deterring or preventing a person from engaging in competitive conduct in the market.
- **Section 47:** This provision prohibits exclusive dealing.
- **Section 48:** This section provides that a corporation shall not engage in resale price maintenance.

The operation of Part XIB is limited to contraventions occurring in a telecommunications market. Section 151AF of the Act defines a telecommunications market as a market in which any of the following goods or services are supplied or acquired:

- carriage services
- goods or services for use in connection with a carriage service
- access to facilities
- content services.

Section 151AQ provides that if the ACCC has reason to suspect that a carrier or carriage service provider has contravened or is contravening the competition rule, the ACCC should act quickly in deciding whether or not to issue a competition notice.

Sections 151AKA and 151AL empower the ACCC to issue competition notices to a carrier or carriage service provider if the ACCC has reason to believe that they are engaging or have engaged in conduct in breach of the competition rule. The ACCC is not required to observe procedural fairness requirements when issuing a Part A competition notice.<sup>11</sup> There are two types of competition notices that the ACCC may issue—Part A competition notices and Part B competition notices. The ACCC has the discretion to issue either. Where anti-competitive conduct of the kind described in the competition notice continues after a Part A competition notice has been issued, the ACCC can seek the imposition of pecuniary penalties from the Federal Court.

A person may seek from the ACCC an order exempting them from any liability incurred under section 151AJ. This power is akin to the authorisation provisions found in Part VII of the Act.

## 2.4. Types of competition notices

### 2.4.1. Part A competition notices

Section 151AKA of the Act provides for the issuing of a Part A competition notice. It states:

- In subsection (7), the ACCC may issue a Part A competition notice under subsection (1) stating that a carrier or carriage service provider has engaged or is engaging in a specified instance of anti-competitive conduct if the ACCC has *reason to believe* that this has occurred. In such a case, the competition notice must specify the instance of anti-competitive conduct, or

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<sup>11</sup> See section 151AKA(9).

- In subsection (8), the ACCC may issue a Part A competition notice under subsection (2) stating that a carrier or carriage service provider has engaged or is engaging in at least one instance of anti-competitive conduct of a kind described in the competition notice where the ACCC has *reason to believe* that such an incident has occurred.

In issuing a competition notice under sub-section 151AKA(2), the ACCC may specify that a particular carrier or carriage service provider has engaged, or is engaging in a kind of anti-competitive conduct. However, the ACCC is not required to specify any particular instance of anti-competitive conduct in a Part A competition notice.<sup>12</sup>

Section 151AO of the Act provides that a Part A competition notice comes into force when it is issued or later if the competition notice specifies a later date. In some circumstances the ACCC may negotiate to have a competition notice take effect from a date after the competition notice is issued.

The ACCC may decide to delay the date when a competition notice takes effect if it would be difficult for a carrier or carriage service provider to alter their conduct immediately. However, the ACCC may attempt to resolve this difficulty by early notification to the carrier or carriage service provider of the allegation, and by entering into discussions early on to stop or modify the conduct of the carrier or carriage service provider.

Regarding a Part A competition notice, the decision about when a competition notice takes effect is influenced by the fact that any affected third party may only seek compensation for damage caused by a breach of the competition rule if the breach occurred when the competition notice was in force. Therefore, the ACCC may decide to consult with affected parties before it makes a firm decision to have the competition notice come into force at a particular time following the issuing of the competition notice.

Section 151AO provides that a Part A competition notice remains in force for the period specified in the competition notice, which must not be longer than 12 months. The ACCC can issue a subsequent Part A competition notice for the same conduct after the first competition notice has expired.

Where a carrier or carriage service provider named in a Part A competition notice continues to contravene the competition rule and this breach is of a kind described in the competition notice, the carrier or carriage service provider may be exposed to the following legal action:

- proceedings for the imposition of pecuniary penalties pursuant to section 151BY of the Act,
- proceedings for an interim injunction pursuant to section 151CA of the Act, and/or
- proceedings seeking damages caused as a result of a contravention of the competition rule, pursuant to section 151CC of the Act.

On the application of a party to any of the above proceedings a range orders may be made, including but not limited to, the following orders:

- an interim injunction ordering the carrier or carriage service provider to cease the conduct which breaches the competition rule. (It is the usual practice of courts to impose an interim injunction pending a conclusive determination of the issues in a hearing.)
- an injunction ordering the carrier or carriage service provider to cease the conduct which is in contravention of the competition rule

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<sup>12</sup> See subsection 151AKA(5).

- that the carrier or carriage service provider found to have contravened the competition rule pay compensation to a party who has suffered loss or damage as a result of the contravention
- declaring void the whole or any part of a contract made between the carrier or carriage service provider found to have contravened the competition rule and any party who suffered loss as a result of the contravention
- varying the whole or any part of a contract made between the carrier or carriage service provider found to have contravened the competition rule and any party who suffered loss as a result of a contravention
- refusing to enforce provisions of any contract between the carrier or carriage service provider found to have contravened the competition rule and any party who suffered loss as a result of the contravention

#### **2.4.2. Part B competition notices**

Section 151AL of the Act provides:

- where the ACCC has *reason to believe* that a carrier or carriage service provider has committed, or is committing a contravention of the competition rule, the ACCC may issue a competition notice setting out particulars of that contravention
- a Part B competition notice may be issued even after enforcement proceedings have been initiated.

Section 151AN of the Act provides that in any proceedings under, or arising out of, Part XIB, a Part B competition notice is prima facie evidence of the matters set out in the competition notice.

#### **2.4.3. Key differences between a Part A and a Part B competition notice**

Different remedies can flow from Part A and Part B competition notices. A Part A competition notice gives the ACCC the option of obtaining pecuniary penalties under section 151BY for conduct found to breach the competition rule for the period when the competition notice is in force. The issuing of a Part A competition notice also provides for the recovery of damages under section 151CC for the time that the competition notice is in force where it is determined that a party has breached the competition rule. The issuing of a Part B competition notice does not make specific provision for the recovery of pecuniary penalties or damages.

Secondly, the type of conduct described in Part A and Part B competition notices tends to differ. A Part A competition notice typically describes a kind of anti-competitive conduct and is not required to specify an instance of anti-competitive conduct. By contrast, a Part B competition notice sets out particulars of the alleged contravention in the notice.

Thirdly, Part A and Part B competition notices have different ramifications from an evidentiary perspective. Unlike a Part A competition notice, a Part B competition notice is prima facie evidence of the allegations set out in the competition notice. What this means is that in any proceedings relating to an alleged contravention of the competition rule, the onus will be on the carrier or carriage service provider which is the subject of the competition notice to refute the existence of the allegations contained in the competition notice. In this sense, the burden of proof is reversed. The question about whether a contravention has occurred is, of course, ultimately to be decided by a court.<sup>13</sup>

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<sup>13</sup> A court deciding the question as to whether a contravention has occurred will make up its own mind on the question, and may, regardless of the prima facie evidentiary role of Part B competition notices, decide that no contravention has occurred.

## 2.5. Variation and revocation of competition notices

Section 151AOA allows for competition notices to be varied. In summary it provides that:

- the ACCC may vary a competition notice, as long as the variation is minor
- in a Part A competition notice the ACCC may vary the competition notice by omitting the time at which the competition notice is to come into effect and by substituting a later time
- the ACCC must provide the carrier or carriage service provider with a written notice setting out the terms of any variation.

Section 151AOB states that the ACCC may revoke a competition notice, and if this occurs, written notice of the revocation must be given to the firm that is the subject of the competition notice.

## 2.6. Register of competition notices

Pursuant to section 151AR of the Act the ACCC must keep a register of competition notices. This must include particulars of all competition notices, including competition notices that have expired. The Register is available to members of the public and can be found on the ACCC's website at [www.accc.gov.au](http://www.accc.gov.au).

## 2.7. Pecuniary penalties

The issuing of a Part A competition notice gives the ACCC the opportunity to recover pecuniary penalties under section 151BX from the relevant carrier or carriage service provider for conduct found to have breached the competition rule for the period during which the Part A competition notice was in force.

Subsection 151BX(2) provides that in determining the amount of the fine, the court must consider all relevant matters, including:

- the nature and extent of the contravention
- the nature and extent of any loss or damage suffered as a result of the contravention
- the circumstances in which the contravention took place; and
- whether the person has previously been found by the Court in proceedings under this Act to have engaged in any similar conduct.

Section 151BX(3) and (4) provide that for contraventions of the competition rule, the penalty to be paid by a body corporate is as follows.

- If the contravention does not exceed beyond 21 days, the sum of \$10 million for each offence and a further \$1 million for each day that the carrier or carriage service provider is determined by the court to be in breach, and the contravention has continued;
- If the contravention continues for more than 21 days, the penalty amounts to the sum of \$31 million and \$3 million for each day in excess of the 21 days that the contravention continued.

The maximum fine that a person can pay is \$500 000 for each contravention of the competition rule.

Pecuniary penalties can only be imposed for conduct described in a Part A competition notice, which was in force at the time the contravention occurred. This means that a contravention that occurred before the competition notice was issued and came into force cannot be the subject of a pecuniary penalty under Part XIB. The ACCC has a time limit of six years from the date of the breach to initiate such proceedings.

In contrast, the maximum pecuniary penalty that applies for a contravention of a Part IV provision payable by a body corporate for each offence is the greatest of the following:

- \$10 million;
- If the Court can determine the value of the benefit that the body corporate, and any body corporate related to the body corporate, have obtained directly or indirectly and that is reasonably attributable to the act or omission – 3 times the value of the benefit;
- If the Court cannot determine the value of that benefit – 10% of the annual turnover of the body corporate during the period of 12 months, ending at the end of the month in which the act or omission occurred.

The maximum pecuniary penalty that applies for a contravention of a Part IV provision payable by a person other than a body corporate is a maximum of \$500 000 for each offence.<sup>14</sup>

## 2.8. Exemption orders

Carriers or carriage service providers can seek an exemption order from the ACCC, which while not explicitly stated in the Act, by implication exempts anti-competitive conduct from the competition notice regime.<sup>15</sup> The opportunity to apply for an exemption order is additional to the opportunity to apply for an authorisation under section 88 of the Act or to file a notification under section 93. However the ACCC may refuse to consider an application for an exemption order if it has already received an application for an authorisation or for a notification regarding the same conduct.<sup>16</sup>

After the ACCC has received an application for an exemption order it must publicise the receipt of it.

The ACCC must give the applicant and any party whom the ACCC considers would be interested in doing so the opportunity to make a submission about the order and any conditions that should be placed on it.<sup>17</sup>

Before an exemption can be made the ACCC should be satisfied that either

- the conduct will result, or is likely to result, in a benefit to the public
- the benefit outweighs, or will outweigh, the detriment to the public caused by any lessening of competition that results from engaging in the conduct, or
- the conduct is not anti-competitive.

An exemption order may be subject to such conditions as the ACCC thinks fit.

The ACCC may revoke an exemption order if it is satisfied that:

- the order was made on information that was false or misleading and this information was material to the making of the exemption order
- a condition of the order was contravened
- there has been a material change of circumstances since the order was made.<sup>18</sup>

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<sup>14</sup> See section 76.

<sup>15</sup> See section 151AS

<sup>16</sup> See section 151AX relating to authorisations and section 151AY relating to notifications.

<sup>17</sup> See section 151BB.

<sup>18</sup> See section 151BG.

The ACCC must give the subject of the order and interested parties an opportunity to comment on its revocation.

### 3. Competition notice guidelines

The followed Guidelines are issued by the ACCC pursuant to section 151AP of the Act, as amended by the *Telecommunication Competition Act 2002*.

#### 3.1. Matters the ACCC will consider when deciding whether to issue a competition notice

When deciding whether to issue a (Part A or Part B) competition notice the ACCC will consider the matters listed below. In deciding whether to issue a competition notice the ACCC will consider each of the matters listed separately and that matter will be given appropriate weight according to the circumstances of the contravention. Each factor potentially relates to the issue of both a Part A and Part B competition notice. These factors are not exhaustive and are not listed in any particular order of priority—the ACCC’s decision on whether or not to issue a competition notice providing an overall balance of the factors listed below.

##### **(a) Effect of the conduct on competition**

The effect or likely effect of the conduct is likely to be one of the first matters that the ACCC will have regard to when considering whether a competition notice should be issued for conduct engaged in by a carrier or carriage service provider in breach of section 151AJ of the Act. For the purposes of subsection 151AJ(3), which incorporates relevant provisions of Part IV of the Act including sections 45, 46, 47 and 48, there is no strict requirement to assess the effect of the conduct on competition.

##### **(b) Extent of the conduct**

Relevant to considering the effect of the conduct may also be the extent of the conduct—that is, whether the conduct is having an effect in segments of a market, across the whole of a market or in a number of markets. For example, conduct that occurs at the wholesale level of the market may also affect competition in downstream retail markets. Similarly, conduct at the retail level of the market may stifle competition at the wholesale level of the market, dampening incentives for investment that otherwise may give rise to infrastructure-based competition, and associated benefits for consumers from competition at the wholesale level.

##### **(c) Immediacy of the effect of conduct on the market**

The time over which the effect or likely effect of the conduct will be experienced by the market may be relevant to considering whether to issue a competition notice at an early stage or, at first instance, to attempt to resolve the ACCC’s concerns about the conduct without the issuing of a competition notice.

##### **(d) Cooperation with the ACCC**

The cooperation of the carrier or carriage service provider in relation to this particular conduct, would be relevant to the ACCC deciding how quickly to issue a competition notice.



### **(e) Emerging markets and new technology**

A key characteristic of the telecommunications industry is the very fast pace of change. The ACCC appreciates that anti-competitive behaviour can cause rapid damage to the competition that has already developed in telecommunications markets and severely hamper new entry. The insertion of the competition notice regime into the Act, which allows a faster response than under Part IV, was one means of addressing this concern.

A further relevant consideration may be whether the conduct involves a significant new market issue, for example, access to a new technology or the leveraging of market power into a new and emerging market. The leveraging of market power into a new market may have the effect of foreclosing entry into that market (through a 'first-mover advantage') with the result that market power is transferred or replicated in markets that otherwise have the potential to develop into competitive markets.

### **(f) Ongoing conduct**

If the carrier or carriage service provider has stopped the anti-competitive conduct and the ACCC considers the conduct is not likely to recur, it may be less likely to issue a competition notice. This may be particularly so if the ACCC believes there is little or minimal benefit to market participants, consumers or the community in issuing a competition notice in response to past anti-competitive conduct. The ACCC may, however, consider it appropriate to take other action under the Act.

### **(g) Benefits to consumers from competitive markets**

The ACCC considers it is relevant to the decision to issue a competition notice if the anti-competitive conduct has or is likely to have an adverse impact on consumers in terms of the price and product offerings available to them.

### **(h) Third party rights**

The ACCC may also consider whether, after issuing a Part A competition notice, the matter is more appropriately left to private litigation or other means of resolution, without further action by the ACCC. Once a Part A competition notice has been issued, third party rights are activated and a third party may start an action for damages based on that competition notice. Issuing a Part B competition notice may still be appropriate if a private party has instituted, or has indicated it will institute, proceedings against the recipient of a Part A competition notice.

### **(i) Submissions received from the carrier or carriage service provider**

The ACCC will consider any submissions received from the carrier or carriage service provider where appropriate. However, the ACCC is not required to observe any of the requirements of procedural fairness in relation to the issue of a Part A competition notice.

### **(j) The appropriateness of issuing a competition notice as opposed to other action under the Act**

When deciding whether to issue a competition notice, the ACCC will consider the appropriateness of issuing a competition notice as opposed to taking other action under another provision of the Act. This is dealt with in more detail in part 2 of these guidelines (see page 4).



### **(k) Any other relevant matter**

In accordance with subsection 151AP(1)(b), the ACCC will also consider any other matter that it believes relevant to its consideration of anti-competitive conduct in telecommunications markets.

## **3.2. Appropriateness of issuing a competition notice**

While recognising that the government has designed the competition notice provisions of the Act to provide a regulatory mechanism which will encourage fast and effective responses to the special characteristics of the telecommunications industry, the ACCC uses a case-by-case approach in deciding which of the powers under the Act (both general and telecommunications specific) it should use.

Accordingly, when deciding whether to issue a competition notice, the ACCC will consider the appropriateness of doing so as opposed to taking other action under the Act. The ACCC will assess whether compliance with the competition rule could be more quickly and effectively achieved by any of the following means of action under the Act:

- issuing an advisory notice under Part XIB
- instituting court proceedings for an interim injunction under Part XIB
- instituting court proceedings for a contravention of Part IV, or
- initiating the declaration process under Part XIC.

### **(a) Issuing an advisory notice under Part XIB**

After investigating an allegation of a contravention of the competition rule, the ACCC may decide to issue a written notice advising the carrier or carriage service provider under investigation of the action it should take to ensure that it does not continue contravening the competition rule. Such a notice is known as an advisory notice.

An advisory notice can be issued regardless of whether or not the ACCC issues a competition notice. The ACCC's decision to issue an advisory notice is discretionary in nature and there is no duty on the ACCC to consider whether to issue an advisory notice.<sup>19</sup> An advisory notice can be varied. Subsections 151AQB(6) and (7) require that the ACCC notifies the carrier or carriage service provider concerned with written notice of a variation or revocation of an advisory notice.

An advisory notice is not legally binding—the ACCC is only offering guidance to the recipient on how it can change its conduct to avoid contravening the competition rule.

There also are limitations on the ACCC's ability to advise firms on how to alter their business processes in terms of the financial impact of taking a particular course of action. This is because there may be a number of different and equally acceptable steps that a firm can take to change its conduct and avoid the operation of the Act. The ACCC devotes its energies to determining the likely existence of anti-competitive conduct and enforcing the provisions of the Act.

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<sup>19</sup> Section 151AQB provides that: the Commission may give a carrier or carriage service provider a written notice (an 'advisory notice') advising the carrier or service 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. And, that the Commission does not have a duty to consider whether to issue an advisory notice in relation to: a particular instance of anti-competitive conduct, or a particular kind of anti-competitive conduct, before it issues a Part A competition notice in relation to that instance or kind of conduct.

As long as businesses ensure their activities do not breach the Act, the ACCC is typically not concerned with the way in which a business chooses to operate. Therefore, depending on the complexity of the alleged conduct, it may be beyond the scope of the ACCC to suggest the most appropriate course of action for a particular firm to take in the context of an advisory notice.

### **(b) Instituting court proceedings for an interim injunction under Part XIB**

Before and after the issuing of a Part A competition notice, any person (including the ACCC) has standing to seek an injunction in relation to a contravention or attempted contravention of the competition rule.<sup>20</sup> An interim injunction operates for a short period only, expiring on a date specified in the order.

An interim injunction is generally sought when it would be difficult to restore the affected parties to the position they were in before the alleged anti-competitive conduct began and this could result in irreversible harm to the competitive process.

### **(c) Instituting court proceedings for contravention of Part IV**

The competition notice regime in Part XIB applies in addition to the provisions of Part IV of the Act. However, the provisions of Part IV are not as broad as those of Part XIB with respect to the taking advantage of market power. Subsection 151AJ(2) provides that where a carrier or carriage service provider has a substantial degree of power in a telecommunications market and takes advantage of that power with the effect, or likely effect, of substantially lessening competition, the carrier or carriage service provider will be said to engage in anti-competitive conduct.

In contrast, section 46 of the Act requires that it be shown that a corporation has taken advantage of its market power for a proscribed purpose.

In circumstances where an ACCC investigation is focused on the effect of conduct in a telecommunications market, instituting court proceedings under Part IV may be an insufficient way of addressing the alleged anti-competitive conduct.

Part XIB was introduced into the Act by government because it felt that relying totally on Part IV to constrain anti-competitive conduct may prove ineffective, given the developing state of competition in the telecommunications industry. The fast pace change and complex nature of arrangements of firms operating in the industry means that any anti-competitive behaviour could cause rapid damage to competition that has already developed and severely hamper new entry. The government therefore designed Part XIB to increase the ACCC's ability to respond quickly when there is evidence of anti-competitive conduct.

In such circumstances, the institution of court proceedings under Part IV may be an insufficient means of addressing the alleged anti-competitive conduct.

### **(d) Initiating the declaration process under Part XIC**

Part XIC sets out an access regime for certain declared services being either carriage services or services which facilitate the supply of carriage services. Under this regime, the ACCC may, after taking account of relevant criteria, declare a specific network service to make it available to access seekers.

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<sup>20</sup> See section 151CA.

The ACCC believes that there is little justification for dividing actions which affect the competitive process in telecommunications markets into 'conduct' issues under Part XIB and 'access' issues under Part XIC.

The ACCC may be cautious about relying solely on the declaration of a service through Part XIC to address a competition issue in the short term due to the time-consuming nature of the public inquiry process which must be conducted before a service is declared.

In some circumstances, Part XIC may be a preferable way of addressing a matter where structural issues are involved and the issuing of a competition notice will not resolve these issues if other parties and new entrants seek access to the service at a later time.

Whether the ACCC pursues action under Part XIB, Part XIC or both will turn on the particular facts of the matter. An ACCC decision to address an issue initially by issuing a competition notice would not preclude it from contemplating a Part XIC action at a later date if it was considered appropriate. If, on the evidence, the ACCC considers that the conduct could be readily analysed under both the competition notice provisions of Part XIB and XIC, then it will take into account any information it receives from various industry participants about the most appropriate outcome for the industry. Factors that are likely to influence the ACCC's decision in taking action include:

- i. Whether time is of the essence

One factor which may result in the ACCC pursuing a matter using a competition notice as opposed to Part XIC is how soon an outcome may be required and how harmful the continuation of the alleged conduct could be to the competitive process. In some circumstances, a competition notice may be a more efficient and effective response to anti-competitive conduct where time is of the essence.

- ii. The position of affected third parties

When deciding whether to pursue a matter by issuing a competition notice or Part XIC, or both, the ACCC is conscious that doing so enables third parties to bring an action for damages, for which there is no provision made under Part XIC. In some circumstances, the competition notice regime may be the more appropriate way to minimise the financial impact of the alleged anti-competitive conduct on third parties.

## 4. ACCC Contacts

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